

Submission no. S358

**CAJ's and PFC's joint submission to the
Committee of Ministers
in relation to the supervision of**

**Cases concerning the action of the
security forces in Northern Ireland**

August 2011

**Submission to the Committee of Ministers from the
Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC)
in relation to the supervision of**

Cases concerning the action of the security forces in Northern Ireland.

Jordan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
McKerr v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
Shanaghan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001
McShane v the United Kingdom, judgment of 28 May 2002, final on 28 August 2002
Finucane v the United Kingdom, judgment of 1 July 2003, final on 1 October 2003

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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. Its membership is drawn from across the community.

CAJ seeks to secure 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. 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 areas of work include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award, and in 1998 was awarded the Council of Europe Human Rights Prize.

The organisation acted in three of the above cases before the European Court of Human Rights.

The Pat Finucane Centre (PFC) is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We believe that all participants to the conflict have violated human rights. The PFC asserts that the failure by the State to uphold Article 7 of the Universal Declaration of Human Rights, "all are equal before the law and are entitled without any discrimination to equal protection of the law", is the single most important explanation for the initiation and perpetuation of violent conflict. It is therefore implicit to conflict resolution that Article 7 be implemented in full. The PFC campaigns towards that goal.

The PFC represents in or around 160 families who have had a family member killed during the conflict. Through the Legacy Project, funded by the Peace III initiative the PFC provides advice support and advocacy for families bereaved in the conflict and particularly for those who have chosen to engage with the Historical Enquiries Team (HET) and the Office of the Police Ombudsman (OPONI). Many of these deaths involve Article 2 ECHR issues.

General Measures

We continue to submit that it is premature to close its examination of the issues addressed in Interim Resolution CM/ResDH(2007)73 and seek that the Committee of Ministers continues to supervise these to ensure their effectiveness in preventing new violations, namely:

- the lack of independence of police investigators investigating an incident from those implicated in the incident;
- defects in the police investigations

CAJ and the PFC are gravely concerned with issues arising from the Police Ombudsman's office (OPONI) and the Historical Enquiries Team (HET) in relation to how they are exercising their responsibilities for giving practical effect to the general measures. Changes in the organisational structure of the Police Service of Northern Ireland (PSNI) mean that the Historical Enquiries Team (HET) no longer reports directly to the Chief Constable which calls the operational independence of the HET into question. Additionally, through extensive research on the Office of the Police Ombudsman for Northern Ireland (OPONI) conducted by CAJ questions and concerns emerged as to the levels of real and perceived independence of OPONI from both political and police interference.¹ Further the resignation of the Chief Executive, Sam Pollock in response to his concerns that the OPONI's independence was compromised has resulted in two inquiries into the Office's independence.

Historical Enquiries Team (HET)

Some of the families we work with have got a satisfactory measure of resolution from the Historical Enquiries Team. However, we do not accept that the HET is an operationally independent unit of the Police Service of Northern Ireland (PSNI) and are concerned at the alteration in the organisational structure of the PSNI whereby the HET is now located within Crime Operations Department.² In 2004 Special Branch and the Criminal Investigation Department (now the Crime Operations

¹ Human Rights and Dealing with Historic Cases: A Review of the Office of the Police Ombudsman for Northern Ireland, CAJ, June 2011 At:

http://www.caj.org.uk/files/2011/06/16/OPONI_report_final1.pdf

² See current (June 2011) and prior (November 2008) organisational charts for the PSNI enclosed.

Department) were amalgamated under a unified command within the PSNI, but how this affects the autonomy of C3, the Intelligence Branch of Crime Operations, in practical terms is undetermined. This is of further concern because it is unclear how many former Special Branch officers are located throughout the specialist branches of Crime Operations and what percentage of total officers they constitute.³ Given that former Special Branch officers would have substantial years of service and intelligence experience, it is likely these officers occupy pivotal positions with respect to intelligence and security policing. It has been suggested that critical elements relating to both intelligence and operations would be overseen by personnel who have been handpicked and consist overwhelmingly, if not exclusively, of former RUC detectives and former Special Branch officers.

All of this is relevant to the work of HET on historic cases, since it means that the HET is reliant on intelligence efforts undertaken by former RUC (and Special Branch) officers, despite the fact that many of the most serious allegations of human rights abuses involve allegations of improper RUC/Special Branch behaviour. This conclusion is supported by exhaustive research undertaken by Dr Patricia Lundy which established that, "all aspects of intelligence are managed by former RUC and Special Branch officers."⁴ Pivotal among her findings was that, "intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces."⁵ Therefore the placement of HET within the Crime Operations Department raises questions about the perception as well as the practice of independence. We also note with grave concern that the HET no longer reports directly to the Chief Constable but rather to the Assistant Chief Constable for Crime Operations.

The Committee may wish to ask what measures the HET have in place to safeguard their operational independence, and to ensure that 'gatekeepers' are not limiting access to intelligence.

OPONI

This year the Police Ombudsman has been the subject of investigative reports by CAJ, the Department of Justice (DoJ)⁶, and the Criminal Justice Inspector (CJI)

³ The Crime Operations Department is further broken down into 5 specialist branches namely Organized Crime (C1); Serious Crime (C2); Intelligence (C3); Special Operations (formerly Crime Operations Support) (C4); and, Scientific Support (C5).

⁴ Pg 30, Can The Past Be Policed?: Lessons from the Historical Enquiries Team Northern Ireland, Law and Social Challenges, Vol.11, Spring/Summer, 2009.at:

<http://ssrn.com/abstract=1425445>

⁵ Ibid, pg 31

⁶ Police Ombudsman Investigation Report, Office of the Minister of Justice, June 2011. See: <http://www.dojni.gov.uk/publications/police-ombudsman-investigation-report.pdf>

Northern Ireland (pending).⁷ The CAJ and DoJ reports raise serious questions and concerns as to the independence of and political interference in the Office of the Police Ombudsman. It is anticipated that the CJI report will have similar findings with respect to police interference in the Office of the Police Ombudsman.

Specifically the CAJ report identified a number of issues that impact upon the independence of the Office⁸:

1. Irregularities in the appointment process of the current Police Ombudsman.

- CAJ has become aware that the criterion of prior Northern Ireland experience appears to have been added at a very late stage in the recruitment for the current Police Ombudsman. It is difficult to determine precisely by whom, and how, these important decisions appear to have been made; however the evidence points to the changes being introduced by the appointing body (the Northern Ireland Office), which raises serious questions as to why, and when, the NIO would choose to add an additional criterion. It is difficult to avoid the conclusion that certain candidates would be privileged or disadvantaged by the additional criterion and that this was the primary motivation for the change. It is clear that an important appointment procedure is now mired in doubt because of serious questions about the independence and transparency of the process and its potential susceptibility to political interference.

2. Concerns surrounding intelligence and independence from the PSNI.

An overview of the process of accessing intelligence illustrates that there are a number of steps in the process where ‘gatekeepers’ can significantly limit and control OPONI’s access to intelligence without detection:

- As noted with respect to the HET, the fact that most, if not all, historic intelligence material is provided by the PSNI Intelligence Branch (C3) is of concern. It is unclear how many former Special Branch officers are located throughout the specialist branches of Crime Operations and what percentage of total officers they constitute. Given that former Special Branch officers would have substantial years of service and intelligence experience, it is likely these officers occupy pivotal positions with respect to intelligence and security policing.
- All of this is relevant to the work of OPONI on historic cases, since it means – as in the case of the HET - that the Police Ombudsman’s Office is reliant on intelligence efforts undertaken by former RUC (and Special Branch) officers, despite the fact that

⁷ Report to be publicly available in early September. CAJ will submit a copy of the report to the Committee of Ministers

⁸ Human Rights and Dealing with Historic Cases: A Review of the Office of the Police Ombudsman for Northern Ireland, CAJ, June 2011, p. 9-11. See:
http://www.caj.org.uk/files/2011/06/16/OPONI_report_final1.pdf

many of the most serious allegations of human rights abuses may involve allegations of improper RUC/Special Branch behaviour.

- In light of the legal and human rights obligations of the Office of the Police Ombudsman, it would seem appropriate for the Office to adopt a robust position, and ensure that ‘gatekeepers’ are not limiting access to intelligence. Our attempts to establish how independence around intelligence was ensured in theory and in practice in this regard were inconclusive. However, it is the responsibility of the Police Ombudsman’s Office to develop safeguards to ensure independence around intelligence, to be transparent about what these safeguards are, and to subject them to independent scrutiny.

3. Concerns and perceptions of bias arising from historic cases

The police-civilian composition of the Office of Police Ombudsman is crucial as the Office cannot fulfil its statutory remit or domestic and international human rights obligations without impartiality and a balance in perspective:

- Currently the Executive Board of the Police Ombudsman’s Office is composed of three members, the Police Ombudsman and the Senior Director of Investigations both of whom come from a policing background, and the Chief Executive who is from a ‘civilian’ background. In addition, the Director of Current Investigations and the Director of Historic Investigations both have a policing background. It is clear from international parallels that the balance between (former) police and civilian personnel is considered crucial to both the reality and perception of independence.
- To meet the standards required under Article 2, it is “necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of hierarchical or institutional connection but also a practical independence.”⁹ In this regard, perceptions of bias are as important as actual bias when it comes to levels of public confidence in, and the accountability and effectiveness of, the Office.

These concerns were echoed in a leaked draft of the CJI report¹⁰, which focused on the operational independence of the Police Ombudsman’s Office and particularly the Office’s relations with the police, with conclusions that found:

- A “lowering of independence” in the ombudsman’s office which means it should now be suspended from investigating historic murders;

⁹ Para 106, Jordan v UK [2001] ECHR 327

¹⁰ <http://www.thedetail.tv/issues/22/cji-report-into-ombudsman/ombudsman-loses-staff-trust-over-withheld-intelligence>

- Ombudsman reports were altered or rewritten to exclude criticism of police with no explanation;
- Senior ombudsman officials demanded to be disassociated from investigation reports after their original findings were dramatically altered without reason;
- Ombudsman staff investigating some of the worst atrocities of the Troubles believe key intelligence has been deliberately withheld from them; and,
- CJI inspectors uncovered major “inconsistencies” in ombudsman investigations of the Loughinisland, McGurks and Claudy atrocities

The Committee may wish to ask the Police Ombudsman’s Office: how it plans to ensure there is institutional, hierarchical and practical independence at all levels and in all the work of the organisation; how it plans to put in place robust and transparent mechanisms in relation to the policies and practices of intelligence-handling; and, how it plans to correct current imbalances in the police/civilian composition at senior levels in the organisation in an effort to address perceptions of bias. Overall the Committee may wish to enquire what plans are in place to strengthen the legislative mandate of the Office to ensure its independence from political and police interference. The Committee may wish to consider in the context of a society struggling to emerge from thirty years of political conflict whether the Department of Justice is the best sponsor for the Police Ombudsman’s Office or perhaps whether the Office of the First Minister and Deputy First Minister (OFMDFM) is a more appropriate sponsor given the gravity of historic inquiries.

The initial catalyst for CAJ’s research into the Police Ombudsman’s Office was the ongoing distress and traumatisation which has been caused to families who have suffered human rights abuses because of the Office’s ongoing delays in investigations, its lack of transparency and information for families about the processes.

Further, the Police Ombudsman has said that he does not have the capacity or resources to deal with historic cases. It is our experience that investigations in these cases are often given less priority when new matters arise, creating further delay in cases where there have already been defects in investigations. Both publicly and in private meetings with families the Police Ombudsman has consistently referred to a lack of resources as prohibitive and warned that historic investigations are an unnecessary drain on resources required to deal with present-day complaints.

In its consultation on the draft budget for 2011-2015 in December 2010, the Department of Justice NI announced that the Police Ombudsman “will receive

additional funding of over £5m in Budget 2010 for Historic Enquiry costs. £4m of this relates to staff costs.¹¹ This figure represents an increase of approximately 25% over prior years, where net operating expenditure for historic investigations was reflected as £876,417 (2008/09) and £783,263 (2009/10). While these figures and the new allocation of £5m may appear substantial it is worth noting by comparison that over the past two years net operating expenditure for core investigations amounted to £7,741,699 (2008/09) and £8,113,315 (2009/10).¹² These figures indicate that allocation for historic investigations has amounted to approximately one-eighth of expenditure for core investigations. How the resourcing of each investigative division (historic and current) at OPONI is determined is difficult to ascertain but it has not been a topic of public consultation since the formation of the Office.

The present Ombudsman was appointed in 2007. While there are over 100 historic cases awaiting the completion of investigations lodged with the Ombudsman's office, OPONI has averaged only one historic case per annum in 2007, 2009, 2010 and 2011, with two cases concluded in 2008. The Ombudsman has said that historic cases will be dealt with one at a time and that it will take more than a 100 years for them to be completed. Further, the investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The investigation into the bombing of Claudy, for example, took almost eight years to complete (initiated in December 2002, the final report was published in August 2010) with the resulting PDF document an arid 26 pages based on an investigative methodology that focused primarily on a desk-based review of intelligence files, documents from the government and RUC materials.¹³

The Committee may wish to ask the Police Ombudsman how resources are allocated to and spent on historic investigations relative to the methodology adopted and outputs produced, and in particular how the Office plans to address perceptions and concerns related to promptness and efficiency.

Inquests

We note that the Committee closed examination of the measures adopted under the first Interim Resolution of these cases (ResDH(005)20 to remedy the problems identified in inquests. However, we are concerned at the problem of delay evidenced in historical inquests before the Coroners Courts. We note that a further application

¹¹ http://www.dojni.gov.uk/index/public-consultations/archive-consultations/doj_draft_budget_2010_consultation.pdf

¹² See OPONI's Annual Report and Accounts for 2009/10 at:
<http://www.policeombudsman.org/Publicationsuploads/9473S%20PONI%20Annual%20Report%2010-Web.pdf>

¹³ Human Rights and Dealing with Historic Cases: A Review of the Office of the Police Ombudsman for Northern Ireland, CAJ, June 2011, p. 28 – 31. (Copy of Report enclosed)
Also see, http://www.caj.org.uk/files/2011/06/16/OPONI_report_final1.pdf

of McCaughey, Grew & Quinn v. UK has been lodged with ECtHR addressing many of the key problems identified in the 6 cases concerning the security forces in Northern Ireland referred to in this submission.

In consideration of the concerns that exist in relation to the effective implementation of these judgments we note the following:

- The statements of the Committee of Ministers (COM) in recommendation CM/ Rec(2008)2 on Efficient Domestic Capacity for Rapid Execution of Judgments of the Court;
- The Interlaken Declaration and Action Plan of February 2010 which specified that priority should be given to full and expeditious compliance with the Court's judgments which was considered 'indispensable';
- The emphasis placed upon the principle that prompt and effective execution of judgments and decisions delivered by the Court is essential for the credibility and effectiveness of the Convention system (see COM 4th Annual Report, 2010, on the Supervision of the Execution of Judgments, Foreword, discussing generally the reaffirmation of this principle through the Interlaken Conference, and subsequent endorsement by the COM);
- Resolution 1787(2011) of the Parliamentary Assembly of the Council of Europe which asserts the need for the Assembly and the national parliaments to 'play a much more proactive role' in respect of the execution of judgments as if this is not done 'the key role of the Convention...in guaranteeing the effective protection of human rights in Europe, is likely to be put in jeopardy.' The Assembly, at paragraph 7.10 of this Resolution, also urged the United Kingdom to give priority to specific problems in that 'the United Kingdom must put an end to the practice of delaying full implementation of Court Judgments with respect to politically sensitive issues, such as prisoners' voting rights...'. The issue of investigation of alleged unlawful State killings within Northern Ireland continues to be a similarly politically sensitive issue. This resolution also endorsed the Interlaken priority of 'full and expeditious compliance with the Court's judgments' and the COM Recommendation CM/Rec (2008)2 as to efficient domestic capacity for rapid execution of judgments.

Individual Measures

We note in Interim Resolution CM/ResDH(2009)44 the Committee decided to pursue the supervision of the execution of the present judgments, until the Committee has satisfied itself that the outstanding general measure, as well as all necessary individual measures in the cases of Jordan, Kelly and Ors, McKerr and Shanaghan have been taken.

Jordan

We understand that a Preliminary Hearing in this matter has been listed for 7 September and is listed for Full Hearing on 3 October (although we understand that there may be a possible complication regarding anonymity. This inquest must 'so far as possible' comply with Article 2.

We continue to express concern the inquest in this case given that the judgment of the ECtHR was delivered ten years ago.

McKerr

The Coroner has corresponded with the legal representatives following the Supreme Court judgment of *In Re McCaughey & Quinn v UK [2011] UKSC10* that the inquest must be Article 2 compliant he may not hold the inquest. The legal representatives have now received redacted copies of the Stalker Sampson report and the contents are now being considered before making submission on the issue raised by the Coroner.

Shanaghan

Though the family was advised that the HET report would be available by the end of 2009, they received it just before Christmas, in late 2010. The family have considered the report and await the findings from OPONI investigation to determine whether the issues arising from the European Court of Human Rights' judgments have been addressed.

The family have requested a meeting with the Ombudsman's Office for a number of months to discuss the progress of the report. (While such a meeting has not been offered, in recent days the Office has suggested a meeting to discuss the legal constraints it is working within and how they will affect its report) Unfortunately no indication has been given as to when the report will be made available to the family.

These legal constraints arise from the lack of the office's power to investigate complaints or any part of a complaint which has already been investigated. In the Shanaghan's case the ICPC investigated part of the complaint about the inadequacy and ineffectiveness of the police investigation and relating to their concerns about collusion. The ICPC was replaced by the OPONI as there was absolutely no confidence in the ICPC. The Committee may wish to ask the Government when it proposes to amend the powers of the Ombudsman's office to give it at least a discretion, in appropriate cases, to investigate matters that have been the subject of previous investigations.

Kelly and Others

As the Committee will note from previous submissions, the families engaged with the HET with grave reservations and continue to express frustration at the length and the

process of the HET investigation as no date has been given for the delivery of the report.

Finucane

Despite assurances from the Government that it was engaging with the family, we note that the family have recently expressed concern¹⁴ about the Secretary of State's failure to progress discussions with regard to the establishment of a public inquiry as recommended by Judge Cory in 2004. We call upon the Committee again to ask the Government what substantive action is proposed to address this and to advise the Committee on a proposed timescale to ensure compliance with its obligations in this case given that it is 18 years since the judgment was delivered by the ECtHR in this case.

We wish to stress again the importance of the Committee's continuing supervision of the execution of these judgments until it is satisfied that appropriate measures to ensure the Government's commitments under Article 46 ECHR and domestic compliance with the Convention are fully addressed, including the outstanding general measures, as well as full implementation of practically effective individual measures in the cases of Jordan, Kelly and Ors, McKerr and Shanaghan. The implementation of both the general and individual measures impact on many of the victims and survivors. Implementation also has implications for the post conflict work of building public confidence in the institutions and for ensuring appropriate accountability for human rights violations which is essential for avoiding further conflict.

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¹⁴ <http://www.bbc.co.uk/news/uk-northern-ireland-14276460>