

CAJ's submission no. S.438

**Submission to the Committee of Ministers from the
Committee on the Administration of Justice (CAJ) in relation to the
supervision of the cases concerning the action of the security forces in
Northern Ireland**

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

and

Hemsworth v UK, judgment final on 16 October 2013
McCaughey & Others v UK, judgment final on 16 October 2013

November 2014

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 (FIDH). 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.

This Rule 9 communication is for consideration at the 1214th meeting of the Ministers' Deputies. It is to be read in conjunction with our previous submissions on the '*McKerr Group of Cases*' which have set out in detail our concerns about the UK's failure to promptly implement these judgments¹, in particular we refer to our most recent submission in August 2014².

General Measures

We call upon the Ministers' Deputies to seek from the UK details of what substantive progress it is making in relation to the general measures addressing the defects as identified by the Ministers' Deputies in May 2014.

We are concerned at the comments made by the NIO in its communication of 10 October 2014³ which focus on the lack of political progress in Northern Ireland as a hurdle for dealing with the past, stating that:

“The Minister for Justice has stated publicly that current arrangements are not sustainable and that the only way forward is through a political solution’

The UK Minister for Northern Ireland (Secretary of State Theresa Villiers MP has also advocated the bill for dealing with the past should be picked up by the devolved institutions, which is largely already the case.⁴

Responsibility for implementation of the above judgments, and its broader Article 2 obligations, rests with the UK government and not the devolved administration in Northern Ireland. Any deviation from this could set a precedent where any Council of Europe member state could seek to avoid its Article 2 duties by simply delegating the duties to regional bodies who the state party then grants neither the powers nor resources to discharge the duty.

¹[CAJ S421 Submission to the Committee of Ministers, September 2013.](#)

²http://www.caj.org.uk/files/2014/08/28/S435_Submission_to_the_Committee_of_Ministers_August_2014.pdf

³ DH-DD(2014)1242

⁴ McAdam, Noel '[Dealing with past: Stormont to pick up bill, hints Theresa Villiers](#)' Belfast Telegraph 13 November 2014

The Minister for Justice for Northern Ireland, David Ford MLA in his comments to the Northern Ireland Assembly and in subsequent interviews has firmly taken the position that the state party must step up and resource investigations into the past.⁵

“I also believe that I have responsibilities under Article 2 to keep society safe this year and that the responsibilities of the past lie more with those who had responsibility, principally the British Government.

I noted two interviews on Radio Ulster this morning from people who agreed with the view that I have just expressed. They said that there are real issues of the legacy of the past that cannot be dealt with unless there is the direct involvement by the Northern Ireland Office or other aspects of the British Government funded by the Treasury, because the DOJ is funded for the present, not to deal with the past.

We simply cannot get into the position in which the good work that is being done by justice agencies for the present cannot be carried through because of the legacy of the past. That requires a political joining-up. It requires an input from the British Government, and it requires the Treasury to accept that there are specific issues there. I think that most people will accept that it is not possible for us to manage today’s budget to deal with the past as well as the present.”⁶

We also draw the Ministers’ Deputies attention to the comments made by the Council of Europe’s Commissioner for Human Rights, Nils Muižnieks, at a conference in Belfast on 6 November 2014 addressing the UK’s obligations under Article 2 ECHR:⁷

⁵ <http://www.bbc.co.uk/news/uk-northern-ireland-29948722>

⁶ <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2014-2015/October-2014/In-year-Financial-Position-and-Outcome-of-June-Monitoring-Round-Mr-David-Ford-MLA-Minister-of-Justice-and-DOJ-Officials/>

⁷ <http://www.thedetail.tv/issues/356/eu-commissioner-uk-govt-the-past/uk-government-cannot-wash-its-hands-of-legacy-of-the-troubles>

“Regarding the possibility of delegating Article 2 responsibilities, I think it’s quite clear that if a country were to do this...it would be quite a disaster.

“I think with regard to the UK, as far as I am aware, the violations that took place during the Troubles took place primarily during a period of Direct Rule from Westminster.

“I don’t think that the UK government can divest itself of investigatory responsibility or funding responsibility for investigations

“Of course this must take place in conjunction with the devolved authorities, but I don’t think Westminster can wash its hands altogether.”

The Commissioner also stated:

“It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general.”

Regrettably, despite the comments of the UK in its October submission, the delays, obstructions and prevarication in the implementation of the above judgments demonstrates that the UK is not committed to promptly discharging its obligations under Article 2 ECHR.

Historical Enquiries Team (HET)

The Police Service for Northern Ireland (PSNI) has now announced that the HET will be disbanded by the end of the 2014. Whilst much of the public justification for this has related to budget cuts the move appears to acknowledge that confidence in the HET, and its ability to conduct its work, had become irretrievable. CAJ had taken the view that it was not possible to reform HET to an extent that it would be capable of investigations into state involvement cases which meet the Article 2 requirement of independence.

The PSNI has announced that the HET will be replaced by a much smaller Legacy Investigations Branch. The UK has boldly claimed that it will ensure that the new Branch “will be Article 2 compliant and will incorporate requirements to review and investigate legacy cases”⁸.

It is not clear how the Legacy Investigations Branch, insofar as it deals with state involvement cases, will not simply encounter the same incompatibility issues in relation to Article 2 independence requirements that ultimately led to the demise of the HET.

It has also not been made clear whether the intention for the Legacy Information Branch is only to investigate cases which it is obliged to open (for example due to referral by the Public Prosecutions Service), or whether there is still an intention to review all outstanding cases not reviewed by the HET.

CAJ is aware the PSNI has stated in relation to some state involvement cases it has an ‘Article 2’ duty to investigate. It is not however clear what categories of cases the PSNI regards as engaging such a duty, and in particular if it includes British Army cases previously subject to flawed HET reviews.

CAJ has concerns that the archive of evidence material gathered by the HET may now be dispersed, or elements of it destroyed. This would have purpose or effect of hampering any future legacy investigations whether by the PSNI or others. The PSNI has given assurances materials will not be destroyed. Further details on any safeguards to ensure this and ensure the accessibility of the material to other legacy investigations processes, including inquests,

⁸ DH-DD(2014)1242

could be provided.⁹ This includes the question of any material grouped in a manner which would be capable of identifying patterns of human rights violations will still be available in such a format.

Office of the Police Ombudsman for Northern Ireland

We draw the Ministers' Deputies attention to the withdrawal of funding from the Police Ombudsman's Office committed by the Department of Justice (DoJ) for historic investigations and further severe cuts to its budget¹⁰.

As the Police Ombudsman noted:

““The reduction in budget has undermined our ability to deal with the past.

“It is ironic that on the release of a Criminal Justice Inspection report, which states that the independence of the Office has been fully restored, our capacity to undertake work has been significantly reduced.

“I am determined to protect the police complaints system and I will not skimp on the quality of investigations, but if the cuts continue as anticipated, they will have a significant impact on the way in which we hold police to account in Northern Ireland.”¹¹

CAJ is deeply concerned that this latest decision derails the Ombudsman's ability to discharge the investigative duty into alleged past human rights violations. CAJ urged DoJ to ensure that its control of monies is not used to become the latest obstacle facing the office in being able to discharge its obligations under Article 2 ECHR.

⁹ [Question on 'HET' to the PSNI Chief Constable by the Northern Ireland Policing Board, November 2014.](#)

¹⁰ <http://www.bbc.co.uk/news/uk-northern-ireland-29431925>

¹¹ <http://www.policeombudsman.org/Media-Releases/2014/Police-Ombudsman%E2%80%99s-Office-cuts-%E2%80%98historical%E2%80%99-workfo>

Notwithstanding the cuts the UK government is imposing on the NI Executive the Office of the Police Ombudsman will constitute only a small fraction of the overall DoJ budget, and hence opportunities to cut monies. The overall budget for OPONI historic cases is only around £2million a year.¹² CAJ is aware earlier in the year OPONI submitted a business case to DoJ outlining a requirement for £1.1 million to complete the work for its Historic Investigations Directorate. DoJ responded by making available £0.4million to OPONI for this purpose.¹³ However we understand even this has now been withdrawn, and further cuts to the overall OPONI budget of £750k are now planned.

CAJ is concerned that these additional cuts, as well as having the potential to impact on confidence in the current day police complaints system, will particularly impact on historic cases given the short term nature and background to funding this function. This itself means that most of the OPONI temporary staff, who are most likely to be affected by cuts are located in historic cases and the loss of the specific skills set such staff will have a particular impact on these investigations.

CAJ cannot detach the current issue from what we regard as the concerted pattern of cover up we are witnessing in relation to investigations into past human rights violations. This encompasses the past lowering of independence of OPONI; the unlawful practices of the HET in relation to state involvement cases; systemic delays and intervention in disclosing documents required for inquests and the growth of secret courts and 'national security' exemptions to powers. We are also conscious that in particular the issue of funding has been used under the previous Police Ombudsman as a rationale for not investigating historic cases.

Avoidable delays have been subject to litigation, and we are conscious that in May 2014 DoJ had to pay compensation to six applicants as the delays in their inquests had been so severe as to be rendered unlawful.¹⁴

In relation to legislative reform to remedy gaps in the Police Ombudsman's (OPONI) powers there have been significant delays in recent years in

¹² CJINI 'A Review of the Cost and Impact of Dealing with the Past on Criminal Justice Organisations in Northern Ireland', paragraph 2.49.

¹³ OPONI Correspondence to legal practitioners 28 May 2014

¹⁴ Jordan's and five other applications [2014] NIQB 71

implementing recommendations emanating from the Ombudsman’s review of powers which we have detailed in previous communications.

The UK response of October 2014 indicates that it has now “put together a package of measures for the reform of OPONI, to which the Minister is currently seeking the agreement of the Northern Ireland Executive.”¹⁵ CAJ understands that since this time the NI Executive has rejected this package of measures, but no further details have been made public. Key changes sought include powers for the Ombudsman to question retired police officers, the removal of restrictions on the Ombudsman reinvestigating cases already investigated by its predecessor body, and powers in relation to cases involving informants. In CAJ’s view many of the proposed powers are required to ensure Article 2 complaint investigations in specific cases and hence engage the UK’s international obligations.

The Ministers’ Deputies may wish to seek clarification and commitments in relation to:

- Adequate resourcing of the Police Ombudsman’s historic investigations function
- The details of the ‘package of measures’ that the Department of Justice put forward to the Northern Ireland Executive to reform the Ombudsman’s powers
- Whether the UK government will now use its parallel legislative powers to implement those elements of reform to the Police Ombudsman’s powers which engage international obligations, including powers relating to retired police officers

Inquests

We draw the Ministers’ Deputies attention to the Court of Appeal judgment in relation to a judicial review taken by Hugh Jordan delivered on 17 November 2014 which held that there had been a violation of Article 2 ECHR. In

¹⁵ DH-DD(2014)1242, p8.

upholding the High Court's decision¹⁶ to quash the 2012 inquest verdict of a jury into the death of his son, the Court of Appeal ordered a new inquest before a new Coroner. In dealing with matters of disclosure and deployment of material by the PSNI the Court held that reports detailing the involvement of Officers involved in this death in other lethal force incidents should have been disclosed.

The Court also found that the jury had not complied with its obligation to bring in a verdict and that the Coroner had failed to comply with his obligations. More broadly the Court noted that while the Article 2 ECHR obligation was one of means not results it must be effective and capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible:

“The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence....”¹⁷

The Court also referred to the 2009 and 2012 comments of the Court of Appeal on the deficiencies of the inquest system, which we have drawn to the Ministers' Deputies attention. The Court added:

“Despite the unsatisfactory nature of the present coronial system no material step has been taken to address this lamentable state of affairs and there is no realistic prospect of the Assembly legislating to resolve this situation before the expiry of its present mandate in May 2016. In those circumstances it may well be close to 2020 before appropriate legislation which reflects the impact of the ECHR is put in place.”

The Lord Chief Justice noted that the absence of a satisfactory coronial system adversely affects the work of Coroners and that it is impossible for

¹⁶ <http://Jordan-High Court - 31 Jan- 2014>

¹⁷ <https://Summary of Judgment - CoA Jordan Nov 14>

Coroners to conduct their inquisitorial role to establish the truth, identify wrong doing and learn lessons for the future without having coroners' officers to assist them in their duties. He noted that there are pending legacy inquests into 78 deaths and the lack of powers and procedures has led to a large number of proceedings domestically and before the ECtHR:

“If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040.”

In noting that the requirement of promptness will continue to be breached unless there is a new approach to these matters the Lord Chief Justice did make observations which he hoped would be of assistance:

“There are models within this jurisdiction, such as the Historical Institutional Abuse Inquiry, which might provide the basis for an effective solution. It would be possible to have all the legacy cases taken out of the inquest system and all of them considered in a time bound inquiry.”¹⁸

We welcome the Court's comments on the need to review the current mechanisms and remind the Ministers' Deputies of our submissions on the proposed Historical Investigations Unit as proposed by Haass. The legislative competencies of such a model will of course require detailed scrutiny to ensure compliance with Article 2 ECHR.

We call upon the Ministers' Deputies to seek concrete details from the UK on what immediate action it intends to take to remedy the ongoing breaches of Article 2 ECHR that exist in relation to all of these general measures.

¹⁸ Whilst there is undoubted merit in examining the framework of this inquiry as it stands its founding legislation explicitly prevents the inquiry from obtaining any evidence on matters which do not fall under the legislative remit of the Northern Ireland Assembly. As such evidence held by the UK government cannot be sought this legislation as it stands and could not provide the basis for effectively investigating conflict related deaths in Northern Ireland. (Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013, s9(7)-(8)).