Just News

CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Human Rights in Northern Ireland January 2017

The Legality of Detention in Afghanistan: The UK Supreme Court Decides

The United Kingdom Supreme Court delivered a number of high profile and long-awaited decisions recently all focused on the legality of detention by British Forces in Afghanistan. They include Belhaj v. Straw, Rahmatullah v Ministry of Defence and the joined cases of Serdar Mohammed v. Ministry of Defence and Al Waheed v. Ministry of Defence. My analysis is focused on the multi-part and somewhat fragmented decision in Serdar Mohammed v Ministry of Defence. There are lots of moving parts in this judgment, and the case makes an important contribution to understanding state obligations in situations of military occupation and military enforcement in the multinational force context. But my comments here briefly reflect on two threads of the decision.

First, the precise relationship between the European Convention and Resolutions of the United Nations Security Council in situations where the use of force has been authorized by Resolution. Second, background political concerns that, in my view, pervade the judicial approach in this case. Namely, British political apprehension about overreach of the European Convention into matters of executive and military regulation with consequent effects on the Convention's domestic and international legitimacy. In parallel, one senses judicial worry that overburdening European Convention states in respect to detention in non-international armed conflicts would lead to an abdication of detention practices to states not bound by the Convention who are less burdened by human rights norms in conflict/post-conflict settings.

Al-Waheed and Serdar Mohammed were decided by the Supreme Court in a 7 to 2 vote. Essentially, the Court found that British military forces in their operations in Afghanistan had power to capture and detain members of opposing forces for periods exceeding 96 hours if this was necessary for imperative reasons of security. However, in exercising that detention function, the Court majority (and Lord Reed) held that the UK's procedures for detention did not comply with the requirements of ECHR article 5(4). A majority (Lords Sumpton, Hale, Wilson, Hodge, Reed and Kerr) found a breach because detainees did not have a right to effectively challenge their detention (judgment), though a number thought this matter should be remitted to trial (Lords Mance, Hughes and Neuberger).

Lord Sumpton (joined by Lady Hale) gave the leading judgment followed by multiple concurrences and the dissent came from Lord Reid joined by Lord Kerr.

The decision follows a tumultuous line of cases before the English and Strasbourg courts where the compatibility of detention with the regime of protection provided by Article 5 of the European Convention has been tested, including in the case of Al-Jedda.

This decision reflects an ongoing engagement by national courts in Europe testing the precise calibration of their domestic, regional, and international legal relationships in conflict contexts where their militaries are engaged abroad.

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The judgment also reflects some pragmatic dissatisfaction with the implications of decisions by the European Court of Human Rights, not least in the practicalities of undertaking detention (or not) in situations where British forces are engaged as a result of UNSC mandates.

While this case clarifies the British position on the legality of detention in NIACs, it clearly does not end the conversation. We can expect to see further litigation on the same issues in the Grand Chamber of the ECtHR.

The High Court decision in Serdar Mohammed had found that British forces in Afghanistan had no powers to detain any person for more than 96 hours (plus whatever time the transfer to those authorities took). This finding was based on the applicable Afghani law, and in the absence of a specified legal regime for the detention for suspected insurgents at the time of arrest (here). The Appeal Court also agreed. This Court did not.

In finding that there was a power to detain past 96 hours in the Afghan context, the Court (in lead and concurrences) spent an extraordinary amount of judicial time articulating the legal basis for detention as it flows from UN Security Council resolutions. The majority found in Serdar Mohammed that there was implied authority to capture and detain persons suspected of insurgency for imperative reasons of security contained in the relevant Security Council Resolutions—1546 (2004) in Iraq and UNSCR 1386 (2001). Much could be said about the intricacies of deference to implied powers in Security Council Resolutions. The Court itself recognizes the ambiguity of Security Council Resolutions in this regard. But, despite acknowledging the limitations of Security Council decision-making and interpretation, the Court does not take the next logical step and caution against reliance. Rather, it moves in precisely the opposite direction.

It is apparent that a reliance on UNSCR gives a plausible basis to avoid some of the more challenging implications of applying the Convention in contexts of armed conflict. However, there ought to be some concern that the Supreme Court is abdicating the creation (or not) of detention regimes to the UNSC, which, to state the obvious, remains an often dysfunctional, highly partisan body. Partisan and political entities produce rules that function to advance the interests of states, particularly P5 members. That is not necessarily consistent with the protection of human rights norms. Even assuming (and that is not a foregone conclusion) that the Security Council would not deliberately undermine human rights protections, we should never assume that the balances between security, state interest, and protection will always fall neatly in Security Council deliberations.

Finally, this judgment is also notable for the keen political awareness it evidences to the legitimacy challenges the ECHR faces in the United Kingdom. The majority decision is pervaded by sensitivity to military challenges in armed conflict. This antenna to political realities can be read as an acknowledgement of strong media and political responses that have been elicited when British soldiers have been prosecuted for actions taken in Iraq, Afghanistan and recently in Northern Ireland. Moreover, these judges are channeling the executive political apathy for the European Convention and its domestic vehicle, the Human Rights Act. While much of the attention to this judgment will rightly be focused on its international law and security implications, we need to bear in mind the tremendous political pressure the Convention (and by extension these judges) face in the United Kingdom. It is also a reminder to our local audience that the influence of recent decisions in respect of legal liability for conflict related practices in Northern Ireland have the capacity to influence in unexpected places.

Professor Fionnuala Ní Aoláin

NI legacy: the abandonment of the rule of law?

Among the unimplemented agreements on the table at the envisaged post-election negotiations are the legacy mechanisms outlined in the 2014 Stormont House Agreement (SHA). ECHR-compliant legacy inquests provided for in the SHA are currently obstructed by the UK withholding funding and hence a whole area of the rule of law is being disapplied, despite clear statements from the Lord Chief Justice on the requirements of international obligations. In late 2016 the Secretary of State James Brokenshire responded to the Council of Europe's urging that the SHA legacy institutions be implemented 'without further delay' by announcing a further indeterminate delay under the fig leaf of seeking local 'political consensus.'

Donald Trump's recent attack on a judge who found his discriminatory travel-ban unlawful brings sharp attention to broader threats to the rule of law. Whilst judicial decisions can be appealed or critiqued, when an Executive and other branches of government cease to defend the independence and integrity of; and paradoxically attack, the judiciary, there is the risk of the cornerstones of a democratic state will be dismantled piece by piece. The common pattern involves attacks on law officers, lawyers and the demonisation of human rights defenders.

The last year has given plenty of cause for concern in the local context. Last summer CAJ corresponded with the then new Secretary of State after a branch of the UK Executive - MI5, through briefings to the Belfast Telegraph, had launched an attack on Northern Ireland judges over bail decisions. In an apparent acknowledgement that the Security Service had overstepped the mark, the minister said nothing to defend the Security Service's actions in his response. It is however the comments on legacy by sections of the UK media and political establishment that have given the greatest cause for concern.

Perhaps it is indicative of learning from the 'post-fact' world that some of the discourse has evolved. Real statistics show that not a single member of the security forces has been convicted in relation to a legacy killing following the 1998 Belfast/Good Friday Agreement, and there were only a handful of convictions before that. There is clear evidence, released from the public archives, of the past policy of not applying the proper rigours of the criminal justice process to members of the security forces. In this context it is unsurprising that the UN Special Rapporteur Pablo de Greiff in his recent official assessment of the legacy of the conflict, held that selectivity in past prosecutorial policy has been the source of impunity in relation to conflict-related cases. It is in this context that many current legacy investigations must be viewed – as a remedy for those cases, overwhelmingly state-involvement cases - which were not properly investigated in the first place. That said the majority of cases in the PSNI's Legacy Investigations Branch, established in 2015 related to republicans and loyalists not deaths directly attributable to the security forces. Many of the military cases in the Legacy Investigation Branch (LIB) caseload are only there as the HM Inspector of Constabulary found unlawful preferential treatment in the way the PSNI, through the HET, had handled those cases in the first place.

None of this could be garnered from reading many of the outraged statements and articles which followed the first-GFA decision to prosecute a former solider - with the attempted murder of John Pat Cunningham, a civilian with a learning disability, who was shot dead in 1974. Headlines in the Sun and Mail, proclaimed outrage and a 'witchhunt' against soldiers, pointing, at first, the finger at human rights lawyers, and claiming that the PSNI had newly established the LIB which was looking purely at military cases. The Sun followed by publishing the names and photographs, along with the general location and reported value of their family home of two prominent local lawyers alongside an adjacent picture box entitled "Solicitors' IRA clients". Statements from senior Conservatives followed, including those that directly attached the DPP, and promoted a general climate of misinformation about the nature of legacy investigations.

Whilst it would be expected that the Secretary of State would publicly defend the independence and integrity of the LCJ, DPP and lawyers, instead the silence has been deafening. NIO ministers have instead preferred to endorse the suggestion that the criminal justice system is biased against the security forces, despite this being explicitly contradicted by the statistics and evidence. The guardians of the rule of law are abdicating their responsibilities, this does not bode well for the future.

AGM Report and Launch of 'A Beacon of Hope: The Story of CAJ'

CAJ's AGM and 35th anniversary event were held on 8 December 2016. The year 2016 saw many challenges for the cause of human rights, not least the Brexit vote, the election of Donald Trump as President of the United States, ongoing conflict in Syria and long-standing opposition to the Human Rights Act by some members of the Conservative government. In this context, the day's theme of looking back at CAJ's history and looking forward to future challenges for human rights was particularly apt.

Following the conclusion of the morning's formal business, former CAJ Director Maggie Beirne launched her recently published monograph 'A Beacon of Hope: The Story of CAJ' in front of a large and appreciative audience. The result of archival work, questionnaires sent to nearly 300 people (and responded to by over 100) and face-to-face or telephone interviews with more than 50 people, 'A Beacon of Hope' reflects on CAJ's past, charting what has been done and achieved, and the principles, membership structures and techniques that have evolved. Commenting on her own personal involvement with CAJ since its original conference in June 1981 – which itself ended in disarray following the discovery of an IRA bomb under Lord Gardiner's car – the keynote speaker, through to dealing with emerging controversies – around work concerning non-state actors for example and the decision to develop an international focus, Maggie provided an illuminating insight into the origins of CAJ and the dedication of its members and volunteers.

In her lecture and in 'A Beacon of Hope', Maggie was clear on the lessons and challenges for CAJ's current and future work. Some are more technical and procedural – to remain politically astute but not partisan and the importance of continuing to review organizational techniques. Others are more challenging and more worrisome for human rights defenders. This is particularly clear in the chronological report contained in 'A Beacon of Hope'. While Northern Ireland may be coming out of its 'long hard night' (p.2) of violent conflict, issues of policing, equality, minority rights, advances and retreats in human rights and legacy issues dominate each phase of the chronological report. The persistence of these issues not only attests to CAJ's strength and resolve in seeking to develop a culture of human rights, but also highlights the need for persistent and continued advocacy and legal analysis.

As CAJ enters its 36th year, there is much to be commended but there also remains a much needed space for organisations such as CAJ at a time when monitoring compliance with human rights standards in Northern Ireland and more broadly looks to be particularly important. Maggie's excellent report provides the ideal foundation and inspiration from which to continue this work.

Women March around the World for Social Justice

As I attended the Women's March on Saturday 21st January at Belfast's City Hall with 1200 (PSNI estimate) other supporters, I did so in the knowledge that around the world women were marching in protest and in solidarity with the oppressed, the marginalised, and the angry. Speakers from Belfast Feminist Network, Black Lives Matter, Housing for All NI, GenderJam, Amnesty International and Friends of the Earth addressed the rally and spoke of the many injustices faced locally and globally not least a culture of misogyny in political leadership; and I am not referring to former First Minister Arlene Foster's claims here.

At the Washington rally the 500,000 strong crowd (City officials estimation) listened to one of the speakers we will be welcoming to Belfast for International Women's Day; Professor Angela Davis. Professor Davis's political activism began when she was a youngster in Birmingham, Alabama, and continued through her high school years in New York. But it was not until 1969 that she came to national attention after being removed from her teaching position in the Philosophy Department at UCLA as a result of her social activism and her membership in the Communist Party, USA. In 1970 she was placed on the FBI's Ten Most Wanted List on false charges and subjected to a controversial trial. During her sixteen-month incarceration, a massive international "Free Angela Davis" campaign was organized, leading to her acquittal in 1972. Today she is Distinguished Professor Emerita at the University of California, Santa Cruz and in 1994 she was appointed to the University of California Presidential Chair in African American and Feminist Studies.

At the Women's March, Davis made a passionate call for resistance and asked the audience to become more militant in their demands for social justice over the next four years of Trump's presidency.

> "At a challenging moment in our history, let us remind ourselves that we, the hundreds of thousands, the millions of women, trans-people, men and youth who are here at the Women's March, we represent the powerful forces of change that are determined to prevent the dying cultures of racism, hetero-patriarchy from rising again.
>
> "The freedom struggles of black people that have shaped the very nature of this country's history cannot be deleted with the sweep of a hand. We cannot be made to forget that black lives do matter. This is a country anchored in slavery and colonialism, which means for better or for worse the very history of the United States is a history of immigration and enslavement. Spreading xenophobia, hurling accusations of murder and rape and building walls will not erase history.
>
> "This is a women's march and this women's march represents the promise of feminism as against the pernicious powers of state violence. And inclusive and intersectional feminism that calls upon all of us to join the resistance to racism, to Islamophobia, to anti-Semitism, to misogyny, to capitalist exploitation.
>
> "This is just the beginning and in the words of the inimitable Ella Baker, 'We who believe in freedom cannot rest until it comes."

Angela Davis will give the International Women's Day lunch time lecture on Wednesday 8th March Central Hall Belfast, and booking is recommended. We are honoured to have such a remarkable civil rights defender joining us to inspire, motivate and continue the fight for social justice for women around the world.

Kellie O'Dowd

The Supreme Court's Brexit Judgment

Who has the legal power to start the process to take the UK out of the EU (or 'trigger Article 50' of the Treaty of Lisbon) – the Government or Parliament? That was the main question decided in the Brexit judgment of the UK Supreme Court.

The Government had argued that it could do so alone using its 'prerogative' (executive) powers. Applicants in the English case of *Miller*, and in the Northern Irish case of *Agnew and others* (including CAJ) had argued that an Act of Parliament was required.

The Supreme Court decided by an 8-3 majority that the Government could not trigger Article 50 without an Act of Parliament.

In addition to that core question there were other arguments raised in the Northern Irish cases of *Agnew* and *McCord*. If an Act is required to trigger Article 50 then does UK Parliament need the consent of the NI Assembly to any Act approving the triggering of Article 50 (a question affecting all the devolved nations)? The NI cases also raised questions more specifically about Section 75's equality obligations, and whether the consent of the people of Northern Ireland was required.

Majority opinion

All 8 judges in the majority have written majority judgment. This joint authorship signals to potential critics that the majority regard this as a clear, legal position, and there is no scope to quibble. This is reinforced by the language used to describe the Government's arguments - one argument 'plainly does not apply' (para 84); the Government's arguments are 'improbable' (para 91), 'bold' (para 92), imply 'incongruous' results (para 132).

The majority judgment has four parts. There is an introductory section on the EU and on prerogative powers (13-59). Three key points of discussion follow. The core of the judgment considers whether the prerogative can be used to trigger Article 50 or is this precluded by the European Communities Act 1972 (60-125). This is followed by a short discussion of the NI issues (126-135) and a lengthier discussion of the devolution question (136-151).

Prerogative and European Communities Act

The Government's prerogative powers must yield to an Act of Parliament; all agree on that. The disagreement between the Government and the applicants is whether any Act rules out the use of prerogative powers to trigger Article 50. There is no Act which *explicitly says* this in clear words. Does any Act, properly interpreted, imply this? According to the Supreme Court the answer is yes: the European Communities Act 1972 (ECA).

There are two closely related reasons for this. First the ECA created a major constitutional innovation introducing a new source of law (EU law) into the legal system. This cannot be undone by anything less than another Act of Parliament (paras 80-82). Connected with that, if the prerogative were to be used to trigger Article 50 it would inevitably change *rights* held by virtue of EU law (para 83). This again cannot be done by mere prerogative.

Northern Ireland

The consideration of specific Northern Ireland questions (apart from the broader devolution discussion) is brief. The Supreme Court rejects the argument that the provision for a referendum on the future of Northern Ireland in section 1 of the NIA means Article 50 cannot not be triggered without the consent of the people of Northern Ireland. According to the Court that 'important provision' only relates to the decision whether to remain part of the UK or to unite with Ireland and does not regulate 'any other change in the constitutional status' (para 135).

The Supreme Court does not decide several NI questions because they are 'superceded' by the decision about the ECA, though it does comment on them.

The Supreme Court considers whether the Northern Ireland Act precludes the use of the prerogative to trigger Article 50 without an Act of Parliament. The Court strongly hints that the NIA does preclude this (paras 131-132) but ultimately concludes 'it is not necessary to reach a definitive view' (para 132).

On the argument that the Section 75 equality obligations apply to the Secretary of State's role in Brexit: the Supreme Court says this question is 'superseded' but nevertheless indicates a view that Section 75 does not apply because giving notice to leave the EU 'is not a function carried out by the Secretary of State for Northern Ireland in relation to Northern Ireland within the meaning of section 75' (para 133).

Devolution

Turning to the third major issue, the devolution discussion: if an Act of Parliament is needed to trigger Article 50, is there is a legal obligation to get the consent of the Northern Ireland Assembly for that Act?

There is a *convention* on this (called the Sewel or legislative consent convention); a convention is a political custom which is treated as politically obligatory, but not legally enforceable. According to the convention, the Westminster Parliament will not normally legislate on devolved matters without the consent of the relevant devolved Parliament or Assembly. This is the narrow view of this convention. On a broader view, the convention also applies when the Westminster Parliament alters the competences of the devolved Parliament or Assembly. Recently, the Scotland Act 2016 gives recognition to the narrow version of this convention in relation to Scotland.

The Supreme Court decides that the Sewel convention is an important part of the political system but remains a convention and therefore *cannot be enforced in the courts as a legal requirement*. The language in the Scotland Act does not change its status as a convention. Therefore, there is no legal obligation to seek consent from the devolved assemblies.

That is the *legal* position; what is possible, desirable or required as a *political* matter is not decided by the Supreme Court. The Supreme Court judgment does not preclude the argument that consent is required by the convention, but that is an argument that has to be settled in the political not the judicial arena.

Means have to be found in the political constitution to take account of the interests of the devolved nations and in particular the special features of the Belfast / Good Friday Agreement. We now need to see whether the political constitution and political leaders can rise to this challenge.

Rory O'Connell, Director, Transitional Justice Institute.
I am grateful to Daniel Holder CAJ and Colin Harvey QUB for comments on an earlier draft.

Civil Liberties Diary - December

1st December:
A police probe into allegations of criminal activity in the Police Ombudsmans Office has seen two former Police Ombudsman investigators reported to the Public Prosecution Service over alleged misconduct in the Derry Four Case, were four Derry teenagers were falsely accused of murdering a British Soldier in 1979 and subsequently moved to the Republic of Ireland until all charges were dropped almost 20 years later.

The head of the Coroners service has blamed a funding logjam for his inability to schedule an inquest into the Ballymurphy Massacre of 1971 where 11 people including a priest were shot and killed by the British Army. NI's Lord Chief Justice proposed a specialist unit be set up to deal with this and around 50 other legacy cases but coroner Adrian Colton says "I am not going to set a date and then disappoint people because I can't deliver it." Politicians have so far failed to agree on releasing the £10 million needed to fund the process.

7th December:
Secretary of State James Brokenshire claims there is a currently a severe threat posed to NI from paramilitaries. In 2016, 6 people have died in paramilitary attacks while 103 people have been arrested in connection with terrorism. He also noted however that there has been only 4 national security attacks in 2016, down from 16 last year and 40 in 2010.

Former Justice Minister David Ford has brought forward a private members bill which if eventually passed, will allow women carrying foetus' with what the proposed legislation terms a 'fatal abnormality,' to legally access a termination in NI. Pro life opponents of a change to abortion laws in NI have called for an end to the use of the term which the Northern Ireland Council for the Royal College of Obstetricians and Gynaecologists (NICROCOG) has confirmed it does not recognise.

8th December:
A report by the Criminal Justice Inspection Northern Ireland (CJI) looking at the PSNI arrangements to manage and disclose information to the Coroners Service in support of legacy inquests found them "complex, convoluted and slow ". These are historical cases many of which are controversial, complex and may involve allegations of collusion. Asst Chief Constable Mark Hamilton, said the PSNI will consider the recommendations, but that measures such as bringing in additional staff and investing in technology require additional funding.

MPs have overwhelmingly backed Theresa May's plans to trigger the process for quitting the European Union by the end of March 2017 on condition that she reveals her strategy. Shadow brexit secretary Sir Keir Starmer said the plan must set out whether the government intends to keep Britain in the European single market or customs union, or to see a transitional arrangement to cover the period immediately after Brexit.

9th December:
Two projects helping the homeless in Belfast were visited by the Assembly's committee for communities – Stella Maris and DePaul Housing First, to mark Homelessness Awareness Week 2016. The committee identified tackling homelessness a key priority for the assembly term.

It was reported that the British government has said it is prepared to disclose all relevant material about the Troubles to an Independent Historical Investigations Unit (HIU). It said the administration will engage with victims' groups, political parties and the Executive to build the necessary political consensus to get the Institutions agreed in the Stormont House accord up and running. The HIU is among many organisations planned to investigate the bloody legacy of the conflict once a row over the state's national security "veto" is resolved.

Compiled by Stephen Maginn from various newspapers

Just News

Just News welcomes readers' news, views and comments.
Just News is published by the Committee on the Administration of Justice Ltd.
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