Just News

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

Human Rights in Northern Ireland May 2012

The growth of secret 'evidence' and the case of Marian Price

There were two significant reminders recently about the creeping use of secret 'evidence.' The first was the continued imprisonment of Marian McGlinchey (née Price), despite her three co-accused walking free, when a judge threw out charges against all four. Marian Price was technically speaking already 'out on bail' in relation to these charges (which the Prosecution Service may now seek to resurrect). Her continued imprisonment relates not to a decision by a Court, but a separate procedure involving a government Minister and a Commission which can rely on secret evidence.

The second reminder was the UK Coalition Government's inclusion of an ominously titled 'Justice and Security Bill' within the list of laws it announced it would introduce in the next Parliamentary session. The Bill would allow government Ministers to instruct 'CMPs' – Closed Material Procedures (i.e. secret evidence) to be used in civil court processes. Our local circumstances were not for once the impetus for such a dramatic change (although as it could include the likes of 'Troubles' related legal challenges, it would have serious repercussions here). The move is in response to MI5/6 involvement in 'war on terror' practices such as 'extraordinary rendition' (i.e. the kidnap, torture and unlawful detention of persons) being increasingly challenged in Court, and in particular the compensation settlements being paid to Guantanamo Bay detainees. The Government argues it needs CMPs in order to allow secret trials to protect 'national security. ' They also conveniently reduce the potential to hold the Security Services accountable for malpractice or human rights abuses in which they are implicated.

There is general outrage from human rights groups over the proposals. Amidst this, we should not lose sight of the fact that secret evidence procedures already exist– many piloted and specific to this jurisdiction. Persons who have their fair employment discrimination claims blocked by a 'national security certificate' issued by the Northern Ireland Office (NIO) can only have their claims heard in a 'special tribunal' involving secret evidence – which predates its better known counterpart tribunal for persons subject to 'Control Orders.' CAJ has asked under the Freedom of Information Act how many certificates have been issued and how often the 'special tribunal' has convened – only to be told that the NIO 'did not record' such information. Should you be subject to such processes, you can expect that both you, your lawyer, and the public will be excluded from your court hearing. Secret 'evidence', usually based on security force intelligence data, is then presented against you, which you cannot challenge. A 'Special Advocate' is appointed to represent you but cannot discuss the secret 'evidence' with you. At best, you and your representatives are given a 'gist' of what is being alleged.

Similar procedures also apply for recalling to prison persons with conflict-related convictions who were released under the Belfast/Good Friday Agreement. Such releases were 'under licence,' conditional on no re-involvement in paramilitary activity. The question which arises is how the conclusion is reached that someone has returned to such activity. The decision is not on the basis of a fresh conviction for a similar serious offence proved beyond reasonable doubt in a competent court, but rather a variation of the above CMP process involving the NIO, Secretary of State and a Commission, which can rely on secret 'evidence' in a closed 'Special Advocate' procedure.

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Marian Price was released long before the 1998 Agreement, having been convicted of bombing the Old Bailey in 1973, but issued with a royal pardon in 1980. A similar process exists under the Life Sentences (Northern Ireland) Order 2001 whereby the NIO Secretary of State, Owen Paterson, can provide the Parole Commissioners with evidence and invite them to make a recommendation to return an individual to prison.

Such decisions can also be based on secret 'evidence,' including intelligence data, and do not require a conviction or even a charge. At worst, therefore, the process could be used selectively against ex-prisoners engaged in political activity outside the mainstream, rather than just against those genuinely involved in unlawful activity.

The case of Marian Price is particularly striking, as on the same day a Judge released her on bail in May 2011, a government Minister returned her to prison. There are other due process issues in relation to this case, not least the fact she was given a pardon under the Royal Prerogative of Mercy. The NIO claims this document only related to Marian Price's fixed term and not life sentence for which a licence applied. Her family contest that the pardon related to both, and hence believe that the NIO had no licence to revoke. It would seem a relatively simple matter for the NIO to produce the document to settle the matter. However, apparently the pardon and all copies of it have gone 'missing.' Given that it could possibly change a decision as to whether a person is deprived of their liberty, one would think an investigation would have taken place as to how and when the information disappeared. CAJ has been told that the NIO have decided not to investigate this on the grounds that the pardon is 'not relevant' to this case. Whilst decisions in 'special tribunals' are made on the basis of evidence that defendants cannot see, it is difficult to understand how the NIO reached this conclusion without itself viewing the document.

The dangers of secret 'evidence' within the justice system were set out succinctly in the case of Al Rawi, and others v the Security Services. Here, the government tried to argue that legal norms over the years (the 'common law') meant that it had a right to hold civil trials in secret, despite no law permitting this. The UK Supreme Court threw this out, with Lord Kerr arguing that the "right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness."

It is this case that has led to the present Justice and Security Bill introducing CMPs. In response, Special Advocates themselves have argued CMPs "represent a departure from the foundational principle of natural justice that all parties are entitled to see and challenge all the evidence relied upon before the court and to combat that evidence by calling evidence of their own." Put simply, evidence cannot be relied upon if you cannot challenge it.

CAJ expressed concerns about the CMP proposals, given our experience that measures which effectively bypass rule of law standards and establish, in essence, a parallel justice system, lead to human rights abuses which can exacerbate conflict as well as contributing to the growing marginalisation of 'suspect communities.' A further problem highlighted above is that secret evidence tends to consist of intelligence data which the Police themselves are often keen to (rightly) point out does not necessarily constitute evidence. However, under the present recall arrangements, 'intelligence' can effectively be used as 'evidence' to put an ex-prisoner behind bars.

This is of course not the first time that intelligence rather than evidence has been used to imprison; previous policies of mass arrest and internment involved lists of suspects based on 'intelligence' data. The lesson needs to be learned that illegitimate state practices outside the standard rule of law do not prevent but rather fuel conflict. Further growth in procedures allowing secret 'evidence' would have serious consequences, but in Marian Price's case, such consequences are already apparent.

CAJ wrote a detailed response in January 2012 to the 'Justice and Security' Green Paper setting out the organisations concerns about the proposals and submitted a response to the Second Reading of the Justice and Security Bill on 'Closed Material Procedures.' Please visit our website for more.

This article was first published on The Detail website - www.thedetail.tv

A View from the Archives

What's in a name?

People regularly 'complain' about the name of this organisation: the 'Committee on the Administration of Justice' is a mouthful, is difficult to remember, and is not very informative. Little wonder that, over time it has come to be known as the "CAJ", and many people would not even be able to say what the C, A and J represent. Even insiders spelling out the acronym trip over the name – is it Committee on, of, or for the Administration of Justice! Some of its more rabid critics have even been known to replace "Administration" with "Against"!

The only discussion of the name found to date in the archives implies that things might have been even worse in terms of 'branding'! The current name came about because, from the beginning, the focus was on the administration of justice. The 1981 founding conference (see *Just News February 2012*) was convened as a "jointly sponsored conference on the administration of justice in Northern Ireland", and its purpose was to consider "the appointing of an official review along the lines of the Gardiner Committee of 1974 (or) whether some more permanent unofficial body or forum should be established". The forum arising from the conference presumably sought a serious and respectable name, and the "Committee on the Administration of Justice" must have seemed ideal.

Only a few years later, however, the executive reports that "a short discussion took place on a name change for CAJ and it was agreed that this was properly left to the AGM". An October 1987 paper was prepared, making the arguments about retaining the name of "CAJ", or abandoning it and replacing it with the "NI Council for Civil Liberties". The arguments for keeping "CAJ" included a desire to retain the recognition already achieved and not confuse people, but also the fact that the organisation "works for justice and peace, not just civil liberties". On the other hand, it was argued that the "NI Council for Civil Liberties" would make it clearer that the organisational focus was NI, and would mirror the names of other well-established groups. The Irish & Scottish Councils for Civil Liberties were relatively new, but the London-based National Council for Civil Liberties had been active since 1934.

But it seems that neither option prevailed. Instead, a general meeting in January 1988 agreed to combine the two and "add the words 'NI Civil Liberties Council' to our name", which – in my personal opinion - gives credence to the old maxim that "a camel is a horse designed by a committee"! The 1988 AGM agreed to the name change: "after a lengthy discussion a vote was taken and the amendment was carried by a vote of 11 for, and 2 against, with 2 abstentions." (It is interesting to note in passing that CAJ seemed to have small AGMs even in those days!). A later file-note indicates that the membership accepted the executive recommendation that the title be the 'Committee on the Administration of Justice (The NI Civil Liberties Council)' and "it was agreed that the method of introducing the revised name should be left to the discretion of the executive". To date, the archives suggest that the executive gradually "forgot" the name change (other than in the stationery of the organisation), though I may try and trace this more closely.

It is interesting to reflect on the difference, if any, that an 'easier' name would have made? The NCCL rebranded itself as "Liberty" in 1989. The name change should have been easy: moving from a cumbersome name to a nifty title; the concept of "liberty" is both relatively understood and widely embraced in English popular culture; yet more than 20 years later, members still often introduce the organisation as "Liberty, previously known as the NCCL".

The CAJ archival search has uncovered interesting debates about the distinctions drawn between "civil rights", "civil liberties" and "human rights"- and these definitely merit more study. In the meantime, I thought Just News readers might want to bask in the name of "CAJ" when they realise they might have had to constantly spell out "the CAJ – NICCL".

Maggie Beirne

Transitional Justice and the meeting point of human rights and reconciliation

There has been considerable discussion recently on the possibilities of synergy between human rights practitioners on the one hand and reconciliation practitioners on the other. Although differences in approach have been emphasised in the past, it is suggested that there is considerable scope to make common cause. If we want to make a case for exploring the potential for synergy between human rights work and reconciliation in Northern Ireland today, the most obvious place to start is in their mutual preoccupation with the aftermath of violent political conflict and the reality of deep social division. Though the conflict and its impact are not the sole focus of either discipline, it is clear that, on the one hand, human rights are egregiously abused during conflict and, on the other hand, people fighting each other is the polar opposite of reconciliation. In other words, both areas of work have a deep interest in peace and in promoting the ways to stabilise and develop it.

The scope for cooperation derives from the understanding that there has been a violent political conflict which has fractured society and that a peace process has been engaged in to lead us out of that situation of violence and repression. The concept of a peace process implies that no side has gained a military victory. The corollary is that there must be an accommodation or agreement between all sides, including the violent actors and the state. In a peace process, since no-one has won the war then all must be involved in winning the peace. So, whatever the gap between protagonists, they must, in the end, agree, do a deal, make a contract. The state has to deal, but the state also has to change. In a conflict such as we have experienced, the legitimacy of the state itself has been challenged. To remove the causes of violence, political change is required that removes whatever actual barriers exist to the incorporation of all citizens and, as important, wins their allegiance to the state. It is inconceivable that that can happen without the structures and, in all probability, the nature of the state itself changing. Jean Paul Lederach notes that a peace process "will almost always require a systemic transformation of relationships in the affected society's political, economic and social policies and ethos." So, for a peace process, political change is needed that reaches as far as the nature of the state and also involves many other social and cultural structures in civil society.

Human rights will be central to this process of reform. However, from a human rights point of view, the first point of engagement with a violent political conflict is in relation to human rights abuses by the state. During a conflict, the human rights of all people must be defended and the state held to account for the abuses it practises. This intervention is not simply about the harm done to the direct victims of abuses but also about the corrosive effect on the rule of law. Abuses de-legitimise the state and, in particular, the criminal justice system, thereby weakening its ability to impartially uphold the rule of law and leading to a catastrophic failure in the state's duty to protect its citizens. In the Northern Ireland conflict, abuses included torture, detention without trial, extra-judicial killings and unfair trials. The conflict arose from a society in which there were permanent repressive laws, in fundamental contradiction to human rights norms, and institutional sectarian discrimination in political, economic and social fields.

A human rights approach to peacebuilding therefore involves first the identification, investigation and accountability of human rights abuses, second a process of fundamental reform of the state and its institutions to prevent such abuses occurring again and third the construction of a society based on justice and equality in order to remove the causes and occasions of conflict. This is not, of course, a simple process and in recent years the concept of transitional justice has been developed in order to describe, analyse and promote the series of judicial and non-judicial processes that are necessary to progress from a conflict involving violence and repression to a peaceful and stable society based on human rights and the rule of law.

The International Center for Transitional Justice defines it in the following way:
"Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms."

It goes on to say:
"Transitional justice is not a 'special' kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law." The practical reality therefore, is that transitional justice as a concept, field of study and guide to action has come about from the attempts of human rights practitioners to develop the way in which an adherence to human rights law and standards can be deployed in a flexible yet consistent way in the transition from violence to peace.

It could be argued, however, that it is essential to bring concepts of reconciliation into these processes. In the Northern Ireland context it seems self-evident that the experience of the conflict, on top of the historical divisions between Protestant and Catholic, whose modern boundaries were more or less fixed by the beginning of the nineteenth century, means that relations between the two dominant communities were deeply damaged. The working of institutions, however sophisticated, will not be helped by continuing suspicion, stereotyping and demonisation; which is where the role of reconciliation comes in. Brandon Hamber and Grainne Kelly say: "we see reconciliation as moving from the premise that relationships require attention to build peace. Reconciliation is the process of addressing conflictual and fractured relationships and this includes a range of different activities. We see reconciliation as a voluntary act that cannot be imposed."

The current reality, both in the peace process in general and in transitional justice processes designed to deal with the legacy of the past in particular, is of a stasis at political level but a continuing vibrancy of many forms of engagement within civil society. Elements of victims, ex-combatants and communities have come together in many ways, for various purposes and in a diversity of forums achieving in some examples a real experience of reconciliation. If we want to give more impetus to transitional justice in dealing with the corrosive legacy of the past, perhaps we should begin a process of raising and discussing the practical proposals that have become bogged down in political society with the more progressive and open-minded activists of civil society.

CAJ Staff Changes

The end of June will mark the departure of two programme area staff, Mick Beyers, Policing Programme Officer and John Patrick Clayton, Criminal Justice Programme Officer. Finance Assistant Julie McBrinn also finishes at the end of July. CAJ would like to pay tribute to the enormous contribution all have made our work during their time here. They leave a considerable legacy for our institutional history and we wish them all the very best.

Following a partial restructuring caused by the ending of a funding stream, the four previous programme areas have now been reorganised into the following three part time posts:

Justice and Policing Coordinator, Jacqueline Monaghan
Equality Coordinator, Debbie Kohner
Protection of Rights Coordinator, Adrienne Reilly

This arrangement begins in July, with Jacqueline returning to CAJ at the end of the summer following her maternity leave.

Tizian Peukert EIRENE volunteer for this year finishes in July and will be replaced by EIRENE volunteer Rune Feidler in August. Tizian has been great support during the year and we will miss his cheery presence.

‘Shoot-to-Kill’ Inquest

On 2 May 2012 a jury in Belfast delivered its verdicts in the inquests into the deaths of Mr Dessie Grew and Mr Martin McCaughey - 22 years after were killed by the SAS. Mr Grew and Mr McCaughey who were 37 years old and 23 years old respectively, and who were active service members of the IRA, were shot dead by SAS soldiers at isolated farm buildings near Loughgall in Co. Armagh. Their deaths prompted allegations that they were victims of a British ‘shoot-to-kill’ policy as the farm was believed to have been under surveillance by the SAS.

These ‘legacy’ inquests are the first to proceed since the seminal judgment in *Re McCaughey & Quinn* was delivered in May 2011. As we noted in our June 2011 *Just News,* the Supreme Court held in that case, which was taken by the next of kin of Mr McCaughey and Mr Grew, that while the Human Rights Act 1998 was non-retroactive, and there is no continuing obligation to carry out Article 2 investigations into the deaths of the applicants’ next of kin, where there is an ongoing inquest the UK must adhere to its international obligations under the European Convention on Human Rights (ECHR).

In light of the allegations surrounding these deaths, it was hoped that the planning and control of the operation that night would be thoroughly examined through the lens of Article 2 ECHR. Regrettably relevant contemporaneous army and police documentation necessary to assist this process, the inquest was told, could not be found.

The jury made findings in relation to the medical causes of the deaths, the scenario in which the deaths occurred and found that the nature and purpose of the military operation was to ‘to continue surveillance of a car and mushroom shed, place camera in the mushroom shed and to arrest anyone involved in terrorist activity at that place’. Although McCaughey and Grew were armed but did not fire any shots during the incident, the jury held that the soldiers believed that their position had been comprised due to radio transmissions and continued to fire ‘as they believed they were under continued fire’, however they were unable to determine on the balance of probabilities, if there was an opportunity to attempt to arrest Mr Grew and Mr McCaughey prior to being compromised.

While the jury held that the SAS used reasonable force in shooting dead the men, including when shots were fired at one man as he lay on the ground, they could not reach a verdict on whether the operation conducted by soldiers was designed to minimise recourse to lethal force.

When asked whether there was any aspect of the training and planning by the soldiers that could account for the deaths, the jury held that it was provided with insufficient evidence of the planning and intelligence to reach a finding. On the issue of planning and control the jury found that in planning the operation, the Tasking and Co-ordinating Group (TCG) - which is thought to have operationally coordinated joint operations involving the SAS, RUC Special Branch and/or other security force agencies - tasked a specialist military unit to minimise danger to the RUC.

In concluding, the Coroner, Mr Sherrard, gave his sincere condolence to the families, noting that they were remarkable in their resilience and fortitude shown and dignity in what were very distressing circumstances. He stated that they left no stone unturned and were to be commended for their efforts as were their legal representatives whom he stated had been inexhaustible in their efforts which had been no mean feat. He also thanked all the other legal representatives as they demonstrated a sensitive and proportionate response during these proceedings.

His closing remarks remind us of the many questions that continue to surround our ‘legacy’ deaths and which cannot be properly answered through the coroner’s courts alone. He stated that this case demonstrates the strengths and weaknesses of our inquest system - while we are now in possession of a very detailed and well considered examination of these deaths, there was no real opportunity to gain an understanding of the complex question as to why so many of our countrymen turned against their fellow countrymen or understand the state’s response to this:‘*Those important matters cannot be explored in this process, yet no other process exists – this ought to be a matter for us all.’*

CAJ T-Shirt competition winner announced!

We are delighted to announce that Merin Antony from St. Mary's High School, Downpatrick has won the Children's category of our T-shirt design competition! Merin is pictured below left, with CAJ Human Rights Programme Officer, Adrienne Reilly (right)

Just Updates

We are replacing our currently monthly ezine with a new, in-depth bi-monthly look at the work of CAJ.

The new ezine will cover work from our programme areas, our lobbying efforts, consultation updates and more.

If you already receive our e-newsletter you will automatically receive Just Updates. If not, you can sign up to receive Just Updates via our homepage.

Any thoughts or opinions you have on Just Updates would be most welcome.
Please email info@caj.org.uk or call 028 9031 6000.

Civil Liberties Diary - April 2012

2 April
Ministers are preparing new legislation which will expand the government's powers to monitor both email exchanges and website visits of every individual within the UK. Internet companies will be instructed to install hardware which will allow the government to examine contact data of any phone call, text message, email, or website on demand.

3 April
Almost 1,500 children have been unable to find a place in nursery schools this year. Though places remain in some schools, many of these schools would involve long journeys from the child's home.

5 April
A probe into the pseudomonas outbreak has called for the replacement of the Royal Victoria neonatal unit in order to improve infection control. The report also included fifteen other recommendations, including guidance on cleaning standards and infection protocol.

6 April
The Parades Commission has ruled that a parade on Easter Monday may only play one hymn when passing the Crumlin Road flashpoint at Ardoyne. The loyalist band, the Apprentice Boys, have agreed to work within these restrictions.

The Department of Education reported that there is a steady increase in the number of primary-age pupils that are missing school. The report indicated that these numbers are higher in schools located in disadvantaged areas.

16 April
The number of children placed on the child protection register has increased by almost 50 percent in the last five years. A report, issued by Queen's University Belfast, explains that this is evidence that the system is working for child protection. The high number indicates that children are being referred to social services whenever there is a concern for their wellbeing.

17 April
Northern Ireland's Health and Social Care Board has commissioned an independent expert panel to review children's heart services. This review comes after the deaths of three children between 2007 and 2010.

18 April
Following the leaking of a 2009 unpublished report, which raised concerns around abuse at Lissue House and Forster Green Children hospitals, Health Minister, Edwin Poots, wrote a letter to all Northern Ireland health service staff, explaining that staff have a right and duty to 'whistleblow' if they have legitimate concerns. The letter indicated that staff have nothing to feat if they decide to step forward.

19 April
The National Autistic Society Northern Ireland has reported that autistic children are not getting an adequate education. It has called on the Assembly to consider the needs of pupils with autism as they debate education reforms.

Both nationalist and unionist councillors are meeting with the Equality Commission over debates surrounding Irish language signs at a Magherafelt leisure centre. Sinn Féin has requested that all signs at the centre be in both English and Irish. The centre, which is scheduled to open in July, will temporarily have minimal signage in only English until the matter is resolved.

The National Board for Safeguarding Children has stated that more needs to be done to protect children within the Catholic Church. The report identified problems accessing diocesan records, which are needed to identify possible dangers to children. It also identified confidentiality within the sacrament of confession as preventing priests from reporting child abusers. Finally, it recommended an end to the culture of secrecy within the church.

20 April
A quarter of taxis operating in Northern Ireland do not meet legal standards. The Driver and Vehicle Agency found that one in four taxis were either not roadworthy or were committing serious traffic offences.

24 April
The Department of Justice proposed to replace Magilligan Prison with a new medium security prison within the next six years. The Prison Service wants to build this new jail closer to Belfast, potentially by Maghaberry, in order to serve the majority of inmates who are from the greater Belfast area.

27 April
Department of Education figures indicate that 23 percent of students (approximately 73,000 students) are eligible for free lunches due to low family income. This number has increased by 10,000 pupils in the past

Diary compiled by
Elizabeth Super
from various newspapers

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Just News is published by the Committee on the Administration of Justice Ltd.
Correspondence should be addressed to the Editor, **Fionnuala Ní Aoláin**,
CAJ Ltd.
2nd Floor, Sturgen Building
9-15 Queen Street
Belfast
BT1 6EA
Phone: (028) 9031 6000
Fax: (028) 9031 4583
Email: info@caj.org.uk
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