CAJ
Committee on the Administration of Justice

CAJ's submission to the

Committee of Ministers

in relation to the supervision of cases concerning the action of the security forces in Northern Ireland

(Shanaghan v UK, Jordan v UK, Kelly & Ors. v UK, McKerr v UK, McShane v UK, Finucane v UK)

February 2009

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Promoting Justice / Protecting Rights

45/47 Donegall Street, Belfast,
BT1 2BR
www. caj.org.uk
Tel: (028) 90961122
Fax: (028) 90246706
Email: info@caj.org.uk

CAJ
Committee on the Administration of Justice

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. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure 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. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly 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 activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Committee on the Administration of Justice (CAJ) Ltd
45/47 Donegall Street, BELFAST BT1 2BR
Northern Ireland

Tel: (00 44 (0) 28 9096 1122 Fax: (00 44 (0) 28 9024 6706
Email: info@caj.org.uk Web: www.caj.org.uk

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Winner of the Council of Europe Human Rights Prize

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from the Committee on the Administration of Justice (CAJ)
in relation to supervision of

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(*Shanaghan v UK, Jordan v UK, Kelly & Ors. v UK, McKerr v UK, McShane v UK, Finucane v UK)*

(February 2009)

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

We respectfully make the following submissions for consideration at your 1050th **meeting**.

General Measures

1. Coroner Service

The inquest system in Northern Ireland has long been the subject of controversy. CAJ has previously criticised the inability of inquests to issue verdicts of lawful or unlawful killings as inadequate to meet international standards[1]. It remains of concern to CAJ that a coroner and/or a jury are still prohibited from returning verdicts of lawful or unlawful killing.

In a minority opinion in **Jordan v Lord Chancellor and another (NI) [2007] UKHL 14** (Para 49), Baroness Hale of Richmond records:

"I too have difficulty understanding why a verdict of lawful or unlawful killing should be available in England and Wales but not in Northern Ireland. The statutory basis

[1] Committee on the Administration of Justice, 'Preliminary Response from the Committee on the Administration of Justice (CAJ) to the 'package of measures' submitted by the UK to the Committee of Ministers, 8 October 2002, p.5;

for the verdict in each case is virtually identical.…… prohibit(ing) 'the expression of any opinion on questions of criminal or civil liability'? The object is to avoid attributing blame to any individual or individuals, while being as precise as the evidence permits in answering the four factual questions posed by the legislation. In reality, if that is done, then ……the inquest will have done its job."

CAJ asserts that the inability of inquests in Northern Ireland to issue verdicts of lawful or unlawful killing falls short of international standard. It is particularly problematic when families are denied their right to a declaration of whether their loved ones were lawfully or unlawfully killed by state agents.

There is a minimal safeguard when the coroner considers that a criminal offence may have been committed, in that he or she has a statutory duty to refer the case to the PPS. However, even when a case is referred to the PPS by a coroner because he/she considers that a criminal offence may have been committed, there are limited remedies available to families if the PPS chooses not to prosecute. (See on)

Further, we accept largely that there has been a positive development in the Coroners Service for Northern Ireland (CSNI). However there remains disparity between the service and support provided to families bereaved before the reform of the service (i.e. prior to April 2006) and those families bereaved after the reform. HM Inspectorate of Court Administration stated in its inspection report that:

"The distinction between post- and- pre-reform cases is significant. In the majority of the cases, CLOs (Coroners Liaison Officers) are not involved in pre-reform post-mortem cases. We have not inspected the systems that were in place prior to the reforms. However, evidence from families and bereavement support agencies indicates that many families bereaved prior to the reforms did not receive any written information about the Coronial process at the time of their bereavement unless it was requested."[2]

Obviously, since most of the conflict-related deaths occurred in Northern Ireland before 2000, it is the service and support provided to families bereaved before the reform of the Coroner Service that is of most importance to the cases under scrutiny by the Committee of Ministers.

2. Public Inquiries

The Committee of Ministers would be fully aware of CAJ's misgivings in relation to the Inquiries Act 2005 (Inquiries Act). CAJ continues to be concerned that Inquiries being conducted under the Inquiries Act would not provide an effective investigation in accordance with Article 2 of the ECHR. The Act removes effective control of inquiries from independent judges and places it in the hands of the relevant government Minister, who in many of the cases arising in Northern Ireland is an interested party.

The UN Human Rights Committee has roundly criticized the Inquiries Act 2005 for weakening the ability of inquiries to be transparent, effective and independent of

[2] Paragraph 3.11 Inspection Report (November 2007) website address: http://www.hmica.gov.uk/files/NI_Coroners_report.pd

government officials.[3] Most recently, the Committee expressed concern that: "a considerable time after murders (including of human rights defenders) in Northern Ireland have occurred, several inquiries into these murders have still not been established or concluded and that those responsible for those deaths have not yet been prosecuted."[4]

The Billy Wright Inquiry in January 2008 issued a damning "Position Paper" in relation to the Police Service of Northern Ireland (PSNI) failure to disclose to the Inquiry panel pertinent material that was requested as far back as November 2005. [5] The Inquiry Panel in its Position Paper gave a detailed account of the difficulties they faced and the fact that their requests had fallen on deaf ears. The Inquiry Panel at paragraph 1.4 of its Paper stated that:

"Regrettably, despite those efforts, we have reached the point, more than three years after the Inquiry was established, where we have not yet been able to lay before the public any evidence of substance…"

It further at paragraph 1.21 stated that:

"Whereas the Inquiry has formal powers under the Inquiries Act 2005 to require the production of evidence, it has limited powers to investigate or search repositories. It is wholly dependent on those who hold the information to provide it. As we indicated in the body of this paper, the Inquiry has, at all times that it has considered it necessary, used its full powers under the 2005 Act to require the provision of materials from PSNI. Formal Notices were served upon the Chief Constable on 26 August and 25 November 2005, on 26 May 2006 and on 16 April, 24 August and 1 November 2007." (CAJ's emphasis)

Despite this we understand that no formal sanction or action would be taken against PSNI compelling them to disclose the requested material and/or in the very least provide, using the words of the Inquiry Panel good explanations for its inability to provide the requested material. It is not conducive to public confidence that PSNI is not held properly to account for its actions or inactions.

Accordingly, important learning about current policing practice and policies is being lost – or will be lost until such time as the Inquiry finalises its recommendations at the end of what is likely to be a lengthy process. These kinds of experiences further emphasise the unsuitability of the Inquiries Act 2005 as a vehicle by which the United Kingdom proposes to discharge its Article 2 obligations.

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[3] Submission from CAJ to the UN Human Rights Committee in response to the Sixth Periodic Report submitted by the government of the UK, June 2008, p.3; UN HRC, "*Consideration of Reports Submitted by State Parties under Article 40 of the Covenant - Concluding Observations of the UN Human Rights Committee re United Kingdom of Great Britain and Northern Ireland*", 93rd session, Geneva 7-25-2008, "Even where inquiries have been established, the Committee is concerned that instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the government minister who established an inquiry to control important aspects of that inquiry. (art.6)

[4] Id.

[5] Website address: http://www.billywrightinquiry.org/filestore/documents/Position_Paper_on_PSNIs_response_to_requests_for_information.pdf

3. HET/ OPONI

The Historic Enquiries Team (HET) has yet to publish any summary review of reports in relation to the above cases, where the families have alleged collusion. There are mixed feelings among the families who are engaging with HET. The Kelly and the Loughgall families have serious reservations about the HET process. They are concerned that there has not been, as promised, maximum permissible disclosure. In particular some of the families have expressed concern that HET will not disclose crucial and central information in relation to the death of their loved ones. They believe that HET is capable of disclosing such crucial information whilst adhering to the requirements of Article 2. HET in its dealings with the families implements the blanket policy *"to neither confirm nor deny"* whether an informant/agent was involved in the operations that led to the killing of families' loved ones by State agents. Consequently, the families would not be told of the extent and the role of informants/ agents. Crucially this goes to the heart of the question of what steps if any were taken by the authorities to minimise to the greatest extent possible the recourse to the use of lethal force.

The Court in ***McCann and others v. the United Kingdom, GC, judgement of 5th September*** 1995, stated at paragraph194:

"Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force."

This issue will of course have wide implications for the rest of the families pursuing the truth through the HET process. There is no doubt that the HET stance in relation to the disclosure of material information would not be conducive to public confidence.

"The HET pledges to deal with families with honesty, trust and confidentiality. Providing such a "family centred" approach is at the heart of the HET project".[6] The families in these cases have had little contact with the HET and it is they who make that contact. The Kelly and Shanaghan families while accepting there has been some contact are very concerned that they have never been contacted by the HET family liaison officer and still await review reports into the death of their loved ones.

In relation to the Office of Police Ombudsman for Northern Ireland (OPONI) CAJ has several concerns:

[6] Memorandum prepared by the Department for the Execution of Judgements of the European Court of Human Rights (DG-HL) CM/inf/DH(2008)2revised, 19 November 2008, Part 3. General measures: 2a.23

The Committee of Ministers may be already aware that a new Ombudsman (Al Hutchinson) has been appointed. Prior to his appointment as Ombudsman he commented that a choice has to be made between "policing the past or the future". He stated in the 19th report on Overseeing the Proposed Revisions for the Policing Service of Northern Ireland of 31st May 2007[7], at page 215 under the heading **A Choice: Policing the Past, or Policing the Future?** That:

"…Some believe that the past security policing methods were appropriate and necessary for the times, bringing the stability enjoyed today; others believe that the methods and styles used, including allegations of collusion, are never appropriate and should be sanctioned. The truth is probably buried in a murky world of those overlapping perceptions. What is undeniable is that many people want many different and often conflicting things: truth, justice, retribution, an opaque wall shielding the past, or simply the end to the financial drain from reliving the past. What is clear to me is that it is an issue hindering forward progress of policing" (CAJ's emphasis).

He further states that the Historical Enquiries Team and Police Ombudsman's office are *"blunt instruments too narrowly focused to use in a search for truth and justice for societal challenges"*[8]. Naturally many have expressed concern about the priority that his Office will now give to past cases.

Public Prosecution Service

CAJ has referred in previous submissions to the Committee of Ministers that the change in procedure regarding the "giving of reasons" by the PPS is still far from satisfactory, and the PPS is rarely amenable to challenge when it decides not to prosecute. We fail to understand why the position is different in England and Wales where the Director of Public Prosecutions is obliged to give reasons amenable to challenge.

In cases where families are deprived of their right to be told about the lawfulness of the use of lethal force by State agents contrary to Article 2 of the ECHR, the failure of the PPS to give reasons and the unavailability of challenge to that decision means they are also devoid of any legal remedy. CAJ thus strongly urges the Committee of Ministers supervising the above cases to examine the PPS failure to provide reasons amenable to challenge and the inquests inability to issue verdicts of lawful or unlawful killing.

Individual Measures

Pat Finucane:

The Finucane family and their legal advisors received a letter from the Northern Ireland Office, dated 10th February 2009 which arrived on the 20th anniversary of his murder informing them that the British Government was considering the matter of

[7] Website address: http://www.oversightcommissioner.org/reports/default.asp?page=reports
[8] Ibid

what to do in relation to the inquiry into Pat Finucane's case in light of the report of the Consultative Group on the Past. This report recommended that the case could be processed through the Legacy Commission being proposed as an alternative to a public inquiry. The NIO informed the family that they were now considering whether the holding of a public inquiry under the 2005 Inquiries Act would still be in the public interest.

The British government gave a commitment to Judge Peter Cory that they would implement his recommendation, whatever it might be. He recommended the holding of a public inquiry under the then legislation. The government should keep to this promise. The current formulation is yet another means to postpone or avoid implementation of the European Court of Human Rights instruction to hold an Article 2 compliant investigation into the murder of Pat Finucane and the surrounding allegations of collusion. The family of Pat Finucane have clearly stated that they do not view the proposed Legacy Commission outlined by the Consultative Group on the Past as an appropriate mechanism and continue to call on the British government to hold an Article 2 compliant public inquiry. CAJ urges the Committee of Ministers to to maintain its supervisory role, under Article 46, until a resolution to the outstanding issues in this case has been secured.

McKerr:

The coroner has now read the Stalker/Sampson report and a decision was taken to reopen the inquest. To date there has been little progress and no date for hearing has yet been set or any indication of when the hearing may be. It is in the early stages and discussions are ongoing concerning disclosure and related issues. CAJ urges the Committee of Ministers to continue supervision of this case.

Kelly & Others:

There has been limited progress in this case. The families in the case of Kelly and Ors v UK as outlined above have serious reservations about how the HET process can provide a remedy in their cases. One obvious concern in this case is the direct involvement of both military and police and, therefore, whether either of the mechanisms on offer is appropriate to tackle the overlap in authority between these different branches of the security forces.

The family have had little contact with the HET or OPONI and have expressed significant doubts as to whether the HET process will be useful. As stated above HET implements a blanket policy *"to neither confirm nor deny"* informant/agent involvement. It is doubtful that HET would provide information to the families pertinent to making assessments of the management and planning of the operation that led to the killing of their loved ones. CAJ has requested an update on progress into this case from both HET and OPONI. We await their response.

Jordan:

The Inquest into the death of Pearce Jordan is listed for a four-week hearing on 1 June 2009. At a preliminary hearing on 7th January 2008 counsel for the PSNI told the coroner that several civilian eyewitnesses could not be traced. Legal representatives for the Jordan family have lodged judicial review proceedings challenging the

coroners decision to accede to applications for anonymity and screening to fifteen eyewitnesses and in particular Sergeant A.

Separate proceedings have also been lodged by the family's legal representatives regarding the failure of the coroner who they contend erred in law in deciding that he has no jurisdiction under section 17 of the Coroners Act (NI) 1959 to issue a summons for Sergeant A.

Sergeant A is the police officer who shot and killed Pearse Jordan. As a consequence of a 2002 amendment to the Coroner's (Practice and Procedure) Rules (NI) 1963 Sergeant A is a compellable witness. For the reasons given by the European Court of Human Rights in ***Jordan v UK*** Sergeant A would be regarded as the most important witness. CAJ is very concerned with the failure of the coroner to take all reasonable steps to issue a witness summons on Sergeant A, who is resident outside the jurisdiction and has indicated that he will not attend.

CAJ strongly urges the Committee of Ministers to maintain supervision of the Jordan case under Article 46 until a satisfactory resolution to these outstanding issues has been secured.

McShane:

Clear evidence emerged at the inquest into the death of Dermot McShane that calls into question the conclusions previously reached by the Director of Public Prosecutions not to prosecute Private Daniel Moran the driver of the Saracen that killed Dermot McShane. It should also be given attention that Private Moran did not turn up to give evidence at the inquest. From the evidence given at the inquest and from the jury's findings the following matters are clear:

1. That the hoarding was being used as a shield or means of providing cover by individuals including, as we now know, Mr McShane;
2. That the hoarding was not self-supporting or being supported by any other object but rather was being held up or carried by people who were behind it;
3. That the hoarding remained upright until it was struck by the vehicle being driven by Private Moran;
4. That army policy on the driving of Saracen vehicles was not followed in a number of respects including the failure to give a warning, the lack of "top cover" and the manner in which the hoarding was struck.

This clear evidence discloses that an offence may have been committed by Private Daniel Moran, namely the offence of causing death by dangerous driving contrary to Article 9 of the Road Traffic (NI) Order 1995. At the request of the families legal representatives sent a letter to the Coroner urging him to comply with domestic legislation to send a written report to the Director of Public Prosecutions. The Coroner Mr Brian Sherrard sent a letter to the PPS at the end of January 2009 and a response to him indicated that they would be reviewing the case. CAJ would urge the Committee of Ministers not to close supervision of the McShane case at the very least until the decision from the PPS is available.

Shanaghan:

We understand that the Historical Enquiries Team is conducting a review of the investigation surrounding the death of Patrick Shanaghan. At a meeting with the Senior Investigating Officer in April 2007 it was indicated that the review period would last for 10 weeks. The family of Mr Shanaghan have had no contact direct or indirect with the HET since late 2007. No report on the review has ever been released to the family or, as far as we are aware, to anyone else. The Office of Police Ombudsman for Northern Ireland is also conducting an investigation relating to the original investigation into Mr Shanaghans death. CAJ has contacted both HET and OPONI for an update on these ongoing investigations. We await their response.

Conclusions

CAJ urges the Committee of Ministers to maintain its supervisory role over all of the above cases until they have all been adequately and effectively investigated in accordance with the judgements of the European Court of Human Rights. It is clearly apparent that there are a range of issues which are still outstanding and which must be addressed before closure should be considered an option.

CAJ asserts that it is vital that the Committee of Ministers uphold, and be seen to uphold, the rulings of the European Court of Human Rights. The families involved in all these cases took the lengthy and very difficult road to the European Court to seek a remedy and they cannot be denied that now. The Convention is vital in safeguarding the rights of all and it gives particular precedence to the right to life. We would submit that scrutiny by the Committee of Ministers of the implementation of judgements is required to be particularly stringent where there are allegations of direct and indirect state involvement in murder.

CAJ urges the Committee of Ministers to ensure any new arrangements do not over-ride existing rule of law processes and agreements already entered into such as the Cory Inquiries. CAJ is concerned that the outstanding issues with the above cases do not affect only the victims in these particular cases, but are applicable to the many other deaths which have been inadequately and ineffectively investigated. We would urge the Committee of Ministers to continue supervising these cases, and keep under review the general measures flowing from them.

Committee on the Administration of Justice
45- Donegall Street
Belfast
BT1 2BR

E: info@caj.org.uk
Web: www.caj.org.uk
Tel: +44 (0)2890 961122
Fax: +44 (0)2890 246706