

## **CAJ's submission no. S296**

CAJ and PFC's submission  
to the  
Committee of Ministers

**February 2011**

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### *What is the CAJ?*

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 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, Joseph Rowntree Charitable Trust and the Oak Foundation.

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

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

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

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

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CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. CAJ works closely with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

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

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

The Pat Finucane Centre (PFC) is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We believe that all participants to the conflict have violated human rights. The PFC

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asserts that the failure by the State to uphold Article 7 of the Universal Declaration of Human Rights, “all are equal before the law and are entitled without any discrimination to equal protection of the law”, is the single most important explanation for the initiation and perpetuation of violent conflict. It is therefore implicit to conflict resolution that Article 7 be implemented in full. The PFC campaigns towards that goal.

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

### **General Measures**

In Interim Resolution CM/ResDH(2007)73, the Committee of Ministers decided to pursue the supervision of the execution of the above judgments, until it had satisfied itself that all general measures had been adopted, and their effectiveness in preventing new, similar violations had been established. These included measures concerning:

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

We submit that it is premature to close its examination of these issues given the number of concerns that have been raised in relation to these institutions.

In relation to general measures arising from these cases, the Government has pointed the Committee of Ministers to the Historical Enquiries Team (HET) and the Police Ombudsman’s office (OPONI) and stated that these agencies and their processes address violations and the lack of independence and other defects identified by the European Court of Human Rights, in the investigation of deaths where Article 2 ECHR was engaged, both in relation to the past and for the future.

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CAJ and the PFC are becoming increasingly concerned with issues arising from these agencies in relation to how they are exercising their responsibilities for giving practical effect to the general measures.

We note the Grand Chamber decision in *Silih v Slovenia*<sup>1</sup> which held that the procedural obligation to carry out an effective investigation under Article 2 ECHR has evolved into a separate and autonomous duty, and can give rise to a detachable obligation, capable of binding a state even before the European Convention on Human Rights was incorporated into domestic law. In consideration of this, the Committee may wish to ask the Government to what extent they have considered the implications of this decision for how they are addressing the deaths that occurred before the Human Rights Act 1998 was commenced on the 2 October 2000 and its implications for historic or legacy Inquests, and for the role of the Historical Enquiries Team and the Office of the Police Ombudsman's roles in addressing historic cases.

## **HET**

In relation to the HET's role in remedying the defects in police investigation we have concerns that the Chief Constable stated last autumn that all work of the HET must be completed by 2013 and that a line must be drawn under the past. While he resiled from this and said what he meant was that the local politicians would become responsible after that date for funding any such initiatives, we and the families we work with are deeply concerned that the HET should not be disbanded until such time as all the 3,269 murders it was set up to investigate are examined, unless it is replaced by a mechanism that is human rights compliant and has sufficient powers to ensure the requisite accountability. The Committee may wish to ask the Government for assurances that this work will be completed and that funding will be made available to ensure quality is maintained and accountability delivered.

Further, we are concerned that there should be no difference in the quality of the process, dependant on the chronological date of a killing and that later deaths should receive the highest level review and, where there are evidential leads, focused investigation. Many of these killings involve concerns about breaches of Article 2

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<sup>1</sup> [2009] 49 EHRR 37

ECHR, either through collusive actions or through direct breaches, and it is vital that there is no inequality or hierarchy of investigation.

A significant proportion of the investigations into past matters, where there were often defects in investigations, have revealed patterns of involvement by security forces and police and collusion between loyalist paramilitaries and state forces and police in deaths during the conflict, which compound the lack of independence and other defects in the investigations.

In a number of other cases, following information that came to light in the Bloody Sunday investigation, it was revealed that a management rather than investigative approach was taken where soldiers were involved in fatal shootings. Soldiers' statements were taken by the Royal Military Police and the RUC did not follow up by investigating discrepancies in witness statements<sup>2</sup>. Further, as came to light in the William McGreaney case<sup>3</sup>, the then Attorney General, did not think that a soldier could commit murder in the course of his duty.

The unresolved issues around conflict related deaths continue to impact on the families of those killed and have implications for the stability of the peace process. We have become increasingly aware of the importance of truth recovery and of an accountability that includes the acknowledgment of the misinformation that was put into the public domain and undoubtedly contributed to human rights abuses.

We are concerned that there are attempts to draw a line under the past, aimed at avoiding proper accountability, and that these should be strenuously resisted so that the breaches found by the European Court of Human Rights will not happen in future. These lessons are important not just for Northern Ireland but impact on how other states in conflict protect and uphold human rights standards.

We are concerned at the alteration in structural arrangements within the HET, whereby any case with "evidential opportunities" now passes to the C2 branch of the PSNI. We submit that the HET can not be considered an independent organisation, as noted by the Secretariat in the memorandum prepared by the Deputies for the meeting on 19 November 2008.

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<sup>2</sup> Report of the Bloody Sunday Inquiry, Volume 9 Chapter 173.16 <http://report.bloody-sunday-inquiry.org/volume09/chapter173/>

<sup>3</sup> <http://www.patfinucanecentre.org/cases/mcgrean1.html>

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In the past months a major policy change has resulted in a block of cases<sup>4</sup> involving police collusion being transferred from the HET back to the PSNI for investigation. While it was agreed in this case that an independent expert panel would liaise with the PSNI, this obviously has a major impact on the independence aspect of Article 2 compliance. We are concerned that in other cases, which have been referred by the HET to C2, there are not sufficient safeguards given the issues arising.

This is particularly worrying, as in many cases now under review and/or focused investigation by the HET, instances of police malpractice and even in some instances involvement in and facilitation of criminal offences have been uncovered. These matters, where they involve allegations against police or former police, will be passed to the OPONI for investigation.

## **OPONI**

In relation to the Ombudsman's office, further distress and traumatising has been caused to families who have suffered human rights abuses because of the Office's ongoing delays in investigations, its lack of transparency and information for families about the processes.

Further, the Ombudsman has said that he does not have the capacity or resources to deal with historic cases. It is our experience that investigations in these cases are often given less priority when new matters arise, creating further delay in cases where there have already been defects in investigations.

We recognise that in response to these concerns the OPONI changed its process and in October 2010 set up a team which is tasked with dealing with the historic cases. The Committee may wish to ask whether the Ombudsman's office has made a business case and has been granted resources for its work with the past and whether this will address the backlog of cases. The present Ombudsman was appointed in 2007. While there are over 100 historic cases awaiting the completion of investigations lodged with the Ombudsman's office, it has only delivered reports into two incidents<sup>5</sup> since 2007.

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<sup>4</sup> Resulting from the PSNI "Operation Ballast" investigation into a series of murders and other crimes by the UVF in north Belfast, now known as "Operation Stafford"

<sup>5</sup> Report into Claudy, published on 24 August 2010 and Report into the killings at McGurk's Bar, published on 21 February 2011

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### **Individual Measures**

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

### **McKerr**

In September 2009 the Coroner directed that once the process of redacting the Stalker Sampson report had been carried out the redacted documents should be disclosed to the next of kin to enable them to properly prepare for the Inquest. The PSNI refused to disclose the documentation as the Chief Constable stated that relevance had not yet been determined and it was not necessary for the families to have access to the documents. This became the subject matter of a Judicial Review challenge taken by the Chief Constable of the PSNI in February 2010. Gillen J dismissed the application in May 2010<sup>6</sup> and said the material should be disclosed.

The Chief Constable of the PSNI appealed this decision to the Court of Appeal but this application was then withdrawn. The Coroner has recently sent the Applicant correspondence enclosing draft undertakings to be signed before the redacted material will be issued to the families' representatives - effectively designed to ensure that the copies will not go into public domain. A Preliminary Hearing had been scheduled by the Coroner for the 25 February 2011 but it now appears that it is likely to be listed in March 2011.

Following the decision of the Grand Chamber in *Silih v Slovenia* referred to above, the Committee of Ministers may wish to ask the Government what action it intends to take to address the inconsistency between it and the decision of the House of Lords in *Re McKerr's Application*<sup>7</sup>.

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<sup>6</sup> [2010] NIQB 66 [http://www.courtsni.gov.uk/NR/rdonlyres/A557E544-FC67-4B09-821D-58923C1688E8/0/j\\_j\\_GIL7855Final.htm](http://www.courtsni.gov.uk/NR/rdonlyres/A557E544-FC67-4B09-821D-58923C1688E8/0/j_j_GIL7855Final.htm)

<sup>7</sup> [2004] UKHL 12  
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In *Re McKerr* determined that Article 2 obligations did not apply to deaths if they occurred prior to the incorporation of the Convention into domestic law, and appears to be inconsistent with the *Silih* decision that the obligation to carry out an effective investigation under Article 2 ECHR can give rise to a detachable obligation capable of binding the state, even when the death took place before the incorporation of the Convention into domestic law. This was the issue articulated by the Appellants in the recent proceedings of *In the matter of an application by Brigid McCaughey and another for Judicial Review* listed before the Supreme Court on 2 and 3 February 2011<sup>8</sup>. This was an appeal against the refusal by the Northern Ireland High Court and Court of Appeal<sup>9</sup> to grant a declaration that inquests into the killings of the Appellants' next of kin by British security forces were required to comply with the requirements of Article 2 ECHR and judgment is awaited.

### **Jordan**

The Inquest in this case had been scheduled to proceed to hearing on a number of occasions last year. However in or about April 2010 the Applicant was advised that Lord Stevens, who conducted three collusion investigations<sup>10</sup>, held material relating to the Jordan Inquest and a number of pending inquests. The Coroner was anxious to access this material and issues arose in relation to how this would happen. In June 2010 the Crown Solicitors Office advised that the database was effectively unsearchable in its current format and it would take up to two years to enable this facility. The Applicant initially invited the Coroner to proceed without accessing the material, he was not however minded to accede to that application because of a concern that relevant material would subsequently emerge, undermining the efficacy of the inquest. A representative of the Stevens Inquiry Team was asked to attend and give oral testimony in relation to the database because the Coroners Service had previously been advised that the database was easy to search. A member of the Stevens Inquiry Team attended a Preliminary Hearing in September 2010 and confirmed that the database was searchable and that by the end of January 2011 it would be possible to search the database for any individual by name, which would in turn yield all documents relating to that individual.

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<sup>8</sup> UKSC 2010/0101

<sup>9</sup> [\[2010\] NICA 13](#)

<sup>10</sup> The Stevens Inquiries were three official British government inquiries led by Sir John Stevens concerning collusion in Northern Ireland between loyalist paramilitaries and the state security forces between 1990 and 2003

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The inquest therefore adjourned pending the searching of the database. A Preliminary Hearing is scheduled for the 24th February 2011.

### **Shanaghan**

Though the family was advised that the HET report would be available by the end of 2009, they received it just before Christmas, in late 2010. The family have considered the report and will be meeting with representatives of the HET to discuss their findings. They are concerned that until they receive the findings from OPONI they will not be able to determine whether the issues arising from the European Court of Human Rights' judgments have been addressed.

The family last received an update from the OPONI on 21 October 2010, advising that although the report prepared by the Senior Investigating Officer was complete, no definitive timeframe for its release could be provided. There has been no update from this office, despite an assurance given in that correspondence, that they would provide a further update within six weeks. The PFC has recently contacted the Ombudsman's Office and unsuccessfully attempted to get a timescale for the completion of OPONI's investigations. It should be noted that Mary Shanaghan, (Patrick Shanaghan's mother) who took this case to Europe, has died without any resolution to her concerns.

### **Kelly and Others**

Despite reservations, the families engaged with the HET in 2006. They have expressed frustration at the length and the process of the HET investigation. They are particularly concerned that a number of family members have died since the judgment and the families have yet to receive a report from the HET.

In the Memorandum taking stock of the progress achieved and information received up to 15 October 2008, it was noted that the UK advised that the:

*"Review Summary Report is well under development and it is anticipated that this will be ready for delivery by the end of 2008".*

Despite great expectations this has still not yet been delivered and no meetings with representatives of the HET have taken place in recent months despite extensive

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requests by the families and their representatives. The families and CAJ met with the HET on 5 August 2010.

While we note that the HET pledges to provide a family centred approach, the families engaged in this process do not believe that this objective has been met and instruct us that their engagement with the HET has not commanded their confidence. Mr. Kelly, Amelia Arthurs and Anthony Gormley, the parents of three of those killed at Loughgall, have died during the process and since the European Court of Human Rights' judgment and they were very keen to see the outcome of this process.

The Committee may wish to ask the Government to set a date for delivery of the Review Summary Report to the families.

### **Finucane**

The Government has yet to put in place any measure which addresses the violations found by the European Court of Human Rights in the case of Patrick Finucane. We understand that there has been ongoing contact between the Government and the family. The Committee may wish to ask the Government what action is proposed to address this and to advise the Committee on a proposed timescale to ensure compliance with its obligations in this case.

We wish to stress the importance of the Committee's continuing supervision of the execution of these judgments until it is satisfied that appropriate measures to ensure the Government's commitments under Article 46 ECHR and domestic compliance with the Convention is fully addressed, including the outstanding general measures, as well as full implementation of practically effective individual measures in the cases of Jordan, Kelly and Ors, McKerr and Shanaghan.

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