

## **CAJ's submission no. S337**

# **CAJ's submission to the Scrutiny Committee on Protection of Freedoms Bill**

**May 2011**

Promoting Justice /  
Protecting Rights

2<sup>nd</sup> Floor, Sturgen Building  
9 – 15 Queen Street  
Belfast  
BT1 6EA

T 028 9031 6000  
F 028 9031 4583  
E [info@caj.org.uk](mailto:info@caj.org.uk)  
W [www.caj.org.uk](http://www.caj.org.uk)

### *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.

## **CAJ's SUBMISSION TO THE SCRUTINY COMMITTEE: PROTECTION OF FREEDOMS BILL**

CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

CAJ welcomes the opportunity provided by the Public Bills Committee (Scrutiny Unit) to submit written evidence on the **Protection of Freedoms Bill**.

### **1. THEMATIC COMMENTS** **1(1) Process**

While CAJ acknowledges the positive step forward this Bill represents in the improvement of human rights respect within counter-terrorism legislation, we encourage a wider re-examination of counter-terrorism legislation applicable to Northern Ireland to ensure that the political commitment to restoring human rights in the United Kingdom includes and acknowledges Northern Ireland. This Bill seems to ignore the long-standing application of specific counter-terrorism legislation to Northern Ireland and the impact this had on the conflict and continues to have on the normalisation process.

As such CAJ is disappointed that the opportunity has not been taken to revoke the provisions of the Justice and Security (NI) Act 2007 (JSA). For example, CAJ has consistently opposed the powers contained within the JSA, which continued non-jury trials in Northern Ireland. CAJ notes that a similar power is available in England and Wales, under the Criminal Justice Act 2003, where there are concerns with jury tampering. Significantly, this power is not available in Scotland. The Protection of Freedoms Bill could have provided an opportunity for the restoration of jury trials in Northern Ireland. We also draw attention to the failure to repeal the stop and search powers under s.21 of the JSA (addressed further in this submission) which we believe are equivalent to the s.44 Terrorism Act 2000 powers, which are repealed by the Protection of Freedoms Bill.

CAJ also notes that, as yet, no witnesses have appeared before the Public Bills Committee in relation to this Bill, from Northern Ireland. We acknowledge that a

written submission has been made by the Northern Ireland Human Rights Commission and hope that this will be followed up by the Committee with witnesses from the devolved administration, members of the criminal justice system and civil society. We concur with many of the comments made by the Commission in their submission and those made by British Irish RIGHTS WATCH.

## **2. SPECIFIC PROVISIONS**

### **2(1) Clauses 19-22: Bio-metric oversight**

CAJ welcomes the oversight that will be provided by the Commissioner for the Retention and Use of Biometric Material, (Clause 20). Our experience has been that such monitoring, especially where post holders have been prepared to engage with civil society, has an important role to play in building public confidence in the work of the criminal justice system. However, we have concerns at the power of the Secretary of State to withhold parts of the Commissioner's report on the basis of national security or public interest (Clause 21), and hope that this power will be exercised with caution. Similarly, we have concerns at the vague wording which allows the retention of bio-metric material on grounds of national security, and hope that the Commissioner's ability to access all relevant information will not be restricted.

### **2(2) Schedule 1, parts 1-3 and 6: DNA data and profile retention**

CAJ is currently in the process of formulating our response to the Department of Justice (NI)'s consultation on DNA retention. CAJ has previously argued that Northern Ireland should look to the retention scheme currently used in Scotland. Our submission to the original consultation, carried out by the Home Office in 2009, can be found on our website at <http://www.caj.org.uk/contents/375> (copy also appended). In this submission, CAJ highlighted the need to adhere to the principle of the presumption of innocence, the principle of non-discrimination (young black men are currently over-represented on the database); the special protection which should be afforded children under the *UN Convention on the Rights of the Child*; and the need for balance and proportionality in policy making, in relation to Article 8 of the *European Convention on Human Rights (ECHR)*. Many of these concerns continue to apply to the proposed changes to the DNA data and profile retention scheme. There is also a need for clarity on the interaction between the Department of Justice's *Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland* and the proposals contained within the Bill as applicable to England and Wales.

Significantly, Schedule 1, Part 6 of the Protection of Freedoms Bill provides the option for the Chief Constable of the PSNI to retain a DNA profile or fingerprints

for the purposes of national security; as noted above, CAJ has concerns at the vagueness of the term “national security” and at the rigour the oversight Commissioner may be able to apply in this context. The retention of data by the police in Northern Ireland is a sensitive issue, with its roots in the conflict.

Subsequently, relevant history should be borne in mind in relation to such power being granted in Northern Ireland and robust oversight and protection measures must be set in place.

### **2(3) Chapter 2, Part 2: RIPA**

CAJ welcomes the improvements to the level of authorisation required by Clause 37 to enable access to communications data. This provides necessary additional oversight to the process and allows the decision-making process to be reviewed. This in turn should contribute to the use of the communications data only as is absolutely necessary. CAJ equally views as positive the extension of judicial approval for directed surveillance and covert human intelligence sources (CHIS). The use of CHIS in Northern Ireland is particularly controversial and has a history of mismanagement and misuse. Additional safeguards can only improve the situation. However, we believe that this Bill provides an opportunity to define some of the loose terms currently used in RIPA, namely the broad circumstances in which surveillance can be set up in the first place. Similarly, we concur with the comments made by JUSTICE on this issue (paras 33-34, JUSTICE Submission on the Protection of Freedom Bill to the Public Bills Committee), which highlights the multiplicity of different authorisation schemes which exist within RIPA, the limited safeguards that this diversity provides and the need to develop a more streamlined approach.

### **2(5) Clause 57: reducing the maximum detention period for terrorist suspects**

**Contradictory legislation.** The UK Government’s decision to pursue the development of ‘potential pieces of legislation’ to claw back the advances made with the Protection of Freedoms Bill (specifically Clause 57), is disappointing. CAJ can only assume that the motivation behind the current development of the Draft Detention of Terrorist Suspects (Temporary Provisions) Bills, and by subjecting it to scrutiny by Parliament and others, is to produce more balanced and proportionate legislation, in contrast to that legislation potentially developed in response to a terrorist attack and rushed through Parliament. Based on the experiences of counter-terrorism measures in Northern Ireland, CAJ has long argued against knee-jerk reactions to particular events.<sup>1</sup>

---

1 Committee on the Administration of Justice. *War on Terror: Lessons From Northern*

The approach advocated in the Draft Detention of Terrorist Suspects (Temporary Provisions) Bills has its benefits but ignores a number of key issues, including (1) the symbolic danger of having emergency legislation hovering over the democratic arena; (2) the validation that draconian legislation is the correct response to a public emergency; (3) the assumption that this legislation is suitable for the situation for which it is considered; and (4) the denial of more appropriate and currently active legislation such as the Civil Contingencies Act 2004.

CAJ's submission to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills emphasised the belief that the case for extended detention has yet to be adequately made by the Government and that such detention has a disproportionately detrimental impact on the health, welfare, employment and family of individuals subject to the measure.

**Clause 57.** The proposal to revert to a maximum pre-charge detention of 14 days (Clause 57) is welcome. However, CAJ expresses disappointment that the reduction of pre-charge detention is only from 28 days to 14 days in this Bill; we encourage the principle that those arrested for terrorist offences should be subject to the same pre-charge detention period as non-terrorist suspects, i.e. a maximum of 7 days.

CAJ, as joint Third Party Interveners in the case of *In The Matter Of An Application By Colin Francis Duffy, C, D1, D2, G And T For Judicial Review and In The Matter Of A Decision Of A Judicial Authority To Grant An Extension Of Detention Under Section 41 Of The Terrorism Act 2000*, advocated the principle that extended detention was not compatible with Article 5 and Article 6 of the *ECHR*. This, CAJ argued, was because the provision did not allow for an examination of the lawfulness of both the arrest and the detention of a suspect, or allow for bail, the process could take place in the absence of the suspect, and the provisions did not provide a fair trial. This case has recently been given leave to appeal to the Supreme Court.

CAJ believes that the proposed Detention of Terrorist Suspect (Temporary Extension) Bill undermines both the intention behind Clause 57 and Clause 57 itself.

---

Ireland, 2005.

## 2 (6) Clauses 58-61 and Schedule 6: Stop and search

**General principles.** CAJ welcomes the Government's commitment to complying with the European Court judgment in *Gillan and Quinton v UK* (2010). However, while Clause 58 aims to repeal the provisions of the Terrorism Act 2000 (sections 44- 47) which granted very liberal use of stop and search powers to the police, it remains worrying that similar powers are still in place in Northern Ireland through the Justice and Security (NI) Act 2007. This leads to the suspicion that this repeal, rather than being part of the Coalition Government's 'commitment to civil liberties', is purely in response to the judgment by the European Court of Human Rights which determined that the specific provisions in the Terrorism Act 2000 are in violation of the *European Convention of Human Rights*.

**S. 21 JSA.** Our experience of stop and search in Northern Ireland, particularly s. 21 of the JSA, has shown this power to be used disproportionately and often unjustifiably. The fact that s.21 of the JSA remains virtually untouched by the proposals in the Protection of Freedoms Bill is of concern. We draw the Committee's attention to the fact that leave has recently been granted for a judicial review of s. 21 of the JSA.<sup>2</sup> S. 21 of the JSA has had a significantly negative impact on communities and individuals, who feel unfairly targeted by the police. CAJ continues to monitor the situation, with particular regard to the implications of this power on the right to a private life (Article 8 ECHR) and allegations of harassment of individuals by the PSNI.

**Schedule 6.** CAJ does not believe that the measures here go far enough. For instance, Schedule 6 replaces the term 'officer' with 'a member of Her Majesty's Forces'; it is not clear why this is necessary especially considering the much-reduced role of the army from Northern Ireland. While CAJ welcomes the removal of this power from the PSNI, CAJ has concerns at its permanent availability to the military in Northern Ireland. This seems to go against the principle of normalisation in Northern Ireland. We are aware that this issue has been considered by the Committee (Committee meeting transcript: 3 May) and believe that this issue should be revisited.

CAJ also draws attention to the breadth of the proposed powers, which we do not believe are proportionate. Schedule 6 (paragraph 4H) provides for the application of stop and search authorisation across the whole of Northern Ireland. It is not clear how this would comply with the criteria of the area being 'no greater than is necessary'. Schedule 6 (Paragraph 4I) restricts the potential

---

2 Please see: <http://www.u.tv/News/Derry-man-in-stop-and-search-legal-bid/90eb61a2-dc32-4db3-9adc-da42ef23a583>

success of a judicial challenge brought against the Secretary of State, in relation to the area which s/he has authorised the powers to cover. Where the authorisation is challenged, the Secretary of State “may issue a certificate that— (a) the interests of national security are relevant to the decision, and (b) the decision was justified”. This appears to limit the ability of the judicial challenge to adequately interrogate the reasoning behind the authorisation and indeed, enable the challenge process to have any merits. We advocate that this concentrates too much power with the Secretary of State.

CAJ welcomes the compliance with the *Gillan and Quinton v UK* (2010) judgment in relation to the proposal to repeal s.44 Terrorism Act 2000. This is particularly significant when one considers the fact that the use of section 44 of the Terrorism Act, which provides the broadest search powers, by the Metropolitan Police, increased by 266% between 2006-08.<sup>3</sup> The overuse of this power has been the subject of criticism by individuals, NGOs and with those charged with their oversight (such as Lord Carlile). We concur with the concerns raised in the submission from the Northern Ireland Human Rights Commission regarding the replacement power proposed in this Bill.

**Monitoring.** CAJ has concerns at the application, development and monitoring of the provisions relating to stop and search (Clauses 58-61). CAJ highlights the danger that these provisions will compete with existing provisions governing stop and search. The prevalence of legislation in this area could potentially mean that neither the police officer nor the individual concerned is really sure of the powers being used and their implications. For instance, there are powers under the Police and Criminal Evidence Act 1984, Terrorism Act 2000 (which contains two powers), Justice and Security (NI) Act 2007 and the proposed powers: each with different thresholds and safeguards.

The inter-connected impact of this proliferation is seen in the monitoring of these provisions, CAJ notes that there is nothing to indicate that this will take into account the community background of those stopped. Similarly, it is important that the grounds for the stop and search are recorded and analysed, to counter the broad wording of the grounds contained in some of the powers. As noted above, each power provides for a different threshold of authorisation, thus monitoring can play an important role in safeguarding the human rights of those subjected to these powers. The need for monitoring and safeguards is connected to the devolution process, which has been concerned with building confidence in local institutions, such as the police. The provision of accountable and transparent services has been part of this confidence-building exercise. CAJ thus

---

3 See Protection of Freedoms Bill Research Paper 11/20, 23 February 2011, pg 33.

advocates that should these measures come into force in Northern Ireland, they should be subject to appropriate, robust and localised oversight.

The proposals in Clauses 58-61 and Schedule 6: Stop and search seem to offer limited differentiation from the current powers available in Northern Ireland, and therefore highlight hollowness of the idea that this Bill represents an improved commitment to human rights and civil liberties. The focus of these proposals is restricted to the Terrorism Act, ignoring additional legislation in Northern Ireland and the current process of normalisation.

#### **2(4) Chapter 1, Part 3: Powers of entry**

CAJ welcomes both the motivation behind the amendments to the powers of entry and the amendment themselves. The amendment (Clause 39) to repeal unnecessary or inappropriate powers of entry reflect an acknowledgement of the need to balance crime prevention with the respect for private and family life and private property and of the proliferation of potentially intrusive powers. CAJ acknowledges the fact that this legislation offers a more streamlined and proportionate approach to the entry of private property by the police. The additional safeguards to the utilisation of the power of entry are also positive. One criticism of the use of emergency legislation in Northern Ireland, during the conflict, was the limited safeguards and oversight afforded the use of these powers. As such, the commitment to consult before the modification of powers of entry (Clause 43) is an equally positive step.

#### **2 (7) Part 6: The amendments to the Data Protection Act**

CAJ is encouraged by the provisions which allow the expansion of the definition of a publicly owned company, the commitment to the provision of Freedom of Information data in reusable and shareable form and the changes made in relation to copyright provided for in this Bill. However, it is disappointing that public records relating to Northern Ireland continue to be exempt from the reduction, from 30 to 20 years, of the Government's retention scheme. As the Public Bills Committee may be aware, truth and justice continue to be somewhat elusive concepts in Northern Ireland, especially in relation to state action during the conflict. CAJ highlights the failure of the Government to engage with the recommendations of the Consultative Group on the Past or indeed any other proposed mechanisms for truth and reconciliation in Northern Ireland and the contribution this has made to a continued legacy of pain and hurt in Northern Ireland. Restricting access to records relating to Northern Ireland, in a manner out of step with the rest of the UK, serves only to entrench this position.

### **3. CONCLUSION**

The Protection of Freedoms Bill offers a positive opportunity to reinstate those human rights and civil liberties which have been undermined in the past decade. However, CAJ does not believe that this Bill goes far enough, particularly in relation to Northern Ireland. The impact of the continued application of emergency legislation in Northern Ireland is well-known. Despite the Good Friday/Belfast Agreement, normalisation process and devolution, the UK Government seems determined to treat Northern Ireland differently, the recipient of yet more restrictive legislation. This cannot nor should not be a sustainable policy.

Committee on the Administration of Justice  
May 2011