

CAJ's submission no. S405

CAJ's commentary to the Northern Ireland Office on "Non-Jury arrangements in Northern Ireland"

March 2013

About 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 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.

Rt Hon Theresa Villiers MP
Secretary of State for Northern Ireland
Northern Ireland Office
11 Millbank
London
England SW1P 4PN

13 March 2013

Dear Rt Hon Theresa Villiers MP

Re: “Non-Jury Trial Arrangements in Northern Ireland”

Thank you for your letter of 14th February 2013 inviting the Committee on the Administration of Justice (CAJ) to give our views on the non-jury trial system in light of the upcoming expiration date of the present arrangements. As you will know, CAJ is an independent non-governmental human rights organisation that was established in 1981. CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and 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 the Council of Europe Human Rights Prize.

As stated in previous consultations and publications on this issue, CAJ recommends that the right to trial by jury be restored in all cases.

Indeed, much of this submission repeats what we have previously said with regard to this issue. It is with significant disappointment that neither you nor your predecessors have fulfilled the NIO commitment to undertake a ‘*comprehensive review* of the non-jury trial system, including a full public consultation’.¹ Whilst we are fully aware that the administration has changed since this was promised in March 2010, we believe that the present government should follow through with this commitment, which should include a full Equality Impact Assessment, an important procedure in Northern Ireland. Such a review would also heed the call of the United Nations Human Rights Committee to scrutinise whether such restrictive legislative provisions in Northern Ireland continue to be justified. It seems worth mentioning that since the devolution of policing and justice in April 2010 there has been an apparent change in the manner in which the Department of Justice, the successors of the NIO, has begun to consult and engage with stakeholders, evident for example by the various stakeholder forums set up by the department. This makes the consultation

¹ NIO Press Release, Non-jury Trials Remain Essential for Justice System’, 3rd March 2010.
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methodology (the ‘light touch review’²) of the NIO appear starkly less effective. It would appear that despite previous submissions by CAJ and other stakeholders, the NIO has not carried out substantive research and continues to provide no evidence of the explicit need for non-jury trials. We can only presume that there is no real intention of actually exploring the issue and assessing the need, but rather that the NIO simply plans to extend non-jury trials for yet another two years.

In November 2007 the UN Human Rights Committee raised concerns regarding right to a fair trial (ICCPR art.14), specifically highlighting the Justice and Security (Northern Ireland) Act 2007 and the use of non-jury trials.³ The UK government’s response to these issues indicated that the primary justification for non-jury trials in Northern Ireland is to avoid ‘*paramilitary and community based pressures on jurors*’.⁴

In July 2008, in its examination of the government, the UN Human Rights Committee (HRC) expressed concern that ‘*some elements of criminal procedure continue to differ between Northern Ireland and the remainder of the State party’s jurisdiction*’⁵ and specifically highlighted non-jury trials and conveyed concern that there is ‘no right to appeal the decision’ made by the DPP.⁶

The Committee stated that the government should carefully monitor whether the situation in Northern Ireland warrants judicial procedures that are intrinsically different of the rest of the UK ‘*with a view to abolishing*’ such distinctions.⁷

The government’s response to the Human Rights Committee states that ‘*it is difficult to judge the level of juror intimidation in Northern Ireland*’ yet concludes that ‘*it remains prevalent, and intimidation more generally is a growing problem*’.⁸ The government more recently put forward a similar expression in its submission to the United Nations Committee Against Torture in 2011.⁹

From related Freedom of Information (FoI) requests, we are aware of Lord Carlile’s conclusion in his *Report Concerning the System on Non-Jury Trials in Northern Ireland* that the non-jury trial system ‘remains necessary in a small number of cases’. However, there continues to be no substantive body of evidence within the public domain to suggest that there is a serious problem of

² The term used by the NIO Freedom of Information Team in a letter relating to this issue dated 24 November 2011 (Ref: FOI – AP/11/129) on file with CAJ.

³ CCPR/C/GBR/Q/6. 13 November 2007.

⁴ CCPR/C/GBR/Q/6/Add.1. 18 June 2008.

⁵ CCPR/C/GBR/CO/6. 30 July 2008. This was also noted previously by the HRC in its Concluding Observations in 2001. See CCPR/CO/73/UK; CCPR/CO/73/UKOT 6 December 2001.

⁶ CCPR/C/GBR/CO/6. 30 July 2008.

⁷ CCPR/C/GBR/CO/6. 30 July 2008.

⁸ CCPR/C/GBR/Q/6/Add.1, para 160. 18 June 2008.

⁹ CAT/C/GBR/5, para 34-35. 11 September 2011.

juror intimidation in Northern Ireland that necessitates non-jury trials. Moreover, it would appear that other mechanisms and reforms, which would make the possibility of juror intimidation less likely to occur, have not been sufficiently explored. CAJ suggests that mechanisms, such as the use of 'out of town juries', be trialed to supplemented juror protection measures already in place.

Non-Jury Trial Certificates – Human Rights Implications

Under the arrangements of the Justice and Security (Northern Ireland) Act 2007 the Director of Public Prosecutions (DPP) for Northern Ireland may issue a certificate which allows a trial on indictment of the defendant to be conducted without a jury if certain conditions, as set out by s1 of the Act are met. In order to issue a certificate, the DPP must be '*satisfied*' that '*there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury*'. However, CAJ feels that the term '*satisfied*' demonstrates a very low threshold and permits a broad application of the power to issue certificates, even when applied in conjunction with the prescribed conditions. Furthermore, and confusingly, although the legislation states that the DPP issues certificates permitting a non-jury trial correspondence with NICTS states that 'the decision to move to a non-jury trial was made by the trial judge'.¹⁰

When we requested information from the PPS regarding the number of cases designated for non-jury trials, we were directed to the Northern Ireland Courts and Tribunals Service (NICTS). This would suggest that the PPS does not maintain these statistics, which raises questions around applicable procedures and criteria for making such a decision; the monitoring of the decision making process; and the recognition of the serious implications of such decisions.

Further confusion around who holds relevant information can be seen by the fact that when seeking clarity to a related FoI request, the Communications Group of NICTS stated¹¹ that the published information cited in governments submission to the United Nations Committee Against Torture was 'not provided for the report by [the Northern Ireland Courts and Tribunals Service]' as they do not hold the same information on jury intimidation.

Lord Clyde, the Justice Oversight Commissioner (JOC), who was tasked with reviewing the progress of implementing the recommendations of the Review of the Criminal Justice System in Northern Ireland subsequent to the Good Friday/Belfast Agreement, reported in 2006 that 'ten cases of possible intimidation, of which two involved jurors, *have been recorded by the Court Service* and these were dealt with promptly and appropriately. The risk of intimidation particularly of jurors by means outside the vigilance of the court

¹⁰ Response to FOI request by NICTS (ref FOI 50/11) dated 8 August 2011 on file with CAJ.

¹¹ Response to FOI request by NICTS (ref FOI 50/11) dated 8 August 2011 on file with CAJ.

remains a matter for concern on some occasions.’¹² On the contrary, in its original response to an FoI request, NICTS states that ‘information in relation to incidents of juror intimidation has only been collected and recorded from 2008’.¹³

Your letter regarding no-jury trial arrangements suggests that the threat of intimidation or influence on jurors is a primary concern. However, the information available is inconsistent and confusing, it appears that although the number of non-jury trials has decreased the number of cases of juror intimidation has remained quite consistent over the past decade. CAJ feels that jury trials are a fundamental component of the rule of law within the common law system and that non-jury trials are unwarranted in Northern Ireland at present. To this end, **CAJ suggests the introduction of jury trials in all cases for a set period, with the incorporation of alternative measures if and when necessary, after which a comprehensive consultation could take place and the onus to prove non-jury trials to be necessary or more effective be placed on those who wish to have them re-instated.**

The NIO press release quoted above (March 2010) stated that ‘During the passage of the Justice and Security (Northern Ireland) Act 2007 commitments were made to make a statement to Parliament each year on the volume of non-jury trial cases under the legislation.’ Accordingly, it would seem that two, if not three, subsequent statements of evidence should have since been made to Parliament. We nonetheless cannot find confirmation that this has happened.

That Northern Ireland continues to have what is effectively emergency legislation which is contrary to the norm suggests that there should be accurate and effective data collection and monitoring on its use.

The UN Human Rights Committee interprets the ICCPR ‘as requiring that objective and reasonable grounds be provided by the appropriate prosecution authorities to justify the application of different rules of criminal procedure in particular cases (art. 14).’¹⁴ Even in light of the government’s assurance of ‘safeguards such as reasoned verdicts’¹⁵ the UN Human Rights Committee has remained apprehensive about the provisions which allow for cases certified by the Director of Public Prosecutions to be ‘tried in the absence of a jury’.¹⁶

CAJ believes that the high degree of discretion given to the DPP by the Justice and Security (Northern Ireland) Act 2007 is questionable in this regard. Bearing in mind the need to foster public confidence in the Public Prosecution Service, and ensuring the independence of the Public Prosecution Service, we believe that the

¹² Justice Oversight Commissioner. *Sixth Report of the Justice Oversight Commissioner*. June 2006.

¹³ Response to FOI request by NICTS (ref FOI 50/11) dated 15 July 2011 on file with CAJ.

¹⁴ CCPR/C/GBR/CO/6. 30 July 2008.

¹⁵ CCPR/C/GBR/Q/6/Add.1. 18 June 2008.

¹⁶ CCPR/C/GBR/CO/6. 30 July 2008.

present arrangements regulating the PPS do not satisfactorily hold the PPS accountable.

Other human rights concerns regarding this degree of discretion exist. That a certificate permitting a non-jury trial may be issued if the DPP ‘suspects’ that the defendant is (or has been) a member of a proscribed organisation, or has (or has had) a relationship with a member of a proscribed organisation raises questions regarding discrimination; the right to respect for private and family life; and freedom of association (ECHR 14; 8; and 11 and corresponding articles of the ICCPR). That the rights of family and friends of members (or former members) of proscribed organisations may be consequently violated is unacceptable as this condition is highly subjective.

Like the UN Human Rights Committee, CAJ is concerned about the restrictions on challenging the issuing of certificates. The right to legal challenge, particularly judicial review, is a basic right which was acknowledged by the NIO in its original 2006 consultation paper regarding the replacement of Diplock Courts, which stated: *‘As is the case with all administrative decisions, the DPP’s decision will be challengeable by means of judicial review. This will enable defendants to be sure that the decision has been taken properly’*.¹⁷ The right to effective remedy is guaranteed by the ECHR (art.13). The inclusion of section 7 (1)(c) of the Justice and Security (Northern Ireland) 2007 Act which allows for judicial review based on ‘exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law)’ does not assuage the concerns made by CAJ in response to Justice and Security Bill proposed in 2006.

In reality a number of concerns regarding the infringement of rights persist: a) that the defence may be barred from viewing the material/evidence that underpins the DPP’s decision; b) no change to the decision following review can be made by the DPP; and c) the DPP is not a neutral decision-maker given her/his role in prosecuting the case against the accused at trial. Moreover, the decision to opt for non-jury trial casts an immediate prejudicial air on the defendant. All these are indications of the provenance of these powers in emergency law. In a transitional post-conflict society, the government should be seeking to reduce emergency law provisions, not embed it.

Repercussions – Public Confidence

CAJ is aware of the government’s responsibility to ensure the safety and security of those members of the public who participate in the criminal justice system as jurors. However, CAJ believes that non-jury trials are unwarranted given that measures that are less restrictive than non-jury trials may be applied in order to secure juror safety. Although the information available is patchy, there appears

¹⁷ Para. 4.12 ‘Replacement Arrangements for the Diplock Court System: A Consultation Paper’, August 2006.

to have been a marked decrease in non-jury trials in recent years,¹⁸ yet the present arrangements continue to treat Northern Ireland as an emergency situation, which perpetuates a lack of confidence in the rule of law.

While it may be argued that judges sitting alone can impartially and independently hold trial and that, therefore, non-jury trials are not *necessarily* a breach of the right to a fair trial (ECHR art 6; ICCPR art.14), jury trials are inexorably linked to the common law system. Legislation and practices that undermine this principle weaken public confidence in the criminal justice system and the overall peace process in Northern Ireland.¹⁹ In the words of the Criminal Justice Review, jury trials constitute '*a symbol of normality with all that means for public confidence*'.²⁰ The Conservative party has long maintained that the right to trial by jury needs to be protected and strengthened.²¹ We support this view.

The introduction of jury trial for all cases would be a way to acknowledge and commend the enormous political and social progress which Northern Ireland has made in the past decade, resulting in reciprocal confidence between the people and the state. Maintaining echoes of the legal regime from the conflict undermines such progress.

If the arrangements for non-jury trials are to be again renewed, **CAJ suggests that the exceptions to non-jury trials be minimal; stricter conditions be**

required for the DPP to issue a certificate; the ability to challenge the issue of certificates not be subject to stringent limitations; and that certificates issued are adequately justified by the DPP.

Sincerely,
Brian Gormally, Director

¹⁸ According to information provided by NICTS, there were 64 non-jury trials in 2007 (all under the Terrorism Act); 33 in 2008 (15 under the Justice and Security Act & 18 under the Terrorism Act); 17 in 2009 (13 under the Justice and Security Act & 4 under the Terrorism Act); and 17 in 2010 (all under the Justice and Security Act). Email dated 7 March 2011 on file with CAJ. A subsequent email from NICTS (dated 15 July 2011) states that there were 2 cases of juror intimidation in 2008 (neither of which were switched to non-jury trials); 3 cases of juror intimidation in 2009 (none of which were switched to non-jury trials); and 1 case of juror intimidation in 2010 (this case was switched to a non-jury trial). NICTS email on file with CAJ.

¹⁹ Over $\frac{3}{4}$ of the population of Northern Ireland believe that juries (after direction from a judge) are better at deciding cases in the Crown Court than judges sitting alone. Kristine Amelin, Michael Willis and Debbie Donnelly. *Attitudes to the Criminal Justice System in Northern Ireland*. March 2000.

²⁰ Criminal Justice Review Group. *Review of the Criminal Justice System in Northern Ireland*. March 2000.

²¹ See for example, the speech by David Cameron 'Giving power back to people' from 25 June 2009. Available at:

http://www.conservatives.com/News/Speeches/2009/06/David_Cameron_Giving_power_back_to_the_people.aspx See also HM Government. The Coalition: our programme for Government, May 2010.