

CAJ's Submission no. S412

CAJ's Written Evidence to Westminster, on the Anti-Social Behaviour Crime and Policing Bill (July 2013)

July 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.

CAJ's submission no. S412

Written Evidence to the Public Bill Committee on the *Anti-Social Behaviour, Crime and Policing Bill*, introduced into the Commons on 9 May 2013

Committee on the Administration of Justice ('CAJ')

1. 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.
2. CAJ welcomes the opportunity to provide Written Evidence to the Committee in relation to the *Anti-Social Behaviour, Crime and Policing Bill* a number of whose provisions extend to Northern Ireland.¹ CAJ has concerns in relation to some of the proposed changes including those relating to removing extradition safeguards. This submission will comment briefly on the proposed changes to '**port and border controls**' (clause 124/ schedule 6) and then focus on the bills provision to redefine a '**miscarriage of justice**' (clause 132).

Port and Border Controls: still lacking legal certainty

3. Schedule 7 of the Terrorism Act 2000 (TACT) (port and border controls) permanently contains the type of widely drafted emergency power which became familiar to many in Northern Ireland throughout the period of conflict. The current powers allow police, immigration or customs officers to stop, question and detain any person to ascertain whether they appear to be a 'terrorist'.² There is no requirement for reasonable suspicion to exercise the power. The detained person must give 'any information' or 'any document' on his or her possession the officer requests, and can be detained for up to nine hours for this purpose. The person and their possessions can be searched. The powers can be exercised in ports, airports or in anywhere in a mile long strip of land on the Irish land border. The lack of safeguards to regulate the conduct of officers clearly risks such powers being exercised in an arbitrary or

¹ Clause 140 (extent) of the Bill as introduced to the Commons sets out that the following provisions will apply in Northern Ireland: Increased penalty for improper importation of firearms etc (clause 101); Review bodies for police remuneration etc (clauses 112, 113, & 115 and schedule 5); changes to Terrorism Act 2000 port/border controls (clause 124 and schedule 6); changes to extradition (clauses 126-131); miscarriages of justice (clause 132); and Court and Tribunal fees (clause 136).

² Defined under section 40(1)b of TACT as a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism.

discriminatory manner, and hence in our view the provisions lack the requisite legal certainty required by matters which engage Convention rights.³

4. CAJ recognizes that the changes in the Bill are designed to introduce safeguards in the exercise of the power which in principle is to be welcomed. In our view however these new provisions will be insufficient to ensure the requirements of legal certainty are met in relation to the powers. This will mean powers akin only to the type of questioning and detention an individual would expect to be subjected to in a police station following arrest can still be used on any person who is merely travelling from Northern Ireland to Great Britain, or across or by the land border.
5. For example, whilst the Bill would oblige the Secretary of State to issue a Code of Practice, its function is limited to addressing the *training* given to examining officers and the *procedure* for designating such officers rather than actually *regulating* the use of the power. An existing Code of Practice on the powers is not otherwise amended by the Bill.⁴ Recently the Northern Ireland Court of Appeal in *Canning and Others* concluded that a broadly drafted non-suspicion question power (section 21 of the Justice and Security (Northern Ireland) Act 2007) “cannot be properly exercised in the absence of a valid and effective code of practice which ensures article 8 compliance.”⁵ Finding the use of the powers had been unlawful the Court found “the kind of safeguards against potential abuse or arbitrariness envisaged by the Strasbourg case law” were not present in the absence of a Code of Practice which *effectively* regulated their use. In the view of the Court of Appeal therefore such a Code is required to satisfy the minimal requirements of Article 8 in relation to a non-suspicion question power. It would appear expedient to reappraise the current Code of Practice for Schedule 7 TACT powers to ascertain whether it meets this threshold and introduce further safeguards on the face of the legislation and/or within the Code according to regulate the use of the questioning power. Neither is however taken forward in the Bill as it stands.
6. The Bill would also shorten the maximum time a person can be questioned from nine to six hours. A person will have to be detained to be questioned for over one hour, but can still be questioned without being ‘detained’ for up to one hour. Whilst the reduction in time is travel in the right direction CAJ remains concerned about the ongoing potential to use the power for temporary arbitrary detentions.

³ For our commentary on Convention requirements post *Gillan and Quinton v UK* see CAJ research report ‘*STILL PART OF LIFE HERE? A report on the use and misuse of stop and search/question powers in Northern Ireland*’, November 2012 [available at: <http://www.caj.org.uk/contents/1148>, accessed July 2013].

⁴ Home Office ‘*Examining Officers under the Terrorism Act 2000: Code of Practice Issued pursuant to paragraph 6(1) of Schedule 14 to the Terrorism Act 2000*’ N6167879 c20 06/09 2009.

⁵ Fox (Bernard) and McNulty’s (Christine) Application and Canning’s (Marvin) Application [2013] NICA 19 [49-50]. [Available at [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/\[2013\]%20NICA%2019/j_i_GIR8854Final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/[2013]%20NICA%2019/j_i_GIR8854Final.htm) June 2013].

CAJ urges Parliament to amend the Bill to repeal the Schedule 7 TACT port and border control powers or provide effective ECHR-compliant safeguards for them.

Miscarriages of justice: an onus to prove yourself innocent?

7. Clause 132 of the Bill would amend section 133 of the Criminal Justice Act 1988 (compensation for miscarriages of justice) to change the definition of a ‘miscarriage of justice’. The change would significantly raise the threshold for compensation to one which will often be very impractical to meet and hence significantly reduce the number of miscarriages of justice which are recognised as such.
8. In Northern Ireland the changes will apply to compensation applications determined by the Secretary of State and not those determined by the Department of Justice.⁶ The Secretary of State determines Northern Ireland applications when she takes the view ‘protected information’ is relevant to an application (for example, because the court which quashed the original conviction did not make public, in whole or in part, the reasons why), and she is of the view that ‘on the grounds of national security’ the Department of Justice, or their assessor, is not to be given the protected information or a gist of it.⁷
9. The Bill would mean that a miscarriage of justice falling to be determined under its provisions would only be categorised as such “*if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence*”. In effect the victim of the alleged miscarriage of justice will have to take on the roles usually undertaken by police and prosecutors and gather evidence to prove themselves innocent to the high threshold of a criminal law test, for matters which may have occurred sometime ago.
10. Such a threshold would appear inconsistent with the UK’s international obligations. The UN International Covenant on Civil and Political Rights (ICCPR) provides that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.⁸

⁶ Clause 132(1) of the Bill would insert subsection 1ZA into section 133 of the Criminal Justice Act 1988, this would require the new test to be used when cases under subsection 6H of the Criminal Justice Act 1988 (as amended by schedule 6 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).

⁷ See subsections 6A-6K of the section 133 of the Criminal Justice Act 1988 (as amended by schedule 6 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).

⁸ Article 14(6) ICCPR. The UK is party to the ICCPR and entered no such reservation in relation to Article 14(6) at the time of signature, succession, or since.

11. The Bill would overturn the *UK Supreme Court* judgement of 2010 which dealt with the appeals of Adams and two Northern Ireland Judicial Review cases (Eamonn MacDermott and Raymond McCartney).⁹ The judgement held that a ‘miscarriage of justice’ occurred when the original evidence said to justify the conviction has been undermined to the extent whereby no conviction could possibly be based up on it. This state of affairs must furthermore be shown by reference to a ‘new or newly discovered fact/s’ which was interpreted as including either facts the significance of which were not appreciated previously by the accused or his/her lawyers, or alternatively facts which were newly ‘discovered’ to the appeal court on appeal (with comparison with the fresh evidence principles on appeal). CAJ has had subsequent concerns about the restrictive manner in which Northern Ireland Courts have interpreted this test.¹⁰
12. The present Bill however does not merely ‘clarify’ the law but significantly changes it away from a position whereby the individual is to demonstrate that a Court could not have rightly found beyond reasonable doubt that they were guilty, to one whereby an individual is expected to prove their innocence. The Bill would constitute a significant change rather than a clarification of the position, and as the new provision sets a threshold it will be very difficult for applicants to meet, the motive for its introduction is questionable.
13. There are unresolved issues relating to ill treatment of detainees during the Northern Ireland conflict and subsequent convictions in non-jury emergency courts, often based on ‘confession’ evidence.¹¹ It would be a matter of concern if in part the motivation behind the current provision relates to preventing such practices from being further exposed. The proposed change sits uncomfortably with a recent recommendation to the UK by the UN Committee Against Torture. The Committee commented on mechanisms carrying out historical investigations related to the Northern Ireland conflict, including those relating to torture and ill-treatment. The Committee noted reported limitations on current mechanisms which curtail “the ability of competent bodies to provide prompt and impartial investigations of human rights violations and to conduct a thorough examination of the systemic nature or patterns of the violations and abuses that occurred in order to secure accountability and provide effective remedy.” In this context The Committee recommended that the UK “ensure that all victims of torture and ill-treatment are able to obtain adequate redress and reparation.”¹²

⁹ R (Adams) V Secretary of State for Justice [2011] UKSC 18.

¹⁰ See in the matter of application for Judicial Review Joseph Fitzpatrick and Terence Shiels, High Court Northern Ireland Queens Bench Division TRE8655 delivered 30 November 2012.

¹¹ See for example Cobain, Ian Inside Castlereagh: ‘We got confessions by torture’ The Guardian Monday 11 October 2010 [Available at <http://www.guardian.co.uk/uk/2010/oct/11/inside-castlereagh-confessions-torture> accessed July 2013].

¹² UNCAT Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), paragraph 22.

14. The devolution of policing and justice powers to the Northern Ireland Assembly in 2010 removed a provision in the Northern Ireland Act 1998 that the criminal law was a matter reserved to Westminster.¹³ The current legislation does not appear to explicitly exempt the subject matter of the Criminal Justice Act 1988 from the devolution of powers. Government may therefore wish to clarify whether a Legislative Consent Motion is required to amend the Act in relation to Northern Ireland.

CAJ recommends amendment to remove or reformulate clause 132 in a manner consistent with the UKs international obligations.

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¹³ The Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010, article 3 substituted the previous paragraph 9 in the Northern Ireland Act 1998, schedule 3.