

Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland (S447)

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003
and
Hemsworth v UK, judgment final on 16 October 2013
McCaughey & Others v UK, judgment final on 16 October 2013

May 2015

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 (FIDH). Its membership is drawn from across the community.

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.

This Rule 9 communication is for consideration at the 1230th meeting of the Ministers' Deputies in June 2015. It is to be read in conjunction with our previous submissions on the 'McKerr Group of Cases' which have set out in detail our concerns about the UK's failure to promptly implement these judgments¹, in particular we refer to our most recent submissions in August 2014² and November 2014.

¹ [CAJ S421 Submission to the Committee of Ministers, September 2013.](#)

² [CAJ s345 August 2014; CAJ s348 November 2014;](#)

Our last submission in November 2014 recorded the following developments:

- **Devolving Article 2 Obligations:** concerns at the UK government taking a position that the responsibility for implementing the judgements and taking forward and resourcing the related Article 2 obligations to deal with the past in Northern Ireland were a matter for the devolved administration in Northern Ireland and not the state party.
- **The disbandment of the PSNI Historical Enquiries Team (HET) and its replacement with a smaller PSNI Legacy Investigations Branch (LIB):** the PSNI had announced the standing down of the HET on the 31 December 2014 and its replacement with the LIB, the UK had argued that the LIB will conduct ‘Article 2 compliant’ investigations into a small number legacy cases. CAJ raised concerns that the LIB, like the HET, would not be Article 2 compliant, and the lack of clarity as to the categories of cases the LIB would cover;
- **Concerns about the fate of PSNI archives held by the HET,** CAJ raised concerns whether materials would be dispersed or destroyed, thus hampering future legacy investigations;
- **Cuts to the funding of the Police Ombudsman’s office:** concerns at the monies for legacy investigations by the Ombudsman being severely cut, just at a time the Office was taking forward major investigations. We also raised concerns that measures to remedy gaps in the Ombudsman’s powers had also not been taken forward. CAJ stated that we cannot detach the cut in funding from what we regard as the concerted pattern of cover up we are witnessing in relation to investigations into past human rights violations;
- **Inquests:** we drew attention to a Court of Appeal decision upholding a decision by a lower court to quash the inquest verdict in Jordan, which held there had been a violation of Article 2; also highlighted were the views of the Lord Chief Justice, in relation to ongoing delays in taking inquests forward;

Significant developments since November 2014:

At the end of 2014 the UK and Irish Governments and the five parties in the power-sharing Northern Ireland Executive reached and published a political agreement, **the Stormont House Agreement**, which provides for a new set of mechanisms to deal with the past, namely:

- **An Historical Investigations Unit (HIU)** ‘an independent body to take forward investigations into outstanding Troubles-related deaths’ to take over the work of the HET and OPONI;
- **An Independent Commission on Information Retrieval (ICIR),** ‘to enable victims and survivors to seek and privately receive information about the deaths of their next of kin’
- **An Oral History Archive** ‘to provide a central place ...to share experiences and narratives related to the Troubles’

- **An Implementation and Reconciliation Group** ‘to oversee themes, archives, and information recovery’;

At the beginning of 2015 CAJ in cooperation with Queens University Belfast published a comprehensive report, entitled the ‘**Apparatus of Impunity?**’ providing a narrative and critiquing the limitations and obstruction which faced by all the mechanisms tasked with investigating the past in Northern Ireland since the 1998 Agreement. The Summary of Main findings is included as an appendix to this submission. The overarching conclusion was that:

This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in Northern Ireland. An assessment of this evidence does not support a conclusion that a ‘package of measures’ is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among Northern Ireland politicians. Rather, the evidence points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state agents. Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable.

The new UK government has included a bill to **implement the Stormont House Agreement** provisions within its **legislative programme for the coming Parliamentary year**. Officials have been taking forward the drafting the legislation with a timetable that draft legislation will be consulted on in June 2015 and the bill will be introduced into Parliament in the autumn session. The UK government’s legislative programme background document sets out that the legislation will be entitled the: *Northern Ireland (Stormont House Agreement) Bill* and will:

Establish the Historical Investigations Unit, and an Oral History Archive. An additional body in the Bill, the Independent Commission for Information Retrieval would be established by an international agreement between the UK and Irish Governments.³

Shadow Stormont House Agreement (SHA) legislation

In light of the complexity of the provisions within the SHA, and the experience during the peace process of commitments in Agreements being lost when translated into legislation, CAJ in partnership with academics has been developing a shadow bill designed to implement the SHA in an ECHR compliant manner.

A drafting group has been established consisting of CAJ practitioners and academics from the two universities in Northern Ireland, Queens University Belfast (QUB) and the Transitional Justice Institute (TJI) of the Ulster University (UU). Namely Professor Kieran McEvoy (QUB), Daniel Holder (CAJ), Professor Louise Mallinder (TJI, UU), Brian Gormally

³ [Queen’s Speech Briefing Pack, Press Office 10 Downing Street, 27 May 2015](#), page 55.

(CAJ), Jeremy Hill (Visiting Fellow, TJI, former legal advisor to Eames-Bradley, and former UK ambassador to Bulgaria), Gemma McKeown (CAJ). This group instructed an experienced draftsman to produce the shadow legislation.

CAJ and the two universities, in partnership with Amnesty International subsequently showcased and discussed a draft of the legislation at a major conference held in Ulster University, Belfast on the 18 May 2015.⁴ The conference was opened by the Minister for Justice for Northern Ireland Mr David Ford MLA. A draft of the shadow legislation was presented and has now been published for comments, with a view to producing a final version to coincide with the planned official consultation.⁵

Key issues relating to the implementation of General Measures

CAJ would like to draw attention to the following developments which relate to the proposed changes to the institutions put forward as the package of measures by the UK in relation to remedying the systemic problems identified in the cases:

Resourcing:

There has been some movement by the UK government in relation to resourcing its Article 2 obligations to provide for independent and effective investigations into the conflict-related deaths. Within the Stormont House Agreement and its accompanying financial annex the UK has committed to 'contributing' up to £30 GBP million a year over five years to the institutions dealing with the legacy of the conflict. The following issues have arisen:

- It remains unclear as to whether the UK government would expect the devolved institutions in Belfast to cover the shortfall in costs for the Historical Investigations Unit (HIU) and other institutions either during the first five years or beyond if its mandate is extended in light of ongoing obligations;
- It also remains unclear as to whether there will be safeguards in relation to the control of the funding to ensure the independence of the HIU and other institutions. The shadow legislation provides for monies to be provided through the 'Consolidated Fund' via the UK Parliament, to prevent Executive interference in the running of the independent institutions through the control of their resources;
- It is currently planned that the HIU and other bodies will be operational by April 2016. There have been discussions regarding resourcing existing mechanisms in the meantime but as of yet none of the SHA monies have been allocated. The two key areas would be using such monies to resource legacy inquests and the Police Ombudsman legacy functions, given the existing shortfalls. The Ombudsman increasing its capacity of investigators would also have a beneficial effect in increasing the pool of independent investigators who could subsequently move to

⁴ *Dealing with the Past in Northern Ireland: Implementing the Stormont House Agreement*, A joint conference was organised by Amnesty International, the Committee on the Administration of Justice (CAJ), the Institute of Conflict Transformation and Social Justice Queens University Belfast (QUB) and the Transitional Justice Institute Ulster University which took place on Monday 18 May 2015.

⁵ The draft shadow bill, and explanatory notes, are available at: <http://www.caj.org.uk/contents/1313>

the HIU. Both the Ombudsman and coroner have been seeking resources for some time and it is unclear why government is withholding such monies;

- It is a matter of concern that the UK government have stated that they may not implement the HIU and other bodies if the parties to the Northern Ireland Executive do not implement unrelated cuts to the welfare state that the UK government has been seeking. The two issues are not linked in the SHA and it would be of deep concern if victims are to be used as leverage to seek to secure welfare cuts in this way. We are conscious that the duties to take forward independent and effective investigations under Article 2 are obligations.

The Ministers deputies may wish to ask the UK to address the above matters and ensure that sufficient resources are provided by the state party to discharge its Article 2 obligations and that the legislation establishing legacy bodies is not delayed because of failure to agree on cuts in welfare provisions.

PSNI Legacy Investigations Branch

The UK informed the Committee of Ministers that investigations carried out by the LIB will be in full compliance with Article 2. In our previous submission we raised concerns that the LIB would not meet the independence requirements of Article 2. This specifically refers to state involvement cases, with the PSNI investigating cases involving the military and state bodies including elements of the work of its predecessor force the Royal Ulster Constabulary (RUC) for whose actions the PSNI are legally liable.

There is some restriction on the role of the PSNI in relation to investigating deaths caused by the RUC. Specifically under s55(2) of the Police NI Act 1998 the Chief Constable must refer “any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person.” This has to date generally been interpreted narrowly as to when lethal force was directly used by an RUC officer. There are much broader categories of cases, most notably those involving the actions of informants run by the RUC and potential collusion, or when the RUC did not pass on threat warnings, in which the PSNI are involved in investigating RUC actions. Equally the PSNI investigates cases involving the military, even when they were operating under RUC direction, and also effectively reviews the initial RUC investigation in all cases.

Since the previous submission a Committee of the UK Parliament has examined the question as to whether the LIB is sufficiently independent to be Article 2 compliant and has concluded it is not. The Parliamentary Joint Committee on Human Rights Concluded:

...the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service.⁶

⁶ JCHR Human Rights Judgments Seventh Report of Session 2014–15, HL Paper 130 HC 1088, 11 March 2015, paragraph 3.7.

A second area of controversy regarding the LIB has been the lack of clarity around the categories of cases it is currently dealing with and how it is prioritising them. The LIB was initially announced as a 'much smaller' unit than the HET which would only take on cases where the PSNI had legal obligations. CAJ and other NGOs were told in January 2015 that the LIB workload could only presently encompass three major follow up inquiries.⁷ This was however not correct and it has subsequently transpired that the LIB has taken on a broad range of cases including all outstanding HET cases. The PSNI has argued that it has a legal obligation to take on all such cases. It is unclear where the interpretation is coming from that the PSNI, rather than the State, has a legal obligation to re-investigate such a range of legacy cases, and CAJ wrote to the PSNI to seek clarification on this point and as to how the service could sustain its position that it meets Article 2 compliance standards in relation to independence. The PSNI response however was limited to stating that Article 2 investigative obligations were complicated and would ultimately be decided by the courts, indicating that the PSNI themselves are not clear or in agreement as to what their Article 2 obligations are.⁸ Ultimately CAJ is concerned that the LIB may seek to open and close cases before the planned independent Historical Investigations Unit (HIU) is established.

The Ministers Deputies may wish to seek clarification of the categories of cases the LIB is currently taking on, and itself pronounce on the matter of the LIB and Article 2 independence requirements.

Historical Investigations Unit: Independence

The UK and the SHA have made clear that the HIU will be independent yet there are a number of issues becoming apparent that threaten this independence:

- The UK may well permit a 'mixed staffing' approach within the HIU allowing former RUC and army officers to take investigative posts but allowing other investigators to take on cases where the RUC or other security forces are implicated. The 'mixed staffing' approach would render the HIU less independent than the Police Ombudsman and other independent UK policing practices. The Ombudsman does not employ former RUC or military personnel within its legacy work, and has adopted an Article 2 policy position ruling out the employment of such persons in this capacity outside exceptional circumstances. Particularly in the context of collusion it is clearly not possible to determine which cases are 'state involvement' cases until they have been investigated. A 'mixed staffing' approach was adopted by the HET and significantly contributed to its discrediting and downfall.
- The UK may step outside the independence requirements of the Stormont House Agreement and seek to provide in legislation a veto for the Secretary of State over the onward disclosure of information by the HIU. This would allow the Secretary of State to redact HIU reports to families, other SHA legacy institutions, public statements and even HIU files forwarded to the Public Prosecutions Service (PPS).

⁷ Namely the Bloody Sunday, 'On The Runs' and Military Reaction Force investigations.

⁸ Exchange of Correspondence with the Chief Constable and Assistant Chief Constable, 26 February 2015 and 23 March 2015.

CAJ is of the view that the HIU itself should make the decision on redacting any of its reports on the sole basis, explicitly provided for in the SHA, that the publication of such information would put an individual's life at risk.

- The UK has made a very welcome commitment that all public authorities, including the police and security services, will make full disclosure to the HIU. However, there has been an indication that the mechanism for the PSNI to afford access to its police and intelligence records will not be through direct request from the HIU, as is the case with the Police Ombudsman which has its own confidential unit, but rather via the PSNI Legacy Support Unit (LSU). This is a matter of serious concern as the LSU is currently responsible for PSNI disclosure to the Coroner in relation to legacy inquests. This disclosure process has been plagued by over-redaction and systemic delays. Conflicts of interest concerns have also been raised with key positions within the LSU being held by rehired RUC Special Branch officers.

The Ministers Deputies may wish to seek clarification and assurances that:

- **The legislation will provide for a policy similar to the Police Ombudsman's precluding former RUC and other security force personnel from employment in the HIU;**
- **The legislation will not grant the Secretary of State powers to control and redact onward disclosure by the HIU;**
- **The legislation and structures will allow the HIU direct access to the archives of public authorities, rather than seeking to expand the role of the PSNI Legacy Support Unit;**

Inquests:

The Stormont House Agreement ultimately makes the welcome commitment that:

Processes dealing with the past should be victim-centred. Legacy inquests will continue as a separate process to the HIU. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the [Northern Ireland] Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.⁹

To date however there has been no progress in taking forward such steps or publicly indicating the range of measures which are under consideration. The problems facing inquests are largely related to delays in disclosure and resourcing, which could be remedied relatively quickly.

CAJ is also conscious that there are also those parties to the Stormont House Agreement who wished to see legacy inquests discontinued. Whilst this position has not prevailed in the Agreement we are concerned that there will be further attempts to run down or otherwise delay the inquest system.

⁹ Stormont House Agreement, paragraph 31.

The Ministers Deputies may wish to seek assurances from the UK that it will not seek to undermine ongoing legacy inquests and seek clarification as to the appropriate steps being taken to ensure Article 2 compliance of inquests.