

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 (S448)

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

November 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 1243rd meeting of the Ministers' Deputies in December 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 2014,² November 2014 and May 2015³.

Our last submission in May 2015 recorded the following developments:

Stormont House Agreement (SHA)

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 SHA**, 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';

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

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

³ [CAJ s447 May 2015](#)

We set out that the UK government has included a bill to **implement these Stormont House Agreement** provisions within its **legislative programme for the coming Parliamentary year**.⁴ They committed to consulting on draft legislation in June 2015 and introducing the bill into the UK Parliament in the autumn session in October 2015.

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 developed a shadow bill designed to implement the SHA in an ECHR compliant manner. The Drafting Group consisted of CAJ practitioners and academics from the two universities in Northern Ireland, Queen's University Belfast (QUB) and the Transitional Justice Institute (TJI) of the Ulster University (UU). This group instructed an experienced draftsman to produce the shadow legislation. Following a conference in May 2015 focusing on a draft the final unofficial 'Model Bill' for SHA implementation was launched in Belfast on the 16 September 2015. September also saw the launch of the 'Gender Principles for Dealing with the Legacy of the Past' at the Northern Ireland Assembly by the Legacy Gender Integration Group in which we participated.⁵

Other matters:

We included further information on the above matters in our previous submission and also recorded developments in relation to: Inquests, the lack of Article 2 compliance of the new PSNI Legacy Investigations Branch, and resourcing legacy investigations.

Developments in the Official SHA implementation process since May 2015

The aborted legislative process

As alluded to above the official process for implementation of the SHA legacy institutions was to have involved consultation on draft legislation by the Northern

⁴ [Queen's Speech Briefing Pack, Press Office 10 Downing Street, 27 May 2015](#), page 55.

⁵ The Model Bill, as well as explanatory notes, a conference report and the Gender Principles can be viewed at: <http://www.caj.org.uk/contents/1289>

Ireland Office who were then to introduce the legislation – **Northern Ireland (Stormont House Agreement) Bill**- into the UK Parliament during the session which began on the 12 October. This has not happened.

The Department of Justice HIU ‘Position Paper’ (July 2015)

In July 2015 the NI Department of Justice issued a ‘Position Paper’ outlining details of what it was proposing in relation to one SHA institution – the Historical Investigations Unit (HIU). One significant omission from this document however was clarification in relation to onward disclosure to families and others, where no detail was unusually provided on the grounds that this was a matter for the Northern Ireland Office (NIO) to take forward.

CAJ wrote to the NIO Secretary of State in August to clarify the position and to seek assurances that the NIO was not now seeking to introduce a ‘national security’ veto over onward disclosure by the HIU. The negotiations which led to the SHA, and the Agreement itself, intentionally did not provide for a ‘national security’ caveat to disclosure. Rather the SHA provides restrictions on onward disclosure will be limited to ensuring that no individuals are put at risk and duties to keep people safe and secure.⁶ This was instead of the much broader concept of ‘national security’ which the UK does not define in law, has in practice been interpreted very broadly and been deployed to fetter legacy investigations.⁷

The SHA also guarantees the independence of the HIU. CAJ would therefore expect the decision making duty and power on necessary redactions to sit with the HIU Director and not a Minister in the UK Executive, whose very past actions may be those under consideration.

⁶ Paragraph 37 of the SHA states “The UK Government makes clear that it will make full disclosure to the HIU. In order to ensure that no individuals are put at risk, and that the Government’s duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU.”

⁷ For examples see: <http://eamonmallie.com/2015/09/will-truth-always-be-a-prisoner-of-national-security-in-northern-ireland-asks-daniel-holder-deputy-director-caj/>

The UN Human Rights Committee (July 2015)

In late July 2015 the UN issued its Concluding Observations on the UK's compliance with the ICCPR said that the UK should:

Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims.

In specific reference to the HIU the UN stated:

Ensure, given the passage of time, the establishment and full operation of the Historical Inquiries Unit as soon as possible; guarantee its independence in a statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases and ensure its access to all documentation and material relevant for its investigations.

The NIO 'Summary of Measures' paper and leaked draft bill (September 2015)

In September 2015 the NIO finally published a "Summary of Measures" document which outlined provisions in Northern Ireland (Stormont House Agreement) Bill.⁸ This policy document set out further detail in relation to the implementation legislation on three of the four SHA institutions (the Implementation and Reconciliation Group was not included). CAJ produced a special edition of our *Just News* bulletin critiquing the strengths and weakness of the provisions set out in the document.⁹

⁸https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462888/Policy_Paper_-_Summary_of_Measures_23_Sept_2015_Final.pdf

⁹http://www.caj.org.uk/files/2015/10/29/Autumn_2015.compressed_.pdf

After the publication of the policy paper, and during further negotiations between the British and Irish Governments and the political parties in the Northern Ireland Executive a draft copy of the legislation was widely leaked into the media.

The draft legislation contained detailed national security exemptions never before seen in UK legislation, using the concept of 'sensitive' information. The draft bill provided for this category of 'sensitive' material to include any information which hypothetically could prejudice UK 'national security' interests, but also extends to *any information* which was supplied by the security and intelligence services, or *any intelligence* information from the police or military. The draft bill contains a mandatory duty on any 'Relevant Authority' (government, military, police, ombudsman, ministers, and security/intelligence agencies) to pre-classify any information they have as 'sensitive information'. A 'relevant authority' may also identify information held by another relevant authority as 'sensitive information'. So even if the police decided some information they held was not to be treated as 'sensitive' a minister or the security services could overrule them. There is also a mandatory duty on the HIU to identify any information it holds falling within the category of 'sensitive' information'.

Once materials have been classified as within a class of being of sensitive national security information the HIU is not permitted to disclose the information. The only two exemptions to this are firstly when the information is supplied to the Secretary of State herself, or under certain circumstances criminal justice bodies. The second exemption is when the Secretary of State gives permission for the disclosure. Essentially therefore the decision maker as to what 'sensitive' information is disclosed to families in relation to findings of investigations is a government minister. Should a member of the HIU, past or present, disclose sensitive information to a family without the permission of the Secretary of State, they commit a criminal offence for which they could face up to two years in prison. By contrast, unusually, there is no offence created if public authorities fail to disclose requested documents to the HIU.

This system of ministerial national security veto is clearly at odds with both the requirements of ECHR Article 2 and the terms of the Stormont House Agreement. In this context the NI political parties refused to support the draft legislation.

The Ministers Deputies may wish to ask the UK how its proposed ministerial national security veto over onward disclosure to families would be compatible with the requirements of the ECHR.

The Stormont Agreement and Implementation Plan (November 2015)

On 17 November 2015 negotiations concluded between the British and Irish governments and Northern Ireland parties and the above new agreement was published. Save for a section on paramilitarism the stated objective of this new Agreement (also known as ‘A Fresh Start’) was the implementation of the SHA. Whilst other elements of the SHA were taken forward, most notably those on finances and social security, legacy elements were not included in the new Agreement and have essentially been ‘parked’. There is wide consensus that the stumbling block was the UK Government’s insistence on maintaining the ministerial national security veto within the legislation.

Northern Ireland’s First Minister, Peter Robinson MLA, has stated that the national security caveat on disclosure was the only issue on which consensus had not been achieved in the negotiations on changes to the draft bill.

On 18 November 2015 the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence issued preliminary observations and recommendations¹⁰ at the conclusion of his 10 day visit to the UK. He spent several days in Northern Ireland as the aim of his visit was to offer an objective assessment of the various initiatives undertaken to address the legacy of the violations and abuses during the ‘troubles’ in Northern Ireland.

In his concluding remarks he noted that ‘the legacies of the past have not been successfully or comprehensively addressed on any of these four dimensions (truth, justice, reparations and guarantees of non-recurrence).’ He also recommended that:

Any future arrangements for truth-disclosure and for justice will need to take on board the fact that none of the stakeholders can assume the position of neutral arbiters of ‘the troubles’ and therefore will have to incorporate

¹⁰ <http://www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E>

procedures to guarantee both the reality and the appearance of independence and impartiality.

On the matter of national security he noted:

Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use ‘national security’ as a blanket term.

In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.

The Ministers Deputies may wish to ask the UK what process it will now initiate to progress the SHA legacy bill.

The Stormont Agreement does contain a financial provision that SHA legacy monies, whilst not being available for spend on the SHA legacy bodies until they are established, can be used in the current financial year.¹¹ As referenced in previous submissions resources have been cut or withheld from both the Police Ombudsman and Coronial system in relation to legacy matters.

**The Ministers Deputies may wish to ask the UK whether SHA legacy monies can now be provided to the Police Ombudsman and to take forward legacy inquests.
Legacy Inquests**

The Stormont House Agreement made the commitment that:

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

¹¹ Paragraph 7.2 Section D reads “any underspend of new legacy funding in 2015-16 may be carried forward to 2020-21 (but funding for bodies to deal with the past is subject to agreement on their establishment).” The SHA committed the UK government to providing £30million a year over five years for legacy investigations.

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.¹²

To date however there has been little progress. Since the SHA commitment to measures being taken forward to improve inquests, endemic delays and problems have continued. The resourcing issues hampering legacy inquests have not been promptly dealt with, long sought investigative support to the Coroner is still not in place and a delay in the appointment of his replacement following the retirement of the senior coroner.

On 1 November the Lord Chief Justice assumed Presidency of the Coroners Service and has invited submissions on the issue of prioritisation of legacy inquests.

In his annual address on 7 September 2015 the Lord Chief Justice noted¹³:

Dealing with the past is one area in which political instability is having a particular impact, not least of course on the victims' families. This will require clear political commitment, both locally and at Westminster, as well as the provision of significant additional resources. While I am keen to provide leadership in respect of legacy cases, there remain many factors outside my control which need to be resolved for us to have confidence that these cases can move forward within a reasonable timeframe.

In his speech to the Victims and Survivors Forum on 22 October 2015¹⁴ he outlined the significant challenges involved in managing the 45 legacy cases that remain outstanding.

¹² Stormont House Agreement, paragraph 31.

¹³ <http://bit.ly/1PWLGM6> Opening of the 2015 Michaelmas Term, Lord Chief Justice's Annual Address, 7.9.15

¹⁴ <http://bit.ly/1OpExJw>, Speech delivered by the Lord Chief Justice on 22 October 2015 to the Victims and Survivors Forum 'Dealing with the Legacy of the Past'. <http://www.bbc.co.uk/news/uk-northern-ireland-34606351>

In noting the provisions within the Stormont House Agreement as a way forward he stated:

I have no desire to enter the political fray, but clearly there is a need for both political agreement on the mechanisms for dealing with the past and significant additional resources if we are to move these cases forward in any meaningful way. I have sought to reallocate some resource from within my existing judicial complement but this will only take us so far.

A visible political commitment from Westminster will also be crucial, and I see a pivotal role for the Secretary of State for Defence.

The Lord Chief Justice highlighted the excessive delays plaguing the coronial system with only 9 cases having been disposed of in the past 5 years and 13 cases in total in the past 10 years. He also noted the current pressures within the Coroners Service and the delays in PSNI and MOD responses to request for disclosure, noting 'the redaction of papers in another substantial bottleneck in the current process and current processes are evidently not fit for purpose'.

We understand that a comprehensive review of all legacy cases is being carried out in January 2016 and it is anticipated that complex legacy cases will require a High Court judge to hear the case and others will need to be heard by a County Court judge.

In addition, one of the serious obstacles to progressing legacy inquests has been the delay in disclosing documents by the police service (PSNI). In light of this the Northern Ireland Policing Board requested that the Northern Ireland Minister of Justice call in HM Inspector of Constabulary to conduct an investigation into the matter. The Minister of Justice however declined the Board's request.¹⁵

¹⁵ See statement by the Policing Board *Review of the role of PSNI in supporting legacy inquests* <http://www.nipolicingboard.org.uk/news/article.htm?id=16975> 30 July 2015

We remind the Ministers' Deputies of the excessive delays that continue to beset legacy inquest in Northern Ireland as set out by the Lord Chief Justice

As things stand it could conceivably be many more years before most cases could be dealt with in a manner that would satisfy the requirements of Article 2 of the European Convention of Human Rights if we maintain the present processes. Based on experience to date, I suspect that the number of legacy inquest proceeding annually in the next year or two is likely to be in single figures.

The Ministers Deputies may wish to seek assurances from the UK what steps it is taking to ensure Article 2 compliance of inquests, and why a Policing Board request for an official inspection into the role of the PSNI in disclosure to inquests was declined.

Individual Measures

Shanaghan

The next of kin are still awaiting the Police Ombudsman's report in this matter. The Office advised the family in October 2015 that they intend to provide this report in early 2016.

Loughgall

The Secretary of State certified that the decision on whether to direct a coroner to conduct inquests into the deaths at Loughgall on 8 May 1987 should be taken by the Advocate General for Northern Ireland. On 23 September the Advocate General directed new inquests into these deaths in accordance with section 14 of the Coroners Act (Northern Ireland) 1959. A preliminary hearing on the inquest is listed on 26th January 2016. Civil proceedings are still ongoing.

Finucane

Geraldine Finucane has lodged an appeal against the decision of the High Court refusing to quash the Secretary of State's decision not to hold a public inquiry into

Patrick Finucane's murder. The Secretary of State has lodged a cross-appeal challenging the High Court finding that there has been a procedural breach of Article 2 since the date on which the Committee of Ministers decided to close its examination of the individual measures in *Finucane v UK* (17 March 2009). A date for the appeal will be fixed in late December and the substantive appeal should be heard in early 2016.

On 27 August 2015 Madden & Finucane wrote to the Council of Europe on behalf of Geraldine Finucane and asked the Committee to reopen its supervision of the execution of this *Finucane v UK* insofar as it relates to individual measures. We understand that no confirmation that the Committee shall do so has been received.

Jordan

The inquest into the death of Pearse Jordan took place between 24 September and 26 October 2012. On 31 January 2014 Mr Justice Stephens quashed the verdict and ordered the Coroner to hold a new inquest. The Court of Appeal dismissed appeals by the Coroner and Chief Constable on 17 November 2014. Mr Justice Horner has now been appointed by the Lord Chief Justice to hold the inquest into Pearse Jordan's death. A preliminary hearing is presently fixed for 18 January 2016.

McKerr

The Chief Constable has failed to provide full disclosure by December 2014, as directed by the Coroner. On 22 December 2014 the Senior Coroner set out a comprehensive deadline, premised on the completion of all outstanding elements of disclosure by end of December 2015 with a view to commencing substantive inquest hearings in 2016. The PSNI has confirmed that disclosure will not be complete by end of 2015. On 16 September 2015 the Coroner noted the continuing failure to provide disclosure and stated that these cases remain high risk in terms of failing to meet Article 2 obligations of reasonable promptitude. A preliminary hearing of the inquest will be held on 18 January 2016.

McCaughey

On 13 April 2015 the High Court dismissed an application by Sally Gribben, sister of Martin McCaughey, who was seeking to quash the inquest verdict delivered on 2 May 2012. An appeal is listed before the Court of Appeal on 9 and 10 December 2015.

Hemsworth

The Public Prosecution Service referred this case to the Police Ombudsman for Northern Ireland. We understand that this investigation has completed and no prosecutions are arising. Civil proceedings are ongoing.

We call on the CM to continue to keep these General and Individual Measures under close scrutiny and for it to express itself, including through infringement proceedings, on the failure of the UK to effectively implement both the General and Individual Measures in these proceedings over a decade since these judgments were delivered.