

The Right to Life - A Landmark Decision

On 18 May 2011 the Supreme Court delivered a seminal judgment which directly affects a number of unresolved legacy cases to be considered by our Coroners Courts, and re-affirms the principle that the European Convention on Human Rights (ECHR) is a living instrument. In the case of **McCaughey & Quinn v. UK** it held that the appellants are entitled to an Article 2 compliant inquest into the deaths of their next of kin. Their relatives were shot and killed by members of the British Army on 9 October 1990 and the families believed that they were the victims of a “shoot to kill policy.” There have been no prosecutions in relation to these deaths.

The appellants submitted that the scope of a future inquest should cover the question of whether the operation was planned and controlled so as to minimise to the greatest extent possible recourse to lethal force. This approach was resisted by the Ministry of Defence and the PSNI who argued that the Coroner was required to carry out a “Jamieson” style inquest which restricted its scope to establishing “by what means” rather than “in what broad circumstances” the deceased came to their deaths.

The appellants successfully relied upon the 2009 European Court of Human Rights (ECtHR) judgment of *Šilih v. Slovenia* in which a Grand Chamber of 17 arrived at the decision that in certain circumstances Article 2 ECHR imposed a free standing obligation to carry out an investigation into a death, even if the death occurred before a member state had ratified the Convention: “...the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent “interference”... In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.” (para 159). The ECtHR did clarify, however, that in accordance with the principle of legal certainty the court did not view this procedural obligation as open-ended.

It also held that there must be a “genuine connection between the death and entry into force of the Convention” in a member state to trigger the procedural obligations of Article 2. The Supreme Court made it clear that the Human Rights Act 1998 was non-retroactive and in that regard the 2004 House of Lords ruling in *McKerr v. UK* has not been overturned plus there is no continuing obligation to carry out Article 2 investigations into the deaths of the applicants’ next of kin. However, as there is an ongoing inquest the UK must adhere to its international obligations under the ECHR. It noted that the deaths of McCaughey and Quinn took place in 1990 and the Convention was not incorporated domestically until the introduction of the Human Rights Act 1998 and stressed that “just because there has been an historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now.” However, given that the Coroner has agreed to hold an inquest into these deaths, a free standing obligation exists to ensure that it satisfies the procedural requirements of Article 2. It noted that:

“The mirror principle should prevail. It would not be satisfactory for the Coroner to conduct an inquest that did not satisfy the requirements of article 2, leaving open the possibility of the appellants making a claim against the United Kingdom before the Strasbourg Court.”

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CAJ launches report into Office of the Police Ombudsman

CAJ recently launched a report which examined the Office of the Police Ombudsman for Northern Ireland (hereafter 'OPONI'). The report received significant media coverage, which can be viewed via our website – www.caj.org.uk The following is taken from the Executive Summary of the report. The report in full can be downloaded from our website or ordered from the office.

In recent years, a number of concerns have been raised about the capacity of OPONI to investigate historic cases due to the length of time taken, the quality of the reports it has published, and the conclusions reached. The most recent reports into historic cases published by OPONI have contributed towards questioning the Office's ability and commitment to undertake robust and impartial analysis. A growing lack of confidence in the Office is further exacerbated by the experiences and perceptions of some of those who have referred complaints to OPONI, in particular, those families involved in historic cases as a result of the death of a loved one.

Under Article 2 of the European Convention on Human Rights, where complaints against the police relate to violations of the right to life, the UK government is obliged to conduct independent, effective, prompt, and transparent investigations. This report reviews OPONI on how well it discharges its duties in accordance with the requirements of Article 2: effectiveness, efficiency (promptness), transparency and independence.

Effectiveness

Recent investigations into 'grave and exceptional' (historic) matters by OPONI have resulted in serious questions about the effectiveness of investigations by the Office, and thus its ability to meet Article 2 obligations. In particular a number of issues cause concern:

- CAJ is concerned about the lack of any clear definition or consistent application of the term collusion in a number of recent historic investigations involving allegations of collusion. Furthermore, there is no explanation as to why different aspects of collusion are engaged with in different investigations. This discrepancy leaves the Office open to allegations that a different standard of 'collusion test' is utilised given the specific circumstances of the investigation, which could in turn raise questions about the real and/or perceived impartiality of the Office.
- Of further concern in relation to recent reports on historic cases is the application and interpretation of 'police criminality and misconduct.' In a number of recent reports, OPONI states that "collusion may or may not involve a criminal act" followed by the assertion that "the Police Ombudsman may only investigate and report on matters of alleged police criminality or misconduct." However, a criminal act is criminality and therefore if a collusive act is criminal it would constitute criminality and should be found as such. Likewise, a collusive act that may not be criminal may constitute misconduct. The absence of a definition of collusion, and the subsequent excessively narrow interpretation of criminality or misconduct therein, therefore becomes problematic and contradictory.
- A review of recent investigations into historic cases highlights a tendency towards finding 'failings' but stopping short of more detailed recommendations which might secure accountability for those failings as is required from an Article 2 compliant investigation.

Efficiency

CAJ is concerned that the current levels of efficiency or 'promptness' offered by the Police Ombudsman's Office are not Article 2 compliant:

- The investigative process is agonisingly slow and it is often difficult to ascertain why the research requires such an extensive period to conduct. The length of time it takes for historic cases to be investigated and once opened, completed, is particularly stark given that many families have already waited decades to uncover the truth of their loved one's death.
- Publicly OPONI has consistently referred to a lack of resources as prohibitive and warned that historic investigations are an unnecessary drain on resources required to deal with present-day complaints. Even if inadequate resourcing is accepted, questions nonetheless arise in relation to efficiency and the use of existing resources.

Transparency

While the role of the Office is to investigate complaints against police, in doing so it needs to be accessible and provide information to families:

- In addition to unacceptable delays, the treatment of families by the Police Ombudsman's Office has often been painful and distressing for family members. In particular, concerns exist around the frequency and

nature of communication, willingness to consider views of relatives, and inequality of treatment in relation to prior access to reports.

- It is not only the formal statements, reports and media presence of the Police Ombudsman, but the nature of interaction with the public - individually and collectively – that is a critical determinant of the degree of public support for and confidence in the Office, and by extension the credibility extended to the Office.
- As regards historic cases, the requirements for transparency and openness to public scrutiny form a core part of the Article 2 obligations, and have particular relevance in the context of building confidence in policing and accountability in a post-conflict society.

Independence

The requirement for independence is a statutory duty of OPONI and a key criterion for compliance with Article 2 of the ECHR. This report identifies a number of issues that impact upon the independence of the Office:

1. Irregularities in the appointment process of the current Police Ombudsman

- CAJ has become aware that the criterion of prior Northern Ireland experience appears to have been added at a very late stage in the recruitment for the current Police Ombudsman. It is difficult to determine precisely by whom, and how, these important decisions appear to have been made; however the evidence points to the changes being introduced by the appointing body (the Northern Ireland Office), which raises serious questions as to why, and when, the NIO would choose to add an additional criterion. It is difficult to avoid the conclusion that certain candidates would be privileged or disadvantaged by the additional criterion and that this was the primary motivation for the change. It is clear that an important appointment procedure is now mired in doubt because of serious questions about the independence and transparency of the process and its potential susceptibility to political interference.
- It has emerged that there were irregularities in the manner in which security vetting procedures were conducted with respect to the current Police Ombudsman. The way in which the process appears to have been conducted raises questions as to whether normal procedures were applied, suspended or circumvented. The approach taken to high-level security clearance for the current Police Ombudsman was at best irregular and at worst unacceptable for an Office which deals with highly classified materials. It further raises questions about the propriety with which the Police Ombudsman's Office was treated by the Northern Ireland Office in this regard.
- CAJ's analysis has raised a number of concerns about both the use of public monies and equality with respect to the remuneration extended to the current Police Ombudsman. The salary of the current Ombudsman at the end of the financial year of 09/10 was in the region of £20,000 greater than when the former Police Ombudsman finished her term in office only two years previously. As the marked increase in remuneration correlates with a transition from a female to male incumbent, questions arise around gender equality, and in particular equal pay for work of equal value. Concerns have also emerged regarding the role of the Northern Ireland Office in relation to the remuneration and terms and conditions of the current Police Ombudsman. These financial irregularities, taken together with the irregularities in the recruitment process, and the discrepancies relating to the process of security clearance, raise serious questions and concerns as to the independence of and political interference in the Office of the Police Ombudsman.

2. Concerns surrounding intelligence and independence from the PSNI

An overview of the process of accessing intelligence illustrates that there is a number of steps in the process where 'gatekeepers' can significantly limit and control OPONI's access to intelligence without detection:

- The fact that most, if not all, historic intelligence material is provided by the PSNI Intelligence Branch (C3) is of concern. It is unclear how many former Special Branch officers are located throughout the specialist branches of Crime Operations and what percentage of total officers they constitute. Given that former Special Branch officers would have substantial years of service and intelligence experience, it is likely these officers occupy pivotal positions with respect to intelligence and security policing.
- All of this is relevant to the work of OPONI on historic cases, since it means that the Ombudsman's Office is reliant on intelligence efforts undertaken by former RUC (and Special Branch) officers, despite the fact that many of the most serious allegations of human rights abuses may involve allegations of improper RUC/Special Branch behaviour.
- In light of the legal and human rights obligations of the Office of the Police Ombudsman, it would seem appropriate for the Office to adopt a robust position, and ensure that 'gatekeepers' are not limiting access to intelligence. Our attempts to establish how independence around intelligence was ensured in theory and in

practice in this regard were inconclusive. However, it is the responsibility of the Police Ombudsman's Office to develop safeguards to ensure independence around intelligence, to be transparent about what these safeguards are, and to subject them to independent scrutiny.

3. Concerns and perceptions of bias arising from historic cases

The police-civilian composition of the Office of Police Ombudsman is crucial as the Office cannot fulfil its statutory remit or domestic and international human rights obligations without impartiality and a balance in perspective:

- Currently the Executive Board of the Police Ombudsman's Office is composed of three members, the Police Ombudsman and the Senior Director of Investigations both of whom come from a policing background, and the Chief Executive (since resigned) who is from a 'civilian' background. In addition, the Director of Current Investigations and the Director of Historic Investigations both have a policing background. It is clear from international parallels that the balance between (former) police and civilian personnel is considered crucial to both the reality and perception of independence.
- To meet the standards required under Article 2, it is "necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events...This means not only a lack of hierarchical or institutional connection but also a practical independence." In this regard, perceptions of bias are as important as actual bias when it comes to levels of public confidence in, and the accountability and effectiveness of, the Office.

Conclusion and recommendations

If OPONI is to discharge obligations arising under Article 2 of the European Convention on Human Rights to provide an independent and effective investigation into deaths where complaints have been made against the police, then CAJ recommends that the Office must:

1. Define, operationalise and consistently apply the term collusion in all of its investigations.
2. In this context, clarify what constitutes criminal behaviour and what is misconduct, and ensure that events and activities are considered in their totality rather than in isolation.
3. Move beyond the practice of simply finding failings to articulating conclusions and more detailed recommendations that enable responsibility and accountability to be attributed.
4. Examine how resources are allocated to and spent on historic investigations relative to the methodology adopted and outputs produced and in particular address perceptions and concerns related to promptness and efficiency.
5. Ensure transparency, openness and accessibility to both next of kin and the wider community in order to build confidence in the Office.
6. Ensure there is institutional, hierarchical and practical independence at all levels and in all the work of the organisation.
7. Put in place robust and transparent mechanisms in relation to the policies and practices of intelligence-handling.
8. Examine the current imbalance in the police/civilian composition at senior levels in the organisation in an effort to address perceptions of bias.

CAJ maintains that an independent and effective mechanism for investigating complaints against the police is essential to ensure public accountability of and thus confidence in policing in Northern Ireland. Importantly, while this report focuses on the work of the Police Ombudsman in relation to historic cases, the concerns raised have a broader resonance for the general workload of the Office. Therefore the recommendations made – while located in the context of meeting obligations under Article 2 – are essential to ensuring public confidence in the independence and effectiveness of the Office of Police Ombudsman in holding the police to account.

Rosemary Nelson Inquiry Report launched

On Monday 23rd May 2011, the report of the Rosemary Nelson Inquiry was published (<http://www.official-documents.gov.uk/document/hc1012/hc09/0947/0947.asp>) . At over 500 pages, the report is exhaustive and substantial. It provides a huge amount of detailed information and tells a sad story of the way in which Rosemary Nelson was viewed by the RUC and the NIO in the days, weeks and months before her murder on 15th March 1999.

The reflective and courteous welcome of the report by Rosemary's family and husband in the immediate aftermath of the publication is testimony to the amount of work put in by the inquiry team. It is also in stark contrast to the hectoring and overbearing tone adopted by the NIO Secretary of State, Owen Paterson, in presenting the findings of the report to the House of Commons on the afternoon of the launch. There, Mr Paterson spoke of vindication and praised the efforts of the RUC down the years. Though his statement contained an apology, the tone and the rest of the content belied the contrition. The Secretary of State controversially stated to the House of Commons that the report ruled out any responsibility for the murder on the part of the RUC, NIO, British Army or the Security Services. He also claimed that there was no conspiring by state agents to bring about the murder of Rosemary Nelson.

This was a partial and tendentious summary of the report's findings. Any fair reading of the Report's Overall Conclusions (pp 465-467) point up extremely serious findings that any self-respecting government would feel extremely shame-faced over. In a strange irony, it fell to PSNI Chief Constable Matt Baggott to show genuine remorse in his statement on the Report findings – in marked contrast to his own poorly-judged response in the case of the McGurk's Bar report where he strongly resisted any notion of apology.

The Nelson Inquiry panel (Sir Michael Morland, Dame Valerie Strachan and Sir Anthony Burden) reported that they had found no evidence of any "act" by or within the relevant state agencies (RUC, NIO, British Army, Secret Services). However, they also explicitly go on to say that "we cannot rule out the possibility of a rogue member...in some way assisting the murderers to target Rosemary Nelson". They then go on to find: that RUC members abused and assaulted Rosemary Nelson and made abusive remarks about her to her clients; and that intelligence leaked outside the RUC in a way that increased the danger to Rosemary Nelson. All these actions legitimised her as a target for the loyalist group that murdered her.

Moreover, the Inquiry panel then document a series of omissions by the various state agencies which increased the risk to and vulnerability of Rosemary Nelson. These included: failures by RUC management to stop their officers behaving inappropriately towards her and her clients; failure to take the risk to Rosemary Nelson seriously or follow normal steps that would have been taken for others at risk by senior RUC officers and the NIO. All in all the state "failed to take reasonable and proportionate steps to safeguard the life of Rosemary Nelson" (p.446). The report however fails to conclude that there was collusion. Since the word collusion was not in their terms of reference, it was highly unlikely – though nonetheless disappointing - that the panel would enter potentially controversial territory.

What they describe, however, meets four-square the definition outlined by Judge Peter Cory (who recommended the Inquiry be held) who advocated for a "reasonably broad" definition because of the need to build public confidence. On this reading, the acts and failures of the authorities outlined in the report amount to a culture that, at the very least, did not care what happened to Rosemary Nelson. On any reading, this is a culture of collusion.

The absence of recommendations is a major mistake by the panel. They say that, because so much has changed - the radical reform to policing, independent complaints mechanism, the devolution of policing and justice and so on - recommendations would be otiose. However, there has been no reform programme of the NIO or security services. Many of the civil servants who were in position in the NIO at the time are now in the Department of Justice. The use of intelligence continues with less local accountability now due to MI5 primacy.

The failure to apply the learning in this case was a dereliction of duty by a Public Inquiry that has provided a compelling account of how a courageous defence solicitor of the highest integrity was sacrificed by a state that did not care about her safety.

Taking a closer look at CAJ

Each month in 2011, Just News will profile a different staff member, outlining his/her role in the organisation and giving an overview of the kind of work they do on a day to day basis. If you believe the CAJ staff person can be of any assistance to you, please contact them directly.

Dr. Mick Beyers
Policing Programme Officer

CAJ's Policing Programme works to ensure that policing structures, policies, practices, and conduct conform to best practice and internationally recognised human rights standards. In pursuit of this goal the strategic plan outlines three core aims:

- To influence and encourage policing institutions to behave in a transparent and accountable manner;
- To protect and enhance existing mechanisms and powers in the context of devolution of policing powers; and,
- To seek compliance by policing institutions with equality and human rights obligations.

In pursuit of these aims it should come as no surprise that the Policing Programme concerns itself with the Police Service of Northern Ireland (PSNI), but of equal import to rights-based policing are the three key accountability mechanisms which form the new 'policing architecture' of our post-conflict society; the Police Ombudsman (OPONI), the Policing Board (NIPB), and the District Policing Partnerships (now worryingly renamed Policing and Community Safety Partnerships). In addition to being conflict resolution mechanisms, it is critical to both domestic and international human rights obligations (including Article 2 right to life) that these institutions function robustly and independently.

Since January 2009 when I took up the post, I felt that a number of key contextual factors would influence the shape of the Programme's work, namely: the extent to which the police reforms recommended by the Patten Commission have been embedded; the absence of any macro-level structure to engage with the legacy of the past (which has implications for both police legitimacy as well as public confidence in the accountability mechanisms); and, the ongoing violence and use of emergency legislation.

Recently I have become sensitised to a critical fourth factor, the questionable extent to which our government and its departments are embracing (or not) the opportunities inherent in devolution and by extension, the necessity of transformative change to institutions as envisioned in the 1998 Agreement. This awareness came about while conducting research for our recently completed report into the Police Ombudsman's Office. The research found that the Office is failing to meet its human rights obligations regarding effectiveness, efficiency, transparency, and independence in relation to its investigations of historic cases. In the course of the research, questions and concerns emerged as to the levels of real and perceived independence of the Office from political (NIO and DoJ) and police interference. Our conclusion is that the Office is unfit for purpose in relation to historic cases in particular. Significantly, while the report focused on the Police Ombudsman's Office the concerns raised have broader resonance for all the accountability mechanisms as well as the Historical Enquiries Team (HET).

The aim of preventing human rights violations goes hand in hand with the work of enhancing police accountability and simultaneously democratising governmental institutions. Just as accountability was identified by the Patten Commission as a dominant theme of police reform, independence - freedom from political interference - must also be regarded as absolutely essential to policing accountability mechanisms.

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Creative reflections on key human rights instruments

CAJ continues to creatively reflect on key human rights instruments. This month's contribution is by local poet and Nobel Prize winner, Seamus Heaney.

From the Republic of Conscience
by Seamus Heaney

At immigration, the clerk was an old man
who produced a wallet from his homespun coat
and showed me a photograph of my grandfather.
The woman in customs asked me to declare
the words of our traditional cures and charms
to heal dumbness and avert the evil eye.
No porters. No interpreter. No taxi.
You carried your own burden and very soon
your symptoms of creeping privilege disappeared.

Fog is a dreaded omen there but lightning
spells universal good and parents hang
swaddled infants in trees during thunderstorms.
Salt is their precious mineral. And seashells
are held to the ear during births and funerals.
The base of all inks and pigments is seawater.
Their sacred symbol is a stylized boat.
The sail is an ear, the mast a sloping pen,
the hull a mouth-shape, the keel an open eye.
At their inauguration, public leaders
must swear to uphold unwritten law and weep
to atone for their presumption to hold office -
and to affirm their faith that all life sprang
from salt in tears which the sky-god wept
after he dreamt his solitude was endless.

I came back from that frugal republic
with my two arms the one length, the customs
woman having insisted my allowance was myself.
The old man rose and gazed into my face
and said that was official recognition
that I was now a dual citizen.
He therefore desired me when I got home
to consider myself a representative
and to speak on their behalf in my own tongue.
Their embassies, he said, were everywhere
but operated independently
and no ambassador would ever be relieved.

"From the Republic of Conscience," by Seamus Heaney. Reprinted by permission of Seamus Heaney

Civil Liberties Diary - May

4 May

Mr Marvin Canning has been granted leave to apply for a judicial review of stop and search powers in Northern Ireland. Mr Canning is seeking to argue the stop and search powers under the Justice and Security (Northern Ireland) Act are incompatible with rights enjoyed under the European Convention of Human Rights.

5 May

The High Court dismissed a bid to change voter identification rules in Northern Ireland. The legal challenge had been brought by a Portuguese national who was seeking a ruling which would allow European Union nationals to use their home nation identity cards. However Mr Justice Treacy in dismissing all grounds on which the judicial review was based explained "it would mean if the applicant was right he wouldn't have to produce any form of photographic identification, but somebody who has lived here all their lives and is a UK national would have to produce photographic identification."

6 May

The Prisoner Ombudsman and the police coroner have both launched separate investigations into the deaths of two inmates at the Hydebank Wood Young Offenders' Centre and Prison. Both of the deaths happened on the same day only hours apart. The Prison Service claimed the two prisoners did not know each other and the deaths were unconnected in any way.

6 May

It was ruled lawful for full-body searches to be carried out in Northern Ireland jails. Full-body searches are carried out routinely on prisoners coming from court, transferring from other establishments or returning from home leave. Ruling in the case Mr Justice Treacy stated the searches

were not as invasive as in other UK prisons where squatting and mirror searches are authorised. In his judgment he rejected that the use of force on inmates who neither consented nor resisted the searches breached their rights enjoyed under the European Convention of Human Rights. However one caveat was that Mr Justice Treacy had "significant reservations as to whether such a routine search on final discharge can be regarded as lawful or proportionate."

12 May

The Supreme Court reached a landmark decision in respect to a claim made by Raymond McCartney and Eamonn MacDermott. Both men were jailed in 1977 for the murder of an RUC officer but later were cleared of the charges on appeal. Their claims centred on compensation they argued was due to them for the years they spent in prison. Compensation had been denied in the lower courts if the claimant could not prove demonstrable innocence. In their ruling the Supreme Court stated that a new test should be adopted that does not preclude defendants found not guilty from claiming compensation because they cannot "prove their innocence beyond a reasonable doubt."

18 May

The third inquest into the death of west Belfast man John Hemsworth commenced and will run for 2 weeks. Mr Hemsworth died on New Year's day 1998 and allegations have been made that he had been attacked by RUC officers six months previously. The two inquests held earlier were both abandoned.

21 May

At least 36 solicitor firms in Northern Ireland have withdrawn their services in many criminal cases leaving clients without any legal representation. Solicitors argue that the reforms, and in particular the reduction in state paid fees, are making it impossible to prepare and represent their clients adequately.

24 May

The public inquiry into the death of Rosemary Nelson, who was murdered in a car bomb in 1999, has reported that the state failed to protect her. The report, which was examining claims of state collusion in the lawyer's death, stated it could not find a direct security force role in her murder. It went on to conclude that the leaking of police intelligence "increased the danger to Rosemary Nelson's life" and that threats made by officers against her "had the subsequent effect of legitimising her as a target in the eyes of loyalist terrorists". It stated further that "the combined effect of these omissions by the RUC and NIO was that the state failed to take reasonable and proportionate steps to safeguard the life of Rosemary Nelson."

25 May

The British government has indicated that it will not release any more files held by the government on the Dublin-Monaghan bombings of 1974 where 34 people lost their lives.

Compiled by John Keers from various newspapers

Just News

Just News welcomes readers' news, views and comments.

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