

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 (S468)

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

August 2017

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.

This Rule 9 communication is for consideration at the 1294th meeting of the Ministers' Deputies in September 2017. CAJ has regularly made Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases'. These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement.

In December 2014 the British Government published the Stormont House Agreement (SHA), the result of talks involving the parties in the Northern Ireland Executive and the British and Irish Governments. The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit (HIU)' to conduct Article 2 compliant investigations into conflict-related deaths. The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant.

Our previous submissions of October 2016¹ and February 2017² provide detail as to the series of events which have led to a delay in the implementation of the SHA legacy

¹ <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15125217/S459-CAJ-Rule-9-Submission-to-the-Committee-of-Ministers-on-the-McKerr-group-of-cases-October-2016.pdf>

² <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15125220/S460-CAJ-submission-re-Rule-9-February-2017.pdf>

provisions. In summary the legislation for the HIU was derailed further to the proposed insertion by the UK of a ministerial power to redact the contents of independent investigation reports by the HIU on undefined ‘national security’ grounds. The Secretary of State for Northern Ireland announced that he sought ‘political consensus’ between Northern Ireland parties before moving to publish the consultation document on the proposed legacy bodies in the SHA. This essentially provides a veto to those who are opposed to independent investigations. In relation to inquests, whilst the Lord Chief Justice for Northern Ireland produced a blueprint for their implementation through a Legacy Inquests Unit, the UK has continued to withhold the necessary funding for the Unit. The Northern Ireland Executive collapsed in January 2017 and elections took place in March 2017.

Key Developments since February 2017

Collapse of the Northern Ireland government

The Northern Ireland elections in March 2017 were followed by negotiations between the British and Irish Governments and the Northern Irish political parties which involved a range of issues including implementation of the SHA. Following the extension of several deadlines, no agreement was reached through these negotiations to allow the restoration of the Northern Ireland Executive and the talks were subsequently suspended in light of the decision to call a UK General Election in June 2017.

Negotiations with the political parties in Northern Ireland resumed after the UK General Election. However, failing to restore a power-sharing executive, the talks ceased on 5 July until after the summer recess in September 2017 when further negotiations seeking to restore devolution will resume. There has been no devolved administration in place in Northern Ireland since January 2017.

Further delay in the implementation of the SHA legislation

Following an announcement that political consensus between the Northern Ireland parties was a precondition for publication of a consultation on the legacy proposals³, The State Party set out in April 2017 that “the proposals are now sufficiently developed that the next step should be to publish them for consultation”⁴. The Conservative Party Manifesto for the June 2017 General Election set out a commitment to consult publicly on the details of SHA and to support reforms to the legacy inquest system “to ensure the UK complies with its international obligations”⁵. In the days after the UK General Election, the Conservative

³ <http://www.bbc.co.uk/news/uk-northern-ireland-38147206>

⁴ [https://hansard.parliament.uk/Commons/2017-04-24/debates/834B25F9-3249-4953-89F8-33113FBA9A58/NorthernIreland\(MinisterialAppointmentsAndRegionalRates\)Bill](https://hansard.parliament.uk/Commons/2017-04-24/debates/834B25F9-3249-4953-89F8-33113FBA9A58/NorthernIreland(MinisterialAppointmentsAndRegionalRates)Bill)

⁵ https://www.niconservatives.com/sites/www.niconservatives.com/files/2017-05/GE2017_Manifesto_A5_NI_DIGITAL%20%281%29.pdf

Party and Democratic Unionist Party of Northern Ireland signed a Confidence and Supply Agreement which enabled a UK government to be formed. The June 2017 Agreement pledged a commitment to publish a public consultation on the implementation of the SHA bodies, which it referred to as being the being the “next phase”⁶. The Secretary of State further announced that there is “*a growing consensus of a need to publish the consultation*”⁷ as set out in the 10 July 2017 Communication from the State Party DH-DD (2017)794. A consultation paper setting out proposals for the implementation the SHA bodies has not yet been placed in the public domain.

Continued withholding of resources for the Legacy Inquests Unit

Following proposals put forward by the Lord Chief Justice of Northern Ireland in January 2016 setting out a five year plan for dealing with outstanding legacy cases before the Coroners’ Court through the establishment of a dedicated Inquest Legacy Unit, resources have not yet been made available for realisation of that plan within the coronial process. In March 2017 the State Party announced that no resources will be released for the establishment of a dedicated Legacy Inquest Unit until there is overall agreement on the full range of mechanisms to deal with the past.⁸ The collapse of the Executive in January 2017 related to issues concerning, *inter alia*, the establishment of such mechanisms. Therefore the introduction of a requirement by the State Party for cross-party consensus on this issue prior to the release of resources will potentially indefinitely delay the establishment of a Legacy Inquest Unit. It should be noted that there are no legal constraints within the constitutional settlement which we are aware of that would prevent the UK government providing these monies without the approval of all parties to the NI Executive. In addition the Secretary of State has a power to direct Northern Ireland Departments to take any action necessary to comply with international obligations where necessary. This power, under the Northern Ireland Act, has not been exercised.⁹

⁶ <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/uk-government-financial-support-for-northern-ireland>

⁷ <https://hansard.parliament.uk/commons/2017-07-03/debates/B0282CE2-F76F-4038-BA83-E313C3A00BF6/NorthernIrelandPoliticalSituation>

⁸ James Brokenshire: Deal needed on all legacy issues before inquest cash released (Irish News 10 March 2017) <http://www.irishnews.com/news/politicalnews/2017/03/10/news/james-brokenshire-deal-needed-on-all-legacy-issues-before-inquest-cash-released-960356/>

⁹ s26 [Northern Ireland Act 1998](#).” (1)If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken. (2)If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken

UN Human Rights Committee: follow up procedure

In June 2017 CAJ lodged a submission for consideration by the UN Human Rights Committee as part of its follow up procedure in relation to Concluding Observation 8, “accountability for conflict related violations in Northern Ireland” (CCPR/C/GBR/CO/7) which the Committee sought action on as a matter of urgency and which was consequently selected for the Committee’s follow up procedure.

The Committee raised concerns regarding the “quality and pace of the process of promoting accountability in relation to the ‘the Troubles’ in Northern Ireland and about the absence of a comprehensive framework for dealing with conflict-related serious human rights violations.” The Committee set out that the State party should:

- (a) 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;
- (b) Ensure, given the passage of time, the establishment and full operation of the Historical Investigations Unit as soon as possible; guarantee its independence, by 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 to its investigations;
- (c) Ensure that the Legacy Investigation Branch and the Coroner’s Court in Northern Ireland are adequately resourced and are well positioned to review outstanding legacy cases effectively;
- (d) Reconsider its position on the broad mandate of the executive to suppress the publication of inquiry reports under the Inquiries Act 2005;
- (e) Consider launching an official inquiry into the murder of Patrick Finucane.

Our submission addresses in detail these five sub-areas identified by the Committee.¹⁰

¹⁰ Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee in response to the Concluding Observations on the 7th Periodic Report of the UK under the International Covenant on Civil and Political Rights (ICCPR) June 2017 Follow up Procedure: “accountability for conflict-related violations in Northern Ireland” (CCPR/C/GBR/CO/7, paragraph 8). <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/06/30110335/S465-CAJ-Submission-to-UNHRC-ICCPR2c-June-2017.pdf>

Domestic litigation

Finucane

The Northern Ireland High Court refused the application for judicial review in relation to the decision not hold an independent public inquiry into the murder of human rights lawyer Pat Finucane in 1989, on the grounds that the decision of the British Government was not unlawful and so it was unable to order an inquiry. This was appealed and on February 14th 2017 the Northern Ireland Court of Appeal delivered its judgment disallowing the appeal.¹¹ While the Court held that the widow of Mr Finucane had received a clear and unambiguous promise that any recommended inquiry would be held they concluded that other issues, including political developments in Northern Ireland and the potential cost of a lengthy process, were enough to frustrate her legitimate expectation. An application for leave to appeal that decision to the Supreme Court was granted in July 2017.¹²

Independence of the PSNI Legacy Investigations Branch (LIB): Jean Smyth-Campbell

In March 2017, the Northern Ireland High Court considered ruled that earlier investigations into the death of a young mother in 1972 were fatally flawed and the Police Service of Northern Ireland (PSNI) Legacy Investigation Branch (LIB) “*lacks the requisite independence*” required by Article 2.¹³ A position previously held by CAJ and a UK Parliament Committee.

Glenanne gang

In July the Northern Ireland High Court handed down its judgment in relation to a challenge against the Historical Enquiries Unit (HET) for failing to conduct a lawful, effective and independent investigation into the deaths of Hillcrest pub bombing victims in 1976 and the failure/refusal of the HET to complete and publish an overarching thematic report into allegations of collusion¹⁴. The court found it was always intended that the HET, established in 2005 as part of the Package of Measures, was to have both an individual as well as a collective strand so as to give effect to the UK’s proposals to the Committee of Ministers and ensure Article 2 compliant investigations in cases where there are allegations of collusion. However:

The changes in the structure and process introduced [in the PSNI] after 2009 makes it clear that the structure and process now in place lacks most, if not all, of the

¹¹ <http://www.patfinucanecentre.org/sites/default/files/2017-03/Gillen.pdf>

¹² Finucane inquiry bid granted new Supreme Court appeal (BBC NI News, 27 July 2017) <http://www.bbc.co.uk/news/uk-northern-ireland-40735279>

¹³ With PSNI barred from probe into 1972 killing of Jean, family hope for justice at long last (Belfast Telegraph, 21 March 2017) <http://www.belfasttelegraph.co.uk/news/northern-ireland/with-psni-barred-from-probe-into-1972-killing-of-jean-family-hoping-for-justice-at-long-last-35548685.html>

¹⁴ Summary of Judgment (Judicial Communications, 28 July 2017) Office <https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Summary%20of%20judgment%20-%20Court%20finds%20Chief%20Constable%20breached%20article%202%20by%20failing%20to%20produce%20HET%20Report%20into%20activities%20of%20GI/Summary%20of%20judgment%20-%20In%20re%20Edward%20Barnard.pdf>

essential safeguards which the UK Government agreed with the CM to put in place for future investigations of cases of this nature in order to comply with the decision of the ECtHR in the McKerr series of cases. These changes came about apparently as a result of the decisions of the Chief Constable and the Assistant Chief Constable.

The Court held that a lack of resources as well as significantly reduced scope and independence in a manner required by Article 2 and the Package of Measures, undermined the ability of the LIB to continue the work of the HET. The judge found that “the LIB lacks structural and operational independence as well as functional reach and meaningful output” and stated that:

It is a matter of very grave concern that almost two decades after the McKerr series of judgments decisions were taken apparently by the Chief Constable to dismantle and abandon the principles adopted and put forward to the CM to achieve art 2 compliance. There is a real risk that this will fuel in the minds of the families the fear that the state has resiled from its public commitments because it is not genuinely committed to addressing the unresolved concerns that the families have of state involvement. In the context of the Glennane series, as I said earlier, the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of state actors in this series of atrocities including whether they could be regarded, as the applicant argued, as part of a ‘state practice’. I consider that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the Package of Measures.”

Delayed disclosure: Flynn

In July the Northern Ireland High Court handed down judgment in the case of *Flynn v PSNI* which considered the ongoing delay on the part of the PSNI, and reasons given for same, further to an Order seeking the disclosure of documents required for assessment of a claim for damages in a case of collusion. The judgement stated:

Years have passed without compliance and there is no clear acceptable plan for future compliance. Furthermore, the application for an extension of time is to be seen in the context that there is no evidence of any attempt by the defendant to comply with its initial obligation under the rules to serve a list of documents or to comply with all the orders made by the Master over many years. I am not persuaded that the identification of relevant documents presents the difficulties suggested by the defendant and in any event inherent in the proposition that the defendant has now to start from scratch is the unacceptable inference that the defendant has done nothing or nothing useful about discovery over many years.¹⁵

¹⁵ Summary Judgment – 21 July 2017 <https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Summary%20of%20judgment%20->

Mr Justice Stephens ordered that unless the defendant (the PSNI) provides the list of documents by noon on 1 October 2017 the State's defence will be struck out.¹⁶

UK media and political discourse attacking application of the rule of law in legacy cases

Further to the first post-Belfast/Good Friday Agreement decision to prosecute a soldier in relation to a conflict legacy death there has been a considerable response from prominent sections of the UK media and political establishment. The original sequence of events was further outlined in CAJ's February 2017 Rule 9 Communication¹⁷ and in greater detail in our submission to the UN Human Rights Committee's follow up procedure.¹⁸ In relation to developments since our February 2017 communication:

- In April 2017 the Defence Committee of the UK Parliament published an inquiry report calling for an amnesty, (referred to as a statute of limitations), covering all conflict-related incidents until 1998 involving members of the armed forces. The Committee also sought a truth-recovery mechanism and urged the government to consider extending such an amnesty to the police and other security personnel and, in implicit recognition that this may be discriminatory, stated that it would be a matter for a future government to determine whether such an amnesty should cover all conflict-related incidents.¹⁹
- In May 2017 the Director of Public Prosecutions for Northern Ireland announced he would step down from that role²⁰
- In June 2017 US-based *Human Rights first* issued a report documenting and raising their concerns regarding the vilification of human rights lawyers in Northern Ireland. This includes material from interviews with directly affected practitioners. The report – alluding to the contribution of the Clinton Administration to the Good Friday Agreement and peace process - concludes:

%20Court%20rules%20on%20discovery%20of%20documents%20relating%20to%20informant%201/Summary%20of%20judgment%20-%20John%20Flynn%20v%20Chief%20Constable%20PSNI.pdf

¹⁶ As above.

¹⁷ <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15125220/S460-CAJ-submission-re-Rule-9-February-2017.pdf>

¹⁸ <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/06/30110335/S465-CAJ-Submission-to-UNHRC-ICCPR2c-June-2017.pdf>

¹⁹ House of Commons Select Committee 'Investigations into fatalities in Northern Ireland involving British military personnel' HC1064 April 2017.

<https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1064/1064.pdf>

²⁰ <http://www.irishnews.com/news/2017/05/17/news/barra-mcgrory-director-of-public-prosecutions-to-leave-post-1028175/>

Now an element of that success is in danger of unravelling. Renewed hostility toward human rights lawyers—those representing the families of people allegedly killed by the British military—recalls the Troubles and augurs new danger.

History tells us that rhetorical attacks against lawyers by the press and public officials can lead to violence, which, in turn, inhibits the pursuit of justice and undermines the rule of law. The hostility toward human rights lawyers strikes at the heart of the Good Friday Agreement, which embedded respect for human rights into the politics of Northern Ireland. It's especially alarming given the United Kingdom's broader backsliding on its human rights commitments.²¹

The report calls on the UK to publicly reaffirm the UN Basic Principles on the Role of Lawyers, to urgently calm the rhetoric around the work of lawyers working on legacy cases in Northern Ireland, and outline how it will otherwise protect the lawyers from vilification and violence. It also calls on members of the UK Legislature to refrain from inflammatory rhetoric against Northern Ireland lawyers and the Director of Public Prosecutions.²²

Committee on the Administration of Justice
August 2017

²¹ A Troubling Turn: The Vilification of Human Rights Lawyers in Northern Ireland (Human Rights *First*, June 2017) available at: <http://www.humanrightsfirst.org/sites/default/files/A-Troubling-Turn.pdf>

²² As above page 12.