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Meeting: 1186 meeting (3-5 December 2013) (DH)

Item reference: Communication from a NGO (Committee on the Administration of Justice) (CAJ)) (11/09/13) in the Mckerr group of cases against United Kingdom (Application No. 28883/95)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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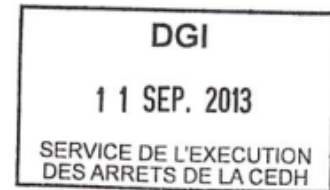
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Réunion : 1186 réunion (3-5 décembre 2013) (DH)

Référence du point : Communication d'une ONG (Committee on the Administration of Justice) (CAJ)) (11/09/13) dans le groupe d'affaires Mckerr contre Royaume-Uni (Requête n° 28883/95) (**anglais uniquement**)

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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**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**

*Jordan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001*  
*Kelly and Ors v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001*  
*McKerr v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001*  
*Shanaghan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001*  
*McShane v the United Kingdom, judgment of 28 May 2002, final on 28 August 2002*  
*Finucane v the United Kingdom, judgment of 1 July 2003, final on 1 October 2003*

**September 2013**

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.

**UK failure to implement judgments delivered over a decade ago**

CAJ acted in three of the above cases before the European Court of Human Rights and we repeat our request in November 2013 that the Ministers' Deputies give these cases their **urgent consideration** as we understand that they have not expressed themselves on this group of Northern Ireland cases since 2009.

This submission outlines serious concerns that exist in respect of a number of the General Measures arising from the judgments. In particular the future of



the Police Service of Northern Ireland Historical Enquiries Team (HET) is now uncertain following a report from the official policing inspectorate that its 'investigations' into British Army killings had been unlawful, due to incompatibility with ECHR Article 2 requirements. The Court has also issued damning verdicts in relation to Article 2 compliance of the inquests system in relation to security force deaths. There is also significant and ongoing delay in legislation being progressed to remedy gaps in the Police Ombudsman's powers.

***CAJ calls upon the Committee of Ministers (CM) to invoke its power under Rule 11 to issue infringement proceedings against the UK government for its failure to abide by the final judgments in the above cases.***

Over a decade has elapsed since these original judgments were delivered and in July 2013 the Court has again found the UK government in violation of its procedural obligations under Article 2 as they relate to inquests in cases concerning killings by the security forces in Northern Ireland in *McCaughey & Ors v. UK*<sup>1</sup> and *Hemsworth v. UK*<sup>2</sup>.

CAJ is concerned that there are still significant delays, deficiencies and obstruction of the implementation of these judgments. Whilst the Northern Ireland cases may seem less immediate than others, a dangerous precedent is set across the region if a powerful member state, in this case the UK, is able to thwart the implementation of judgments in right to life cases.

CAJ continues to follow the decisions adopted by the Minister's Deputies at the Human Rights Meetings and are conscious of the significant volume of cases concerning similar violations, including those in the Chechen Republic of the Russian Federation, in respect of which a parallel with Northern Ireland has been made.<sup>3</sup> We are concerned that the failure to effectively implement these judgments in a prompt manner undermines the Council of Europe standards requiring the prompt and effective execution of judgments.

The recent findings by the ECtHR that there were Article 2 violations in relation to the coronial proceedings in *McCaughey & Ors v. UK* and *Hemsworth v. UK* – both 'legacy' cases emanating from Northern Ireland, provide a stark reminder of the continuing human rights violations that

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<sup>1</sup> Application no. 43098/09, Judgment of 16 July 2013

<sup>2</sup> Application no. 58559/09, Judgment of 16 July 2013

<sup>3</sup> CM/Inf/DH(2010)26 27 May 2010 [<https://wcd.coe.int/ViewDoc.jsp?id=1626557&Site=CM>] paragraph 19.

continue to be perpetrated due to the failure of the UK to effectively investigate historic deaths.

In noting the breach of Article 2, Judge Kalaydjieva, in her concurring opinion, articulated the concern that many have in relation to the UK's compliance with its obligations under the ECHR:

*'My concern is that the overall effect of this judgment not only multiplies the ineffectiveness already observed, but also renders this Court's subsidiary role clearly redundant. This role would have been unnecessary had the domestic authorities fulfilled their primary role in time'.<sup>4</sup>*

We are also conscious that there is a risk of a knock on effect on other Council of Europe member states should the above matters not be addressed. We remind the Ministers' Deputies of some of our most recent submissions<sup>5</sup> as we note that the Deputies decided to resume consideration of these cases at their 1092<sup>nd</sup> meeting in September 2010 in the light of information to be provided on Individual Measures and information provided on the General Measures.

## **General Measures**

### ***Historical Enquiries Team (HET)***

In a joint submission in February 2012 CAJ and the Pat Finucane Centre formally requested the reopening of scrutiny by the CM of General Measures relating to the HET. In 2009 the CM recalled the establishment of the HET with the task of '*providing a thorough and independent reappraisal of*

<sup>4</sup> Page 38, *McCaughey & Ors v. UK* (Application no. 43098/09), Judgment of 16 July 2013

<sup>5</sup> [http://www.caj.org.uk/files/2011/03/11/S296\\_CAJ\\_PFC\\_Submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_February\\_2011.pdf](http://www.caj.org.uk/files/2011/03/11/S296_CAJ_PFC_Submission_to_the_Committee_of_Ministers_February_2011.pdf)  
[http://www.caj.org.uk/files/2011/10/05/S358\\_CAJs\\_and\\_PFCs\\_Joint\\_Submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_August\\_2011.pdf](http://www.caj.org.uk/files/2011/10/05/S358_CAJs_and_PFCs_Joint_Submission_to_the_Committee_of_Ministers_August_2011.pdf)  
[http://www.caj.org.uk/files/2011/10/05/S358A\\_Addendum\\_to\\_CAJs\\_and\\_PFCs\\_Submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_September\\_2011.pdf](http://www.caj.org.uk/files/2011/10/05/S358A_Addendum_to_CAJs_and_PFCs_Submission_to_the_Committee_of_Ministers_September_2011.pdf); [http://www.caj.org.uk/files/2011/10/05/S358B\\_Additional\\_Addendum\\_to\\_CAJs\\_and\\_PFCs\\_joint\\_submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_Sept\\_2011.pdf](http://www.caj.org.uk/files/2011/10/05/S358B_Additional_Addendum_to_CAJs_and_PFCs_joint_submission_to_the_Committee_of_Ministers_Sept_2011.pdf)  
[http://www.caj.org.uk/files/2012/02/16/CAJ\\_and\\_PFC\\_Joint\\_Submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_\(February\\_2012\).pdf](http://www.caj.org.uk/files/2012/02/16/CAJ_and_PFC_Joint_Submission_to_the_Committee_of_Ministers_(February_2012).pdf)  
[http://www.caj.org.uk/files/2012/12/12/S400\\_CAJs\\_Submission\\_to\\_the\\_Committee\\_of\\_Ministers\\_in\\_relation\\_to\\_supervision\\_of\\_the\\_cases\\_November\\_2012.pdf](http://www.caj.org.uk/files/2012/12/12/S400_CAJs_Submission_to_the_Committee_of_Ministers_in_relation_to_supervision_of_the_cases_November_2012.pdf)



*unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist, and, if evidential opportunities are identified, to proceed with the investigation of the crime'. The Committee decided to close its examination of the issue on the grounds that the HET had 'the structure and capacities to allow it to finalise its work'.<sup>6</sup>*

In our previous submissions CAJ expressed concerns at a number of developments which significantly undermined the HET's capacity to carry out the work it had been deemed capable of. Changes to the structure, policy framework and practices of the HET plus serious concerns about limitations on its role in state involvement cases were highlighted in detail in our February 2012 CM submission. This included specific concerns about aspects of the HET process in relation to cases where the deaths involved actions by British Army personnel and had originally been subject to investigation by the Royal Military Police (the 'RMP cases'). Also highlighted were changes whereby the HET role was to be reduced to a 'review' process whereby further investigation would be undertaken elsewhere in the Police Service of Northern Ireland (PSNI).

In November 2012 we reported that we had given evidence to the Northern Ireland Policing Board Human Rights and Professional Standards Committee in relation to our concerns about changes affecting the HET's capacity to undertake effective independent investigations. The Policing Board also heard academic evidence from Professor Patricia Lundy of the University of Ulster at this meeting in relation to new research she had conducted in to the HET's processes and procedures for dealing in RMP cases. The research found apparent anomalies and inconsistencies in the investigation process where the military is involved, compared to historic cases where non-state or paramilitary suspects are involved.<sup>7</sup> As a result of this a decision was taken to call in the policing inspectorate, HM Inspector of Constabulary (HMIC) to conduct an independent review of the HET's investigative practices in relation to the RMP cases.<sup>8</sup>

The HMIC inspection report now been published. The report identified and verified many of the concerns which had been raised about HET in our previous submissions and provided detailed further evidence as to how the HET had been operating. One of the main conclusions of the HMIC Inspection

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<sup>6</sup> Interim Resolution CM/ResDH(2009)44

<sup>7</sup> Lundy, Patricia (2012) *Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases*. None. 12 pp. [Research report (external)] [Available at: <http://eprints.ulster.ac.uk/21809/>]

<sup>8</sup> Northern Ireland Policing Board, Minutes April 2012, item 2



report is that its approach to the RMP cases was unlawful due to non-compliance with the Convention:

*'Our conclusions lead us to consider that the HET's approach to state involvement cases is inconsistent with the UK's obligations under Article 2 ECHR. The inconsistency in the way that state involvement and non-state involvement cases are dealt with undermines the effectiveness of the review process in Article 2 terms. In addition, the deployment of former RUC<sup>9</sup> and PSNI officers in state involvement cases easily gives rise, to the view that the process lacks independence'.<sup>10</sup>*

The HMIC Inspection Report adds:

*'...Since 2010 it is striking that not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution.*

*We consider that the HET's approach to state involvement cases in this regard is inconsistent with the UK's obligations under Article 2 ECHR. As well as undermining the effectiveness of the review in Article 2 terms, the inconsistency in the way the state involvement cases and non-state involvement cases are treated easily gives rise, to the view that the processes lack independence'.<sup>11</sup>*

Following the publication of the report the Northern Ireland Policing Board (the accountability authority for the PSNI) announced its view that HET involvement in military cases be suspended and that all other cases should not be finalised until necessary reforms have taken place. The Chief Constable has subsequently instructed the HET to suspend military cases. The Chairperson Anne Connolly also stated that the Policing Board had no confidence in the leadership of the HET and the Chief Constable had been asked to review and action the management of HET with immediate effect.<sup>12</sup> The PSNI Chief Constable is at present considering the option of whether to

<sup>9</sup> Royal Ulster Constabulary – the predecessor police force to the PSNI

<sup>10</sup> HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013, page 28. <http://www.hmic.gov.uk/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf>

<sup>11</sup> As above, page 28

<sup>12</sup> Northern Ireland Policing Board 'HMIC Report on the Inspection of the PSNI Historical Enquiries Team' Statement of Chair Anne Connolly 4 July 2013. [available at <http://www.nipolicingboard.org.uk/news/article.htm?id=14330NI> September 2013]





suspend the HET all together.<sup>13</sup> The Policing Board has established a working group to overview the implementation of the HMIC inspection as well as “review PSNI failures to respond promptly to issues raised in relation to the work of the HET.”<sup>14</sup> Following the publication of the HMIC Inspection families of 20 persons killed by the British Army whose cases had been handled by the HET initiated civil proceedings against the PSNI on the grounds the HET had failed to investigate the killings properly.<sup>15</sup>

The HMIC Inspectorate Report, recalling that the CM had not envisaged that the HET could satisfy Article 2 requirements alone, questions whether the HET is capable of playing any role satisfying Article 2 requirements.<sup>16</sup> The HMIC finds the legal position of the HET, that state involvement cases should be treated differently to non state cases, as ‘entirely wrong’ and states that:

*‘It concerns us greatly that such an important organisation in Northern Ireland should adopt an approach to such a key area of its work based upon a view of the law that, even if it were ever correct, was manifestly and provably not correct by the time such policy came to be drafted.*

*This substantial legal error was perpetuated by the fact that the HET did not seem to seek the views of others regarding the accuracy of its Operational Guide. At the very least, we would have expected the HET to seek the views of the Director of Public Prosecution (DPP) for Northern Ireland and Her Majesty’s Attorney General for Northern Ireland, given that they were then responsible for prosecution policy.’<sup>17</sup>*

The HMIC found that the HET process of ‘pre-interview’ disclosure, where the representatives of suspected military personnel were essentially given details of the case before interview, was ‘illegal and untenable’ in light of Article 2.<sup>18</sup> Among a range of concerns in relation to the due independence of HET operations the HMIC recommends an ‘independent procedure’ to guarantee that all relevant intelligence documents are provided in every case to ensure compliance with Article 2.<sup>19</sup>

<sup>13</sup> HET: Matt Baggott says suspension ‘not ruled out’ BBC News Online 5 September 2013 [<http://www.bbc.co.uk/news/uk-northern-ireland-23978907>]

<sup>14</sup> Northern Ireland Policing Board ‘HMIC Report on the Inspection of the PSNI Historical Enquiries Team’ Statement of Chair Anne Connolly 4 July 2013. [available at <http://www.nipolicingboard.org.uk/news/article.htm?id=14330NI> September 2013].

<sup>15</sup> Families of people killed by soldiers sue NI’s chief constable BBC News Online 5 August 2013 [<http://www.bbc.co.uk/news/uk-northern-ireland-23576607>]

<sup>16</sup> HMIC inspection, page 90

<sup>17</sup> HMIC Inspection, page 17

<sup>18</sup> HMIC Inspection, page 85

<sup>19</sup> HMIC Inspection, page 23



Whilst the CM in 2008 gave a qualified endorsement of the limited role HET could play it now transpires that, to an extent at least, this was based on misleading information. In relation to the HMIC's finding that HET's approach to state involvement cases were not consistent with the ECHR the HMIC states:

*'These conclusions raise an important issue in relation to the CM's closure of its examination of the issue of the investigation of historical cases in Northern Ireland. Information submitted to the CM by the UK Government in 2008 in advance of the CM's decision to close its examination, was a presentation: 'Policing the Past: Introducing the Work of the Historical Enquiries Team' which stated that the HET applied a consistent standard in each case. Regrettably, we have not been able to conclude that the HET's approach is consistent across all types of case.'*<sup>20</sup>

Whilst welcoming these findings, even if fully implemented, CAJ does not regard the recommendations in the HMIC report, which in part reflect the area of focus of the inspection, as sufficient to make the HET fit for purpose to discharge its current remit. Even with significant reform CAJ does not believe it is possible for the HET to meet the necessary requirements of independence and impartiality in relation to state involvement cases. This would not preclude the HET continuing its role in cases where it is independently verified that there is no state involvement, notwithstanding the need for reform to improve effectiveness in this area.

In addition to the army cases and cases exclusively involving the actions of RUC officers, which are not dealt with by the HET but referred to the Police Ombudsman, the other main area of state involvement cases are those cases which involve police informants, and potential collusion, which are still handled by the HET.<sup>21</sup> In this context it would take an independent mechanism to

<sup>20</sup> HMIC Inspection, page 28

<sup>21</sup> The HET is not deemed fit for purpose for investigating police officers but *is* permitted to investigate agents (informants) who were operating for the police and other state agencies. In as recorded in the CM Interim Resolution CM/ResDH(2007)73 the HETs 'view' was that cases 'that allegedly involve the actions of police officers exclusively' would be dealt with by the Police Ombudsman alone and that a 'parallel investigation' would take place by both HET and the Police Ombudsman when both 'police and external collusion was alleged'. CAJ has sought further information as regards the referral mechanism under freedom of information legislation. However, the PSNI have declined (on grounds of both 'national security' in general and the involvement of the Security Service specifically) to confirm or deny whether they hold any further information on the matter. Whilst the number of cases to August 2013 the HET has referred to the Ombudsman under their exclusive remit, has been published as 44 cases (53 victims) the PSNI have declined to provide an overall statistics both the number of cases





determine whether there was state involvement in a case, as well as independent safeguards over the control and disclosure of intelligence to investigators, to ensure HET is not involved in state involvement cases.

Rather than creating a complex multi-tiered system CAJ's preferred option would be for a Single Mechanism for all cases to be introduced, and we have set this out in a recent briefing paper provided to the multi-party talks in Northern Ireland, which encompass the issue of dealing with the past, and to the Policing Board.<sup>22</sup>

***In light of the HMIC finding that the HET had been acting incompatibly with the requirements of Article 2 CAJ reiterates our request to the CM for the reopening of scrutiny by the Committee of Ministers of General Measures relating to the HET in the 'McKerr group of cases'.***

#### ***Office of the Police Ombudsman for Northern Ireland (OPONI)***

Our previous submissions in August and September 2011 and November 2012 detailed investigative reports into the Police Ombudsman's Office by CAJ, the Department of Justice (the McCusker Report)<sup>23</sup> and the official Criminal Justice Inspector (CJI).<sup>24</sup> The report, as with the CJI investigation which followed it, found serious failings and a 'lowering of independence' within the Office under the tenure of the Second Police Ombudsman. The CAJ report identified serious concerns about political and police interference in the then workings of the Office and the CJI report concluded that the way in which investigations of historical cases had been dealt with had led to a lowering of its operational independence and recommended the suspension of most historic investigations until reforms in the Office had taken place. The second Police Ombudsman subsequently resigned and a successor was appointed. Reform to the Office has now taken place and following a positive appraisal by the Criminal Justice Inspector early in the year the office has again been deemed fit-for-purpose to undertake historic investigations.

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referred for parallel investigation and the overall number of cases which have involved informants. (PSNI FOI reference F-2013-03386.)

<sup>22</sup> CAJ submission 419 Dealing with the Past: Investigating Troubles-Related Deaths: Submission to the multi-Party Group chaired by Richard Haass.

<sup>23</sup> McCusker, Tony 'Police Ombudsman Investigation Report', Office of the Minister of Justice, June 2011 (McCusker Report). See: <http://www.dojni.gov.uk/publications/police-ombudsman-investigation-report.pdf>

<sup>24</sup> Criminal Justice Inspector Northern Ireland Report "An Inspection into the independence of the Office of the Police Ombudsman for Northern Ireland" published on 6 September 2011



CAJ welcomes the reform that has taken place within the Police Ombudsman's office since the resignation of the Second Police Ombudsman. However, there are still a number of outstanding legislative changes to the Ombudsman's powers to ensure the Office can fully discharge its remit which are yet to be taken forward. These changes were highlighted in the first Police Ombudsman's 2007 *Statutory Five Year Review* of powers report. This is a review the Police Ombudsman is required by the legislation to conduct every five years and report on to the Minister.<sup>25</sup> In *Interim Resolution CM/ResDH(2009)44* scrutiny of the Police Ombudsman as a general measure focused on the original review of powers completed by the first Police Ombudsman in 2007.<sup>26</sup> However very few of the reviews' recommendations were ever implemented and the rejection of the majority of them occurred in controversial circumstances under the tenure of the Second Police Ombudsman.<sup>27</sup>

A March-June 2012 consultation by the Northern Ireland Department of Justice on reform to the Police Ombudsman's Office included a consultation paper which floated a number of (ultimately disregarded) suggestions e.g. merging the Police and Prisoner Ombudsman's offices, which seemed far removed from the reforms required to address the issues facing the office.<sup>28</sup> The Department did also put out an updated "Statutory Five Year Review" of powers report but did not take a view on which of its provisions it was intending to take forward.<sup>29</sup>

The Review addresses matters crucial to being able to conduct effective conflict-related investigations. Among its recommendations are:

- Extending the Police Ombudsman's remit to deal with 'all civilians operating with police in a policing capacity';

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<sup>25</sup> Section 61(4) Police (Northern Ireland) Act 1998

<sup>26</sup> The Committee noted a consultation had commenced, and inviting the UK to inform the Committee on their position on the Five Year Review, in particular the recommendation on powers to compel retired police officers to appear as witnesses.

<sup>27</sup> The Department of Justice's McCusker Report (conclusions, p25) refers to an 'agreement' between the Ombudsman's then senior Director of Investigations and "a middle ranking official of the NIO (Northern Ireland Office) without either the imprimatur of the Ombudsman or the knowledge of the Chief Executive." This led to a very small number of recommendations, which would have strengthened the powers of the Ombudsman's office, being accepted

<sup>28</sup> Department of Justice Northern Ireland "Future Operation of the Office of the Police Ombudsman for Northern Ireland" March 2012

<sup>29</sup> Police Ombudsman for Northern Ireland 'Statutory Report: Review under Section 61(4) of the Police (Northern Ireland) Act 1998' 2012



- OPONI empowered to compel former or retired officers to submit to witness interview and provide documentation, in grave or exceptional matters;<sup>30</sup>
- Review and amendment of RUC conduct regulations to enable investigation of deaths directly or indirectly attributable to police, regardless if there was a previous police investigation;

It was not until June 2013 that the Department of Justice issued a position paper setting out its views setting its position on the Five Year Review.<sup>31</sup>

The document outlines a Package of Reforms the Department intends to implement which includes eleven recommendations from the Five Year Review, seven of which will require legislation. Among these are important matters including the above provision to extending the Police Ombudsman's remit to include oversight of civilian staff operating with the PSNI in a policing capacity. In our response CAJ supported the extension of the Ombudsman's remit to civilian staff and suggested in due course the Department provide further detail as to who this would cover.

The Department however did state that it would not currently be taking forward eleven of the recommendations from the Five Year Review. Among the most serious matters not currently being reformed are the gaps in the Police Ombudsman's powers in relation to compelling former or retired officers to cooperate with the Office. This was despite at around this time the Deputy Chief Constable of the Police Service of Northern Ireland (PSNI) expressing regret that a number of retired officers had declined to cooperate with a Police Ombudsman investigation in a high profile historic investigation.<sup>32</sup> The other provision referenced above, the review and amendment of RUC conduct regulations to ensure they cannot be interpreted

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<sup>30</sup> The above document outlines "The Police Ombudsman regularly wishes to interview, as witnesses, officers who have retired, in relation to evidence which they may have relating to an ongoing criminal investigation by the Police Ombudsman, or even in relation to the investigation of the circumstances of serious disciplinary matters. The Police Ombudsman has no power to compel those officers to assist his investigation or provide him with documentation compiled by them during their service and retained by them upon retirement. Most retired officers do assist but some with crucial information do not cooperate. This requirement has been highlighted in a significant way with recent investigations of very serious historic matters where the refusal of retired officers to cooperate damages confidence in the oversight process and policing in general terms." paragraph 10.9.

<sup>31</sup> 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), July 2013

<sup>32</sup> This related to the role of the PSNI's predecessor police force (the RUC) in not warning residents of an IRA bomb which then killed three people in 1998, and the subsequent flawed RUC investigation which followed, see 'RUC 'failed to warn' over 1988 bomb' UTV News Online, 10 July 2013



in a manner which prevents Ombudsman investigations in deaths attributable to police, is also not being taken forward.

The Department states that these recommendations are not being taken forward as there is not presently consensus on them among the political parties in the power-sharing Northern Ireland Assembly (the unicameral regional parliament where the legislation would be progressed). However, the above recommendations do engage the duties to ensure effective independent investigations under Article 2 ECHR and hence will ultimately fall to the state party. CAJ has drawn attention to the powers of the UK government has, further to the 1998 Belfast/Good Friday Agreement under the Northern Ireland Act 1998 to direct action (including legislation) be taken when required to fulfill international obligations.<sup>33</sup>

Further detail on these matters is contained in a CAJ July 2013 submission to the Department of Justice's policy paper.<sup>34</sup>

***CAJ calls call upon the Committee to continue to supervise the Police Ombudsman as a General Measure to ensure its effectiveness in preventing new violations. The Committee may in particular wish to ask the UK to address the full implementation of the Five Year Review of powers and ascertain if it is considering using its powers to direct the devolved Department of Justice to ensure recommendations required to ensure Article 2 compliance are implemented.***

### ***Inquests***

We remind the Ministers' Deputies of CAJ's long standing concerns, as outlined in our earlier submissions, surrounding the capacity of the coronial system in Northern Ireland to deal with 'legacy' inquests.

In its response to CAJ's submission to the CM in November 2012 the UK government noted that '*the Coroner must ensure that any inquest is compliant*

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<sup>33</sup> The Belfast/Good Friday Agreement provided that Westminster ("whose power to make legislation for Northern Ireland would remain unaffected") "will... legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland". s26-27 of Northern Act 1998 provides a power for the Secretary of State to direct action (including legislation) should or should not be taken in order to fulfil international obligations (defined as 'any international obligation of UK' other than EU law or ECHR rights, which are provided for separately in the Act)

<sup>34</sup> CAJ submission S415 to the CAJ's Submission to the Department of Justice's Consultation on the 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), July 2013



*with Article 2 ECHR and consistent with judgment of the European Court of Human Rights'.<sup>35</sup> However, the recent damning judgments delivered by the Court in the cases of *McCaughey & Ors v. UK*<sup>36</sup> and *Hemsworth v. UK*<sup>37</sup> have found the excessive investigative delays in our coronial system to be in violation of Article 2 ECHR and the Court has directed:*

*'that the Government take, as a matter of some priority, all necessary and appropriate measures to ensure, the present case and in similar cases concerning killing by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously.'<sup>38</sup>*

We submit that urgent structural changes are required to prevent an ongoing breach of Article 2 and 3 in these historic inquests. We have previously outlined our concerns about the legislative framework for inquests within Northern Ireland and believe that wider legislative reforms are essential to ensure that the inquest system functions properly in accordance with its obligations under the ECHR.

Over a decade ago the Court established in the six cases, which have been the subject of the Individual Measures under consideration, the principles concerning the duty to investigate and we adopt the comments of Judge Kalaydjieva in her concurring opinion in *McCaughey & Ors v. UK*:

*'I am far from convinced that it was open to the respondent Government to rely on the deficiency or "complexity" of the existing domestic procedure, which seem to have been known to the authorities for some years after the first judgments of this Court in similar cases against the United Kingdom...*

*The fact remains that the respondent Government failed to demonstrate that it had taken any, still less "all reasonable steps" to investigate with a view to establishing the facts of their own motion.'<sup>39</sup>*

*There is nothing to explain, still less to justify, the failure of the domestic authorities to meet their obligations through more appropriate*

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<sup>35</sup> Paragraph 19,  
<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2210920&SecMode=1&DocId=1965424&Usage=2>

<sup>36</sup> Application no. 43098/09, Judgment of 16 July 2013

<sup>37</sup> Application no. 58559/09, Judgment of 16 July 2013

<sup>38</sup> As above, page 33 *McCaughey & Ors v. UK*

<sup>39</sup> As above, page 35



*and expeditious means of their own choice, including by introducing appropriate legislative changes in choosing “as a matter of some priority” any other “specific modalities”.*<sup>40</sup>

Regrettably the 2009 comments of the Northern Ireland Court of Appeal in *Hugh Jordan v. the Senior Coroner* cited by the ECtHR in these two recent judgments have not been acted upon:

*‘The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal and incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently.*

*It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest.*<sup>41</sup>

We understand from information provided by the Coroners Service for Northern Ireland in September 2013 that there are currently 38 inquests involving 65 deaths before the Coroners Court and at least 27 of these proceedings have yet to be listed for hearing.

In relation to this backlog of inquests we note the comments of the UK in December 2012 that the Department of Justice is working with the coroners ‘to determine how it might better support them to deliver this workload.’<sup>42</sup> We seek clarification of what progress has been made in regard to this and confirmation of what criteria is used in the scheduling of inquests.

The comments of Judge Kalaydjieva, in *Hemsworth v. UK* which were echoed in *McCaughey & Ors v. UK* also apply to the large number of historic cases which the UK has failed to expeditiously investigate including the individual measures currently under the scrutiny of the CM:

***‘...the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate***

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<sup>40</sup> As above, page 36

<sup>41</sup> Paragraph 4, [2009] NICA 64

<sup>42</sup> As above, paragraph 23



***investigation and to take all necessary steps to investigate arguable allegations under Article 2 and 3 seem as a matter of principle to make it possible for at least some agents of the State to benefit from virtual impunity as a result of the passage of time***<sup>43</sup> (emphasis added)

As well as the concerns which we have about the endemic delays that surround 'legacy' inquests within the coronial system, which have been identified in the two recent cases of *Hemsworth v. UK* and *McCaughey & Ors v. UK*, we also believe that the independence of the inquest system is being eroded by the process of disclosure provided by the PSNI as recently highlighted in proceedings collectively known as the 'Stalker Sampson' series of inquests. Previous concerns had been raised about the appointment of former RUC Special Branch and other RUC personnel into positions whereby they control the disclosure of police-held information despite having potential conflicts of interest with their former roles.<sup>44</sup> This has been the subject of consideration by the Northern Ireland Policing Board's Performance Committee.<sup>45</sup> Despite the Article 2 requirement of practical and hierarchical independence we are concerned to note that four out of six personnel working in PSNI's Legacy Support Unit are former members of Special Branch or RUC intelligence and have served directly with 92 serving and former police officers who could potentially be called as witnesses at the 'Stalker Sampson' inquests.<sup>46</sup>

***Given this concerning discovery we seek confirmation that the Coroners Service and PSNI are robustly discharging its duty to ensure that the process of disclosure complies with the Article 2 obligations engaged in these inquests.***

### ***Related matters***

<sup>43</sup> *Hemsworth v. UK*, page 25

<sup>44</sup> 'Coroner told former Special Branch officers in charge of redacting 'shoot to kill' files' *The Detail*: 19 October 2012 [Available at: <http://www.thedetail.tv/issues/137/stalker-update/coroner-told-former-special-branch-officers-in-charge-of-redacting-shoot-to-kill-files> accessed September 2013]

<sup>45</sup> Board Members Questions to Chief Constable – July 2013, page 3 [available at [http://www.nipolicingboard.org.uk/es/questions\\_to\\_chief\\_constable\\_july2013.pdf](http://www.nipolicingboard.org.uk/es/questions_to_chief_constable_july2013.pdf) accessed September 2013]

<sup>46</sup> As above



CAJ is concerned to note the actions of the Secretary of State<sup>47</sup> and Chief Constable of the PSNI who recently sought injunctions against an NGO and firm of solicitors acting on behalf of victims who sought copies of inquest proceedings records which had been heard in public. The purpose of seeking copies of historic inquest papers is usually to gather evidence, including of flaws in the inquest, to petition the Attorney General to exercise powers to open a fresh inquest.

Following requests from victims representatives to the Public Records Office for Northern Ireland for this material the Minister responsible in the Northern Ireland Executive<sup>48</sup> acceded to their request and provided it. On the same day the Secretary of State and Chief Constable sought and were granted temporary injunctions against these representatives.<sup>49</sup> The Attorney General for Northern Ireland, representing the Minister, advised the Court that she was the 'keeper of the records' and had acted within her powers.<sup>50</sup>

CAJ question the motivation behind this legal action by the Secretary of State and Chief Constable, the rationale and basis for which remain unclear. We do not believe that there is any justifiable reason to withhold such material which could assist families in obtaining a proper investigation into the death of their loved ones, particularly given the assurances that names of Individual security force members have been redacted. The UK has an obligation to carry out investigations in accordance with Article 2 and not to thwart attempts by families and their representatives who are acting on their own initiative to learn the truth about the deaths of their next of kin.

***CAJ expresses concern that further actions are being taken with the purpose or effect of obstructing access to effective legacy inquests.***

***Given the failure of the UK government to effectively implement General Measures in this group of cases we call upon the CM to invoke its***

<sup>47</sup> The UK government minister for Northern Ireland. Theresa Villiers MP

<sup>48</sup> The Minister for Culture, Arts and Leisure, Carál Ní Chuilín MLA.

<sup>49</sup> Release of Troubles' killings documents sparks legal row *BBC News Online*, 12 August 2013 [available at: <http://www.bbc.co.uk/news/uk-northern-ireland-23663305> accessed september 2013.]  
<http://www.bbc.co.uk/news/uk-northern-ireland-23714304>

<sup>50</sup> 'A late-night injunction on decades-old murder papers: why are the PSNI and NIO keeping them under wraps?' *The Detail* 11 AUGUST 2013 [Available at: <http://www.thedetail.tv/issues/252/krw-high-court-injunction/a-late-night-injunction-on-decades-old-murder-papers-why-are-the-psni-and-nio-keeping-them-under-wraps> accessed September 2013.]

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Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers. / Les documents distribués à la demande d'un/e Représentant/e le sont sous la seule responsabilité dudit/de ladite Représentant/e, sans préjuger de la position juridique ou politique du Comité des Ministres.



**powers to take infringement proceedings against the UK under Rule 11(paragraph 2).**



## Individual Measures

### *Kelly*

The families met with the HMIC in January 2013 to voice their concerns about the HET process but continued with the process until the HMIC released their report in July 2013. In light of these findings the families were left with no alternative but to withdraw their engagement with HET.

Representatives met with a new investigative team within HET in March 2013. At this meeting promises made to the families which had not been upheld were discussed and representatives were advised that another report would supercede the original which will remain in an archive. A formal request was made that all copies of the original report be withdrawn – this has not been granted.

In July 2013 the Loughgall Truth and Justice Campaign which represents the applicants in *Kelly & Ors v. UK* withdrew all engagement with HET providing the following statement:

*'The Loughgall Truth and Justice Campaign has with immediate effect withdrawn all engagement with the HET.'*

*Seven years ago, with serious reservations about engaging with the HET, the campaign, representing 9 families of those killed by the SAS<sup>51</sup> at Loughgall in 1987, engaged in a process they hoped would get them one step closer to the truth about the killings that night. From the outset the families put on record their many reservations with the HET process and the fact that we did not believe it to be Article 2 compliant.*

*We have lost confidence in the HET process but remain steadfast in our campaign to have a full, independent, impartial, open investigation into the killings of our loved ones – and repeat again, a transparent process with no links to organisations and personnel with involvement in the covert operation at Loughgall.'*

In August the HET contacted the families to say that the review had been suspended. Given the failure of the UK government to initiate an independent effective investigation into these deaths the applicants have been required to proceed with civil proceedings and this matter is next listed on 18 October 2013.

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<sup>51</sup> A special forces military unit



## ***Shanaghan***

In a meeting with the family representatives in June 2013 a new investigative team within the HET acknowledged that the report provided to the family in November 2010 contained inaccuracies. Also conceded was that no proper records of the HET review process had been kept and the reasons why certain conclusions were reached in this case were also not recorded. The HET apologised for how the case had been handled and has agreed to conduct a fresh review of the case. Following the publication of the HMIC report the family have sought an assurance that the HET formally retract the November 2010 report and suspend its current review of this case until the issues and concerns raised in the HMIC report have been properly addressed.

## ***Finucane***

The judicial review proceedings taken by the Applicant due to the UK government's failure to provide an independent, judicial, public inquiry into the murder of Patrick Finucane is listed for mention on 13 September but has not yet been listed for hearing. Following a judgment in January 2013 discovery has now been provided to the Applicant,<sup>52</sup> however, the judge is to provide written reasons for the documents sought by the Applicant but refused by him as not being necessary for the fair disposal of the proceedings. Judgment is outstanding in relation to this matter.

## ***Jordan***

As previously advised, the inquest concluded in October 2012 failing to reach a unanimous verdict on any matters of contention other than that the deceased was shot. Leave was granted to the Applicant to challenge the Coroner's verdict on 4 July 2013. The grounds of challenge which are to be heard between 24 September and 22 October can be generally outlined as follows:

1. The refusal to provide disclosure in relation to police witnesses who had been investigated in respect of other lethal force incidents;
2. The decision of the Coroner to sit with a jury;
3. The refusal by the Coroner to discharge an apparently biased juror;

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<sup>52</sup> Summary of Judgment available at: [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/j\\_sj\\_230413/j\\_sj\\_In-re-Geraldine-Finucane\\_230413.html](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/j_sj_230413/j_sj_In-re-Geraldine-Finucane_230413.html) accessed September 2013]



4. The Coroner's closing remarks and the questions posed by him to the jury on the basis that his closing was unfair and not Article 2 compliant and the questions did not assist the jury in reaching an A 2 compliant verdict;
5. The decision to accept a 'verdict' when the jury had indicated they were hopelessly divided on all key issues, in particular 'how' Pearce Jordan came by his death.

An application to deal with the anonymity and screening of witnesses during the inquest is to be considered on 23 September.

The Jordan family has also brought a challenge against the Coroner and PSNI regarding the delay in the holding of this inquest since the decision of the Court in 2001 - that challenge is based upon reliance on Article 2. The leave hearing in this case is listed for the 16 September.

### **McKerr**

CAJ understands that there has been very little progress in this case. The Applicant has received some further disclosure; however, regrettably various disclosure timetables set by the Coroner are routinely not met. A preliminary hearing was listed on 9 September however there are serious concerns at the delays incurred in these proceedings.

CAJ notes the comments of the Court in *McCaughey & Ors v. UK and Hemsworth v. UK* and regrettably note that many of the investigative failings identified in those cases are echoed in these individual measures.

**CAJ is concerned at the potential re-traumatisation of these victims due to the failure of the UK government to effectively investigate these deaths in accordance with its obligations under the ECHR.**

**We call on the CM to continue to keep these General and Individual Measures under 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.**