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Item reference: 1144th DH meeting (June 2012)

Communication from NGOs (Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) (with appendices) in the Mc Kerr group of cases against the United Kingdom (Application No. 28883/96) and reply of the government.

Information made available under Rules 9.2 and 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

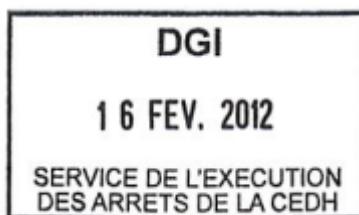
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Référence du point : 1144e réunion DH (juin 2012)

Communication d'ONG (Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) (avec annexes) dans le groupe d'affaires Mc Kerr contre le Royaume-Uni (Requête n° 28883/96) et réponse du gouvernement (**Anglais uniquement**).

Informations mises à disposition en vertu des Règles 9.2 et 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

* In the application of Article 21.b of the rules of procedure of the Committee of Ministers, it is understood that distribution of documents 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 (CM/Del/Dec(2001)772/1.4). / Dans le cadre de l'application de l'article 21.b du Règlement intérieur du Comité des Ministres, il est entendu que la distribution de documents à la demande d'un représentant se fait sous la seule responsabilité dudit représentant, sans préjuger de la position juridique ou politique du Comité des Ministres CM/Del/Dec(2001)772/1.4).



**Submission to the Committee of Ministers from the
Committee on the Administration of Justice (CAJ) & the Pat Finucane Centre
(PFC) in relation to the supervision of**

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

February 2012

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. 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.

The organisation acted in three of the above cases before the European Court of Human Rights.

The Pat Finucane Centre (PFC) is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We believe that all participants to the conflict have violated human rights. The PFC asserts that the failure by the State to uphold Article 7 of the Universal Declaration of Human Rights, "all are equal before the law and are entitled without any discrimination to equal protection of the law", is the single most important explanation for the initiation and perpetuation of violent conflict. It is therefore implicit to conflict resolution that Article 7 be implemented in full. The PFC campaigns towards that goal

The PFC represents in or around 160 families who have had a family member killed during the conflict. Through the Legacy Project, funded by the Peace III initiative the PFC provides advice support and advocacy for families bereaved in the conflict and particularly for those who have chosen to engage with the Historical Enquiries Team (HET) and the Office of the Police Ombudsman (OPONI). Many of these deaths involve Article 2 ECHR issues.

We would urge the Ministers' Deputies to express themselves in relation to this group of cases. The implications of inadequate investigative mechanisms, leading to impunity for human rights abuses in Northern Ireland for a powerful state like the UK, are likely to be used to justify similar approaches by states which have even worse human rights records.

General Measures

We continue to submit that it would be premature for the Committee to close its examination of the issues addressed in Interim Resolution CM/ResDH(2007)73 and seek that the Committee of Ministers continues to supervise these to ensure their effectiveness in preventing new violations, namely:

- the lack of independence of police investigators investigating an incident from those implicated in the incident;
- defects in the police investigations

Historical Enquiries Team (HET)

CAJ and the PFC would formally request the reopening of scrutiny by the Committee of Ministers of General Measures relating to the HET in the 'McKerr group of cases'.

In the above cases the Court found there had been a violation of Article 2 of the European Convention on Human Rights (ECHR) in respect of a range of failings in investigating deaths due to, *inter alia*, the lack of independence of the investigating police officers from security forces/police officers involved in the events and independent police investigations not proceeding with reasonable expedition. Further to this in 2007, assessing implementation of General Measures regarding defects in the police investigations, the Committee of Ministers (CM) noted the establishment in 2005 of the Historical Enquiries Team (HET) of the Police Service of Northern Ireland (PSNI). The CM noted that the HET was established with a remit of reviewing and identifying evidential opportunities in unresolved conflict-related deaths (between 1968 and 1998) emphasised the importance of good coordination between the HET

and Police Ombudsman's Office, and invited the UK to keep the CM informed of the progress and concrete results of both in relation to historic cases.¹

In 2009 the CM recalled the establishment of the HET and its remit of “*providing a thorough and independent reappraisal of 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 CM noted, *inter alia*: the HET process was taking longer than originally anticipated as a result of a high caseload but despite this the HET could bring “*a measure of resolution*” to affected persons; that the HET structure consisted of different teams and was staffed by retired and serving police officers including those from outside Northern Ireland, that the HET had transferred a total of 87 cases to the Police Ombudsman. The CM therefore 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’.²

We are, however, deeply concerned that since this assessment was made by the CM there have been a number of developments which significantly undermine the HET's capacity, including:

1. Significant alterations to the structural relationship of the HET with the PSNI. The HET used to report directly to the Chief Constable, however in 2011 the PSNI's own organisation chart indicates the HET was now located within Crime Operations Department of the PSNI.³ Crime Operations is responsible for counter-terrorism investigations and contains the Intelligence branch of the PSNI (“C3”) and the serious crimes branch (“C2”). The Department supersedes the former ‘Special Branch’ (an elite counter-insurgency unit inherited from the predecessor Royal Ulster Constabulary (RUC) police force) and Criminal Investigations Departments. We believe that PSNI Crime Operations is likely to contain considerable numbers of former RUC detectives and Special Branch officers who remained within the PSNI, playing a significant role in its operations. CAJ has submitted Freedom of Information requests to the PSNI to ascertain numbers and roles of such officers, however to date the PSNI has declined to disclose this information.⁴ We are concerned that former Special Branch officers may occupy pivotal positions with respect to intelligence and security policing and that this could compromise the practical independence of the HET. Information from the PSNI indicates that the HET no longer reports directly to the Chief Constable but rather to the Assistant Chief Constable (ACC) for Crime Operations. Such an alteration of the location of HET within the PSNI structure raises serious questions about the real and perceived independence of the HET. The Committee of Ministers may wish to seek clarification of this situation.

¹ Interim Resolution CM/RESDH(2007)73

² Interim Resolution CM/ResDH(2009)44

³ See current (June 2011) and prior (November 2008) organisational charts for the PSNI enclosed.

⁴ PSNI Freedom of Information Requests by CAJ, reference F-2011-03101, F-2011-03496

2. The concerns over the independence of HET (and other PSNI staff who may have a role in the HET investigative chain) from those potentially implicated in the incidents under examination has been recently compounded. This is due to the recent uncovering of a PSNI practice of re-contracting former RUC officers as 'civilian staff', apparently carrying out key police roles. This relates to former RUC police officers who had 'retired' as a direct result of the reforms to policing contained in the peace settlement now being re-contracted outside standard police recruitment processes as 'civilian' staff within the PSNI. Whilst the PSNI would not disclose details to us under freedom of information legislation some details were eventually given to the oversight body, the Policing Board, which were then published by the BBC. This indicates a significant number of rehired officers are involved in the present PSNI Crime Operations Department including C2 and C3. There are therefore potentially such rehired officers, who may have held senior positions within the RUC Special Branch, within the parts of the PSNI dealing with historic investigations, as well as potentially the HET itself. Further serious questions arise about the general accountability and oversight of these staff (as their 'civilian' status puts them beyond the scrutiny of the Police Ombudsman), we have raised with the PSNI our specific concerns about the role former police officers have in the process of historic investigations into the actions of their former units. In particular we have concerns about the extent to which former Special Branch officers are involved in gatekeeping access and/or providing the intelligence data on which many HET legacy investigations are reliant, particularly when the very investigations themselves engage the activities of police agents. We have also sought, but not yet obtained, clarity from PSNI as to the precise roles rehired 'civilian' staff are playing in historic investigations in relation their former role in the RUC/PSNI.

3. The Committee noted in 2009 that the remit of the HET was to reappraise unresolved cases as *"if evidential opportunities are identified, to proceed with the investigation of the crime"*.⁵ In 2006 a Memorandum prepared by the Secretariat to the Committee indicated that whilst the establishment of the HET *"seems encouraging"*, and its work in identifying evidential opportunities appeared to be a *"valuable compliment"* to investigation, it did caution that *"It is clear however, that it will not provide full effective investigation in conformity with Article 2 in 'historic cases' but only identify if further 'evidentiary opportunities' exist."*⁶ Before 2009 the HET did not refer any cases back to the PSNI. However from 2009 the HET started to refer cases to the "C2" Serious Crime branch of the Crime Operations Department. The PSNI has stated that *"once the HET has carried out a review and identifies evidence that a person may have committed a serious offence then the case is referred to C2 (Crime Operations) and it is then a decision for C2 to take further action."*⁷

⁵ Interim Resolution CM/ResDH(2009)44.

⁶ CM/Inf/DH(2006)4, Paragraph 65

⁷ PSNI Freedom of Information Request by CAJ, reference F-2010-03028 (Emphasis added).

HET and C2 have completed a memorandum of understanding which sets out the hand over process for transferred cases. This provides for: referrals moving cases to C2 in their entirety; the 'majority' of cases where realistic evidential opportunities exist being investigated by C2; a power for the ACC of Crime Operations to direct that historic cases be directly passed to C2 by-passing the HET process 'in exceptional circumstances' (e.g. new information passed to police or an 'investigative opportunity' emerging from Police Ombudsman reports); the ACC of Crime Operations is also given a power to direct in relation to borderline cases.⁸

The above policy change occurred subsequent to the Police Ombudsman's 2007 investigative report, known as 'Operation Ballast'⁹, concerning police collusion with a unit of a Loyalist paramilitary group.¹⁰ The report found that police intelligence reports and other documents, most of which were rated as "*reliable and probably true*" linked police agents and one informant in particular to ten murders.¹¹ The key findings of the Operation Ballast Report included that: a police informant was a suspect in the murder which had triggered the Ombudsman's investigation, but that police had failed to carry out a thorough investigation into the murder and had continued to use the agent despite extensive intelligence indicating his alleged serious criminality; and that following a further murder, in which the agent was implicated, the subsequent Special Branch written assessments of the agent made no reference to his alleged involvement in the murder. Shortly after it became operational in 2006 the HET was assigned to re-investigate the linked series of cases. However in 2009 these investigations, now known as 'Operation Stafford', were actually transferred to C2 in PSNI Crime Operations department.¹²

4. Academic research into the HET notes that originally the HET established some teams exclusively staffed by officers from outside Northern Ireland. However it finds that even when these teams were in place that "*each phase of the HET process included the involvement of former long-serving local*

⁸ Memorandum of Understanding between HET and C2 Serious Crime, (copy enclosed)

⁹ 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters', Nuala O'Loan (Mrs) Police Ombudsman For Northern Ireland, 22nd January 2007

¹⁰ Namely the 'Ulster Volunteer Force' in the Mount Vernon Estate, North Belfast. 'Loyalist' refers to loyalty to the British Crown.

¹¹ Paragraph 9, there was also less reliable intelligence information implicating an informant to five other murders, and other intelligence information linking informants to 10 attempted murders and a significant number of other in a significant number of crimes "in respect of which no action or insufficient action was taken".

¹² In this case in the context of the concerns of victims an Independent Review Panel was established to oversee the Operation Stafford Investigation and provide briefings to families on the process of the PSNI investigation without disclosing information which could jeopardise the investigations and subject to confidentiality undertakings.

*RUC officers, some of whom have from its inception held key positions in senior management.*¹³ Of particular concern is control over HET's access to intelligence data. The same researcher has concluded that *"all aspects of intelligence are managed by former RUC and Special Branch officers"* and further noted that *"intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces."*¹⁴ We have previously urged the Committee of Ministers to seek clarification on what measures the HET has in place to safeguard its operational independence, and to ensure that 'gatekeepers' are not limiting access to intelligence and would reiterate this.¹⁵

5. We also have specific concerns about specific aspects of the HET process in relation to cases where the deaths involved actions by British Army personnel. No effective investigations were carried out at the time of these killings. The original discharge of weapons that resulted in deaths were originally dealt with, not by the RUC, but by the Royal Military Police (RMP). This occurred under an agreement whereby cases involving army personnel suspected of involvement in unlawful killings of civilians were interviewed by the latter and not the former, even where witnesses' statements were at variance with the accounts given by the soldiers. Initially the HET was unable to trace British soldiers involved in incidents through the UK Ministry of Defence. Subsequently following a court case and pressure from NGOs, the HET recalled and/or reconsidered 157 of these cases. The HET has subsequently developed new ways of tracing army personnel. However, exploring evidentiary opportunities appears largely dependent on the 'voluntary' cooperation of military personnel and is governed by a protocol with the Ministry of Defence.¹⁶ The experience of NGOs and further research by Dr Lundy raises concerns about the extent to which the HET's processes and procedures are compliant with Article 2. In light of the failings of the processes for accountability and for determining whether the soldier's actions were lawful at the time of these incidents, we believe this is the standard required in these cases.

¹³ Lundy, Patricia 'Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland' *International Journal of Transitional Justice*, Vol. 3, 2009, 321–340 p 335

¹⁴ Lundy, Patricia 'Can The Past Be Policed?: Lessons from the Historical Enquiries Team Northern Ireland', *Law and Social Challenges*, Vol.11, Spring/Summer, 2009. pp30-31, at: <http://ssrn.com/abstract=1425445>

¹⁵ Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland, August 2011, p 4.

¹⁶ Lundy, Patricia (2011) *Paradoxes and Challenges of Transitional Justice at the 'Local' Level: Historical Enquiries in Northern Ireland*. Contemporary Social Science, 6 (1). pp. 89-106.

6. Limitations in the potential of the HET to review prosecutorial decisions (e.g. decisions not to prosecute members of the security forces) in relation to historic cases have also emerged. The Public Prosecutions Service (PPS) regards the examination of prosecutorial decisions as outside the terms of reference of the HET. There is presently no memorandum of understanding regarding information sharing between the PPS and HET.

In summary we have concerns about the independence and effectiveness of the process underpinning the reports prepared by the HET. Whilst some families have got a satisfactory measure of resolution from the HET, we do not accept that the HET is an operationally independent unit of the PSNI. Further we have some concerns about the HET's capacity to conduct effective independent Article 2 compliant investigations where state actors may have been involved in a death.

There have been considerable changes to the structure of HET since its inception, which further limit its potential to provide independent and effective reviews. HET investigations were proffered as part of a mechanism to remedy the failings identified in the group of cases referenced at the beginning of this briefing in which violations of Article 2 ECHR were found.

The UK has recently reaffirmed its overarching priority on assuming the Chair of the Council of Europe Committee of Ministers (7 November 2011) is the protection and promotion of human rights, reiterating that the UK aims to be an example of a country that upholds human rights.¹⁷ In this context we would like to draw attention to the above and to the Council of Europe standards requiring the prompt and effective execution of judgments.¹⁸ We are also conscious there is a risk of a knock on effect

¹⁷ See reference to Ministerial Statement of David Lidington MP

<http://ukcoe.fco.gov.uk/en/chairman-committee-ministers/uk-chairmanship-priorities/>

¹⁸ Including: the statements of the Committee of Ministers (CM) in recommendation CM/Rec(2008)2 on Efficient Domestic Capacity for Rapid Execution of Judgments of the Court; the Interlaken Declaration and Action Plan of February 2010 which specified that priority should be given to full and expeditious compliance with the Court's judgments which was considered 'indispensable'; the emphasis placed upon the principle that prompt and effective execution of judgments and decisions delivered by the Court is essential for the credibility and effectiveness of the Convention system (see CM 4th Annual Report, 2010, on the Supervision of the Execution of Judgments, Foreword, discussing generally the reaffirmation of this principle through the Interlaken Conference, and subsequent endorsement by the CM); Resolution 1787(2011) of the Parliamentary Assembly of the Council of Europe which asserts the need for the Assembly and the national parliaments to 'play a much more proactive role' in respect of the execution of judgments as if this is not done 'the key role of the Convention...in guaranteeing the effective protection of human rights in Europe, is likely to be put in jeopardy.' The Assembly, at paragraph 7.10 of this Resolution, also urged the United Kingdom to give priority to specific problems in that 'the United Kingdom must put an end to the practice of delaying full implementation of Court Judgments with respect to politically sensitive issues, such as prisoners' voting rights...'. The issue of investigation of alleged unlawful State killings within Northern Ireland continues¹⁸ to be a similarly politically sensitive issue. This resolution also endorsed the Interlaken priority of 'full and expeditious compliance

on other Council of Europe member states should the above matters not be addressed.¹⁹

Office of the Police Ombudsman for Northern Ireland

A Memorandum prepared by the Secretariat to the Committee in 2006 records that at the time HET's view was that cases that 'exclusively' involved the actions of police officers would be reviewed by the Police Ombudsman's office rather than the HET.²⁰ Further where a HET review revealed potential wrongdoing by police officers these were also to be referred to the Police Ombudsman to investigate this element of the case. Other historic cases came within the remit of the Police Ombudsman because of complaints by the next of kin of victims.

CAJ and PFC issued a number of communications to the Committee of Ministers in August and September 2011 in relation to the investigative reports into the Police Ombudsman's Office by CAJ, the Department of Justice²¹ and the official Criminal Justice Inspector (CJI).²² The CAJ report in June 2011 was an extensive review of the workings of the Office on historic cases in relation to compliance with the requirements of Article 2 ECHR which was appended to our submission dated August 2011. The report identified numerous concerns, raised questions and made recommendations in relation to the actual and perceived effectiveness, efficiency, transparency and independence of the Office. This report, as with the Criminal Justice Inspection investigation which followed it, found serious failings and a 'lowering of independence' within the Ombudsman's Office. The CJI report concluded 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 have taken place. The Ombudsman has subsequently resigned and a recruitment process initiated for a replacement.

with the Court's judgments' and the CM Recommendation CM/Rec (2008)2 as to efficient domestic capacity for rapid execution of judgments.

¹⁹ For example there is a risk that, without reference to the above limitations the HET could be promoted as a model for other Council of Europe states investigating alleged state killings. There has already been engagement between the HET and the Russian authorities. The HET states its model has been influential in designing the approach to deal with legacy investigations in Russia (likely to relate to Chechen cases – see HET Press Release '*Russian delegation visits Historical Enquiries Team*' Wednesday 19 October 2011.

²⁰ CM/Inf/DH(2006)4, Paragraph 56. In 2010 CAJ requested under Freedom of Information copies of current and prior policy documents relating to the HET and Ombudsman – (reference F-2010-02677) this disclosed a November 2005 Memorandum of Understanding between the "PSNI Crime Operations Historic Enquiries Team (HET)" and the Police Ombudsman's office – however the purpose of this MoU was to facilitate the disclosure of material to the Ombudsman rather than set out criteria for referrals.

²¹ Police Ombudsman Investigation Report, Office of the Minister of Justice, June 2011. See: <http://www.dojni.gov.uk/publications/police-ombudsman-investigation-report.pdf>

²² 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.

In a recent consultation document the Police Ombudsman's Office states that it has established a Historical Investigations Directorate and has conducted a comprehensive review of how it will deal with over 130 'historical cases'. The focus of the consultation is on a draft policy dated October 2011 which sets out criteria for how individual cases should be 'prioritised'.²³

In late November 2011 news reports indicated that the Office had decided to 'reinterpret' its legislation in a manner which means the Office reportedly argues it can no longer conduct investigations into nearly 50 cases where RUC officers were responsible for deaths. CAJ issued a Freedom of Information request on the 1 December 2011 seeking information to clarify the basis of the Office's reinterpretation of the legislation and documentation indicating what had prompted the Office to re-examine the legislation. No response has been received from the Ombudsman's Office and a complaint has been filed with the Information Commissioner.

In accordance with section 55 of the Police (Northern Ireland) Act 1998 the Ombudsman must formally investigate any matter referred to the Office by the PSNI Chief Constable when it appears that there may be criminal or disciplinary conduct of a police officer and it is in the public interest to do so. One such case –*Martin*– which involves the actions of police agents and allegations of criminal conduct in the original police investigation, was referred to the Ombudsman's office following the quashing of convictions arising from the original investigation by the Court of Appeal in 2009. However, the Police Ombudsman's Office has so far declined to investigate this case, a matter which will now be the subject of a Judicial Review.

Neither the general system for case prioritisation within the Ombudsman's Office nor any previous protocols in place for dealing with historic cases are referenced in the consultation document, nor is there any clarity as to whether the proposals actually consist of a change in policy or rather a reiteration of existing prioritisation criteria. Given this we are concerned that the consultation could be used to retrospectively justify decisions not to have initiated investigations into a number of high profile cases, and/or to justify further delaying investigations into such matters.

Individual Measures

We note in Interim Resolution CM/ResDH(2009)44 the Committee decided to pursue the supervision of the execution of the present judgments, until the Committee has satisfied itself that the outstanding general measure, as well as all necessary individual measures in the cases of Jordan, Kelly and Ors, McKerr and Shanaghan have been taken and we call on the Committee to continue its supervision of these individual measures. In respect of the update provided by the UK dated 15 December 2011 in relation to these cases we note the following:

²³<http://www.policeombudsman.org/publicationsuploads/History%20prioritisation.pdf>
<http://www.policeombudsman.org/publicationsuploads/Draft%20Historic%20Case%20Prioritisation%20Policy.pdf>

Kelly and Others

After a delay of six years the family have received a Review Summary Report from the HET in January 2012. The initial response of the families is that they have some very serious concerns about the extent to which the report addresses the violations found by the European Court. They are now considering of the report in depth and will make an extended submission to the Committee of Ministers when they have completed their consideration of the report.

Shanaghan

The family received a Review Summary Report, in late 2010 and have considered it, but as previously noted they await the findings from OPONI investigation to determine whether the issues arising from the European Court of Human Rights' judgments have been addressed by these two processes. We note that the UK government confirms that the Ombudsman's report has been completed and the Police Ombudsman intends to meet with the bereaved family in the coming months in order to deliver his findings, subject to the completion of a current quality assurance process.

The family has indeed been advised that the OPONI report has been complete since October 2010. No communication has been received by the family or their representatives from OPONI since September 2011 when they were advised that all historic investigations have been temporarily suspended. Neither the family nor their representatives have been kept informed of any developments nor given any time scale for the delivery of this report.

Jordan

The inquest is listed for hearing from 6 June until 27 June this year and we understand that the next of kin are still awaiting additional disclosure.

McKerr

We understand that the next of kin now have the Stalker and Sampson reports in redacted form however there are still considerable delays in obtaining any further disclosure of underlying material. The Preliminary Hearing is listed for the 24th February.

Finucane

In closing its examination of this case, with respect to the individual measure, the Committee stated that it was: *"Noting with satisfaction that, as to the possibility of holding a statutory inquiry, the United Kingdom authorities are currently in correspondence with the Finucane family on the basis on which any inquiry would be*

established; Strongly encouraging the United Kingdom authorities to continue discussions with the applicant on the terms of a possible statutory inquiry’²⁴

While the UK announced in 2004 that there would be a public inquiry into the death of Patrick Finucane following the Weston Park Agreement in 2001 the family were advised in October 2011 that this was no longer available and a ‘review’ of the case would take place instead. Judge Peter Corry, appointed following the Weston Park Agreement, recommended that there be public inquiries into the death of Pat Finucane as well as into the deaths in Northern Ireland of Billy Wright, Robert Hamill and Rosemary Nelson – inquiries into all these deaths have taken place except that of Pat Finucane. The family of Mr Finucane had been in discussions with the UK government with regards to an inquiry into his death and on 11 October 2011 they, with their representatives, met with the Prime Minister and Secretary of State for Northern Ireland. While Mr Cameron apologised to the family for the murder of Mr Finucane and acknowledged that collusion had taken place he stated that an independent public inquiry into his death would not be taking place but there would instead be a review of the papers by Sir Desmond de Silva QC. This review commenced in December 2011 and is anticipated to conclude by December 2012.²⁵

Geraldine Finucane has been granted leave to judicially review the UK government’s failure to provide an independent, judicial, public inquiry into the murder of Patrick Finucane and this matter is listed for hearing on 9 May 2012.

We wish to stress again the importance of the Committee’s continuing supervision of the execution of these judgments until it is satisfied that appropriate measures to ensure the Government’s commitments under Article 46 ECHR and domestic compliance with the Convention are fully addressed, including the outstanding general measures, as well as full implementation of practically effective individual measures in the cases of Jordan, Kelly and Ors, McKerr and Shanaghan. The implementation of both the general and individual measures impact on many of the victims and survivors. Implementation also has implications for the post conflict work of building public confidence in the institutions and for ensuring appropriate accountability for human rights violations which is essential for avoiding further conflict.

²⁴ Interim Resolution CM/ResDH(2009)44 **Error! Hyperlink reference not valid.**<http://patfinucanereview.org/>

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United Kingdom Response to the CAJ/PFC and RFJ submissions made to the Committee of Ministers – February 2012

Part 1 - HISTORICAL ENQUIRIES TEAM (HET)

Background

Relatives for Justice (RFJ), the Committee for the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) contend in their submissions that they are deeply concerned about the operating practice of the Historical Enquiries Team (HET), since the Committee of Ministers (CoM) closed its scrutiny of HET in 2009.

2. In particular, they raise concerns about HET's ability to meet the commitments and promises presented by Sir Hugh Orde when he noted that 'trust and openness' were 'key goals for its (HET) work' and that significant alterations to the structural relationship of the HET with the PSNI calls into question their independence. In addition, RFJ highlight other more general concerns based on their assessment of the views of families engaged with HET.

General Comments

3. RFJ are only involved in less than 2% of cases therefore this is not an accurate representation of the overall position in respect of HET's work with the families.

4. We would refute the allegation that Sir Hugh Orde and Dave Cox personally lobbied the workings of the HET directly to the Council. They had, as part of the oversight mechanism in connection with earlier judgements of the European Court of Human Rights, met with the Department for the Execution of Judgements of The European Court of Human Rights. This followed an invitation from the Department to attend their offices in Strasbourg and give a presentation to explain the role and structure of the HET.

5. The Historical Enquiries Team (HET) remains an operationally independent unit of the Police Service of Northern Ireland (PSNI), which reports to the Chief Constable.

6. To meet concerns around independence, HET continues to have a structure that has separate investigative units, with some teams composed exclusively of staff with no previous connection to the former RUC or the PSNI.

The Welcome Booklet

7. The Welcome Booklet is an introduction to the work of the HET, rather than a policy document. It is available in both the English and Irish languages, and is intended to outline the role of the unit. It has been revised twice since the inception of HET, with the intention of making it more understandable. The latest edition sets out the HET's objectives and includes



and objective to conduct its work '*in a way that commands the confidence of the wider community*'.

Standard Operating Procedures

8. Dr Lundy has not worked with the HET since 2008 and, as such, it is unclear which Standard Operating Procedures (SOP) are being referred to. All reviews are conducted against eight core review disciplines. If realistic evidential opportunities are identified during the review process, which can be pursued, the investigation of the death will proceed and ultimately files will be submitted to the Public Prosecution Service. More often, however, given the length of time that has elapsed, and taking account of issues of degradation of physical evidence, unavailability of witnesses, abuse of process and the requirements of PACE (around new evidence to re-arrest/interview), the focus of the work switches to providing information and answering family questions and concerns. This is completed by the preparation of a comprehensive report, entitled a Review Summary Report (RSR). This idea, developed by HET, is unique in UK policing.

9. The RSR details as much information as possible about the case, and explains the work undertaken by the original investigation, and discusses intelligence, exhibits and forensic evidence; it contains an objective assessment by the HET of the evidence available and the handling of the case. HET deals with families on a basis of confidentiality and honesty; RSRs are prepared in line with the principle of maximum permissible disclosure. HET will explain at the outset that it must comply with legal and ethical considerations. Context is always an important factor when HET explains its findings to families; finding missed opportunities does not mean that they can always be re-created. This is discussed and explained in detail in the individual circumstances that apply.

Organisational Chart and the Independence of HET

10. There has been no change in the status of the HET since its inception. The HET is currently composed of 138 staff. It is made up of staff from both local and external backgrounds. Forty-one staff are former RUC officers. There are no seconded staff from PSNI, and no-one is employed within C2 on HET matters.

11. One of the HET core review disciplines in every case involves speaking to original investigating officers. Usually HET has to trace these former officers and write to them seeking to engage. Of course, if they work for HET it makes the contact process much easier. The purpose of this engagement is to seek any additional evidential opportunities, and any additional information about a case that HET can give to families.

12. Members of staff who have been engaged on an original investigation cannot play any role within the preparation of a review report – indeed, locally based staff must declare any prior involvement in cases brought forward for review and cannot take part in the conduct of any such reviews. This position is unchanged from when the HET was first considered by the Committee of Ministers.

Legal Support

13. HET review summary reports are private documents prepared on an individual basis for families. HET does not release them into the public domain and as a matter of general policy will not comment on individual cases in the media. As such the reports are not, therefore, the official record of death. HET does not discourage any family from seeking advice and support and does not place families in 'risk management teams'.

Access to Documents

14. The HET review process involves a comprehensive examination of all available documentation, and the preparation of the reports for families includes summarising the key contents of the documentation to assist in explaining what happened. It simply would not be practical to include all the content examined in each report as HET examines a wide range of material, including confidential and classified documentation. It does not own any of the material examined, often much will refer to murder investigations, which are never officially closed unless the offenders are apprehended and convicted. Such papers are not released by police forces as a matter of policy.

15. HET procedures around access to intelligence in reviews are unchanged since its establishment. HET has been granted access to all intelligence held by the PSNI, on the authority of the Chief Constable, when it was established. Of course, HET is obliged to handle classified data in accordance with Government and legislative requirements. All staff are security cleared to the required level. Some of the HET personnel involved in intelligence are locally sourced, others are external. Eight of HET's nine review teams are headed by former senior detectives from outside Northern Ireland, each is responsible for the preparation of team reports and is security cleared to developed vetting standard, enabling access to all intelligence held.

Change of policy in respect of HET referring cases back to Crime Operations, PSNI

16. The HET does not have police powers and is not sufficiently resourced to manage multiple homicide investigations and court cases arising. This was demonstrated as the HET became embroiled in a protracted case, emanating from the Police Ombudsman, which resulted in nine people charged with murder and a catalogue of terrorist offences.

17. Initially it was estimated that very few historic investigations would result in arrests and charges, however, in addition to the above case, HET work has seen one person convicted of murder and two others awaiting trial for separate murders. The most effective body to conduct such investigations to the required modern standards is the police service. HET still undertakes reviews in the first instance and only passes cases on once evidential opportunities requiring the exercise of police powers are found. HET has referred over 20 such cases to date. (This is a separate process from any

case in which concerns arise over police conduct, which would still be referred to OPONI).

Complaints Procedure

18. HET is directly accountable to the Chief Constable, who in turn is accountable to the Northern Ireland Policing Board. The HET is also separately funded via a direct grant from the Department of Justice (DOJ), and oversight of funding is managed by quarterly review meetings with DOJ.

19. Each year, HET commissions an external company to conduct a completely independent survey of families who have received RSRs and concluded their engagement with HET. The survey in 2011 was conducted by Quadriga Consulting Ltd, and took place in July and August. Headline results are as follows:

- Community classification - 44.2% Protestant, 45.8% Catholic
- 96.8% said the HET acted professionally throughout the process
- 96.8% said the HET acted sensitively seeking to address individual needs/concerns
- 82% felt their questions were fully or mostly answered and a further 10% felt their questions were somewhat answered
- 76.3% found the HET reports very useful or useful and 13.7% said they were somewhat useful
- 90.5% said that the reports were written in a style that was very understandable
- 90.5% were very satisfied or satisfied with the performance of HET
- 88.4% said that engaging with HET had been very beneficial or somewhat beneficial

20. Two hundred and thirty one families were approached, and 81% responded. The surveys are conducted on a basis of confidentiality and the process involved is designed by – and belongs to – the independent company that conducts it. HET is provided with the results and these have been released publicly.

Witnesses

21. The HET will always seek to engage with new witnesses, and the point made by RFJ shows one way in which this can be achieved. Over the years HET has engaged with many new witnesses provided by NGOs, family members or former colleagues identified by police or army witnesses spoken to in the review process. The HET does not treat witnesses poorly and does not change statements and there is no evidence that this is the case.

British Army Cases

22. RFJ is correct to note that a dedicated team has been established within the HET to examine cases where death occurred as a result of the actions of a soldier. This team is composed entirely of staff from an external background. It is supported by a second team that considers cases involving Special Forces personnel. This is a considerable investment of resources to reflect challenging, complex cases and Article Two requirements.

23. The HET would refer cases in which new evidence emerged to that previously considered by the Director of Public Prosecutions back to the Public Prosecutions Service. One such case involving a former soldier has been referred. In several cases where no new evidence of criminality has emerged, the HET has still been able to achieve official apologies from senior British Government representatives to families over mistakes that resulted in the deaths of their loved ones.

24. HET has accepted that many of the earlier investigations, which often jointly conducted by the RMP and the RUC, were ineffective for the purposes of Article Two. This does not necessarily mean that the actions of the soldiers involved were unlawful nor do they automatically become suspects in a criminal investigation. HET attempts to trace the soldiers and interview them about the incidents in which they were involved. Involvement with HET, however, is a voluntary process, unless the HET review has uncovered substantial new evidence that would alter the situation to the effect that a power of arrest was involved. HET interviews are also intended to find new information to help explain to families what happened. However, if individual circumstances dictate, interviews will be conducted under caution. In one case to date, a file of evidence was submitted to the Public Prosecutions Service (PPS).

Limitations in the potential of HET to review prosecutorial decisions

25. HET was not established to review or question the decision making of the PPS, nor does it have the legal qualifications to do so. However, it will raise comment about the actions of soldiers, even if not prosecuted or acquitted, and this has resulted in four cases so far in which the British government has officially apologised to families over the deaths of their relatives.

Additional matters

Kelly and Others

26. HET commenced operations in 2006, and work through cases in chronological order. The Loughgall case of 1987 was exempted out of the chronological process, which has as yet only reached 1979. HET delivered its report in January 2012 and is committed to responding to feedback from the families, once received.

Shanaghan

A Review Summary Report was delivered in 2010 and to date the family have not responded to HET.

Part 2 - OFFICE OF THE POLICE OMBUDSMAN (OPONI)

Background

The Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) have raised a number of concerns to the Committee of Ministers in relation to the supervision of a number of cases concerning the action of the security forces in Northern Ireland.

General Comments

2. The Police Ombudsman has made it clear since at least 2007 that his Office is inadequately resourced to investigate the numerous historical public complaints, referrals from the Chief Constable and other matters relating to deaths which occurred during the Conflict in Northern Ireland between 1968 and 1998.

3. Although the limited funding that has been available has enabled the Police Ombudsman to pursue a number of historic investigations since 2005, some eighty historical matters, at least eight of which will be highly complex in nature, have yet to be investigated.

Police Ombudsman's Strategic Plan for Historic Investigations

4. In May 2010 the Police Ombudsman established a Historical Investigations Directorate for the purpose of rationalizing this work and developing a strategic approach to his new Corporate Goal of Dealing with the Past.

5. The Historical Investigations Directorate has since developed an overarching strategic plan for the investigation of historic matters with associated processes and policies. Additional funding was also sought and it is now anticipated that the Department of Justice (DOJ) will approve a business case submitted by the Police Ombudsman which will enable him to enlarge the Historical Investigations Directorate and implement the strategic plan.

6. Significant concerns were raised by the Criminal Justice Inspection Northern Ireland (CJINI) in September 2011 around how historic cases are handled including an inconsistent investigation process, a varied approach to communication with stakeholders and differences in quality assurance. In addition, CJINI found a senior management team divided around the production of historic reports and a fractured approach to governance and decision-making. The handling of sensitive material was also found to be problematic. On that basis, it was agreed that the investigation of historic cases should be suspended (save where investigations have to proceed alongside existing PSNI investigations) until a revised investigation process and resourced plan is in place which is capable of independent validation by CJINI.

7. At this stage progress has been made in developing a policy framework that would provide an objective assessment of each case and provide a mechanism for determining the sequence, or priority, with which cases should be investigated. The Historic Investigations Directorate sought the views of a wide range of NGOs on a proposed policy between March and April 2011. Specifically, representatives of CAJ and PFC were consulted in March and April 2011 respectively. A subsequent recommendation of the CJINI in September 2011 was, however, to subject the policy to wider public consultation, an exercise which is due to conclude in March 2012.

8. Progress has also been made in reforming the processes to support the approval of the historic business case, but further work is required in order to fully implement the report recommendations and this will take some further time. Until CJINI is able to give the Office a clean bill of health in respect of processes for historic cases, it would be inappropriate for the Ombudsman to lift the suspension of those cases. The Minister of Justice has made clear his commitment to ensuring that action is taken to ensure that the issues raised in the report are dealt with so that public confidence in the Office of the Police Ombudsman is maintained.

Referral of Deaths by the Chief Constable to the Police Ombudsman

9. Consistent with a protocol established between the Historical Enquiries Team (HET) and the Police Ombudsman, the Chief Constable (HET) has referred deaths for which members of the RUC were believed to have been responsible to the Ombudsman under Section 55(2) of the Police (Northern Ireland) Act 1998; 'the Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person'. These referrals have included the fatal shootings of **Gervaise McKerr** and others on 11 November 1982 and **Pearse Jordan** on 25 November 1992.

10. Assessment of the McKerr and Jordan deaths has established that both were investigated by the RUC with the former also subject of investigation by police officers external to Northern Ireland.

11. In the case of other referrals not previously investigated by police, such as the *Martin* case to which reference is made in the CAJ/PFC submission, there is no question of not investigating such matters but rather an issue of sequencing investigations as it would not be possible to investigate all of these matters simultaneously.

Public Complaints

12. On 11 December 2006 the Police Ombudsman received a public complaint in connection with issues associated with the murder of Patrick Shanaghan. This matter has been subject of investigation by the Police

Ombudsman. As the temporary suspension on reporting on historic matters recommended by CJINI in September 2011 remains in force OPONI are unable to confirm when the findings of the investigation will be released to the family.

13. The Police Ombudsman has now determined, however, that he is restrained from investigating the circumstances of these deaths, and many other similar historical matters, by limitations set out in the Royal Ulster Constabulary (Complaints etc) Regulations 2001.

14. An expert legal opinion provided to the Police Ombudsman in late 2011 confirms that in the absence of new evidence, not reasonably available at the time the matter originally occurred, he cannot investigate any matter that has previously been investigated by police.

15. The legal opinion confirmed that the Police Ombudsman must proceed on the basis of the domestic law as it is enacted. At this stage, therefore neither of these matters will be investigated by the Police Ombudsman.

16. Specifically, the opinion advised that if the Police Ombudsman sought to investigate an historic incident where lethal force was used by police he would be prevented from doing so if it had already been investigated by police in the absence of new evidence. The opinion continued that there was no scope within the legislation for a qualitative analysis of the previous police investigation.

17. In securing this legal opinion the Police Ombudsman was not seeking to 're-interpret' the legislation but rather to establish whether the Regulations presented a conflict with the Convention. Indeed he has requested in his Five Year Review Report, which was laid in the Assembly on 23 January 2012, that the legislation be amended to enable him to investigate such matters.

18. The Minister of Justice shortly intends carrying out a 12 week public consultation exercise on the structure, role and powers of the Office of the Police Ombudsman for Northern Ireland (OPONI). The Minister will issue the Police Ombudsman's Five Year Review Report on the working of Part VII of the Police (Northern Ireland) Act 1998 along with a consultation paper produced by the Department in response to recommendations in the Tony McCusker Report with a view to agreeing a package of reforms to restore public confidence in the work of OPONI. Of primary importance will be to ensure OPONI fulfils its functions with the confidence of the public and to ensure we have a detailed operating model for future working to deliver better value and increase public confidence.

Conclusion

19. The existence of an effective and independent complaints system is something that the public and the police have a right to expect – this is a key part of the policing architecture in Northern Ireland intended to secure public confidence in the police service. The system for current complaints is fully

functioning and what we now need is a fully functioning system to deal effectively with historic cases. The Minster has ensured arrangements are in place through external validation to provide assurance that all the CJINI report recommendations are fully implemented so as the Office of the Police Ombudsman is able to perform its responsibilities in a full and effective manner and is capable of securing widespread public confidence.

28 February 2012