Non-Jury Trials: Northern Ireland Office Consultation (November 2022)

Response by the Independent Reviewer of Terrorism Legislation

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1. This document responds to the Northern Ireland Office's consultation on the renewal of the non-jury trial provisions in the Justice and Security Act (Northern Ireland) 2007 until 2025.

2. My response to the last consultation is available online[1]. On that occasion I saw no reason to differ from the assessment of the David Seymour CB, the Independent Reviewer of the Justice and Security (Northern Ireland) Act 2007, in his 12th Report, that provision for non-jury trials remained necessary[2].

3. Since the last consultation, a working group on non-jury trials has been established, following David Seymour's recommendation. The remit of this group is described by his successor, Professor Marie Breen-Smyth, in her first report at para 9.38: to identify legal and practical measures to reduce the number of non-jury trials, and identify the indicators that would show that non-jury trials were no longer necessary.

4. Given the range of evidence and arguments considered by Professor Breen-Smyth in her first report, together with the fact that a specific working group is now working on the issue, my response is limited to considering one aspect.

5. I start from the following propositions:

[1] https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/11/201125-IRTL-on-NTJ-renewal.pdf (25 November 2020).
[2] 12th Report at 16.2.

- Provision for non-jury trials remains necessary to ensure fairness is a small number of criminal trials every year. I am aware of no evidence that the circumstances in Northern Ireland, described by the Supreme Court in *Hutchings* [2019] UKSC 26, have changed sufficiently to take the step of repealing sections 1 to 9 of the 2007 Act, and I am in no position to doubt Lord Kerr's reference to the need for these powers as being "obvious"[3].
- However, every attempt should be made to drive down the number of non-jury trials to the lowest possible number. At some point, extremely low usage may allow the special provision to wither away. Sometimes powers appear necessary, but it is possible to make do without them after all (as was the case when the heavily used section 44 Terrorism Act 2000 power of suspicion-less stop and search was repealed and not in substance replaced[4]).
- Although this could in principle be achieved by amendments to the 2007 Act (ideas for which are set out by Professor Breen-Smyth at para 9.57 et seq), that would take significant time.
- Accordingly, it is desirable to find ways to drive down the number which do not depend on legislation.

6. In this context, my attention was drawn in Professor Breen-Smyth's report to the Public Prosecution Service's rejection of the option of refusing to issue a non-jury trial certificate where even though the statutory criteria were met, the risk of jury tampering or bias was very low (para 9.32 and 9.49). The PPS's recorded reason is that the Director is legally obliged to issue a certificate in those circumstances.

7. Section 1 of the 2007 Act is certainly a discretionary power[5]. However, in light of *Hutchings*, I am bound to say that I agree with the PPS's analysis, as long as careful attention is paid to Lord Kerr's judgment.

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[3] At para 32 (Lord Kerr gave the only judgment). I make no observations on the eventual views of the working group, which is in continuous and direct contact with the position in Northern Ireland and may be able to say that "obvious" is no longer the right assessment.

[4] Following the judgment of the European Court of Human Rights in Gillan and Quinton v the United Kingdom, App.No. 4158/05 (12.1.10). Section 47A is not a direct replacement and in practice is rarely used: Terrorism Acts in 2020 at 4.9.

[5] Contrast the judge's duty under the non-jury trial provisions for England and Wales in section 44 Criminal Justice Act 2003.

8. At paras 26-27 Lord Kerr referred with approval to the decision in *Jordan* [2014] NICA 76, and to the "need" to be satisfied that the risk of bias had been excluded. At para 32 Lord Kerr referred to the difficulties in eliminating the risk of bias "and of being confident of having done so", at para 34 to the "need for a fair trial" and at para 37 to the "imperative on ensuring that the trial is fair". I understand Lord Kerr's judgment to mean that where one or more Grounds 1 to 4 is satisfied, and where there is a risk to the administration of justice affecting the fairness of the trial, there is only one way that the Director's discretion can be exercised.

9. However, Lord Kerr was not referring to *any* risk to the administration of justice, however small. The type of risk to the administration of justice to which Lord Kerr was referring at paras 26-7 and again at para 40 was the type described in *Jordan*: a "real risk", not a "remote or fanciful possibility", "a real (as opposed to the remote or fanciful) possibility of jury bias".

10. In addition, Lord Kerr was clear about the importance of "…focus[ing] on the need for a fair trial" (para 34). Accordingly, "Where trial by jury would place the fairness of the criminal justice process at risk, the right must yield to the imperative of ensuring that the trial is fair" (para 37). It was in the context of a real risk to a fair trial, that certification would be required.

11. The PPS's guidance on non-jury trial certification is set out as an annex to Professor Breen-Smyth's report. However:

    - It does not distinguish between a real risk and a remote or fanciful risk.
    - It does not explain that the focus of considering the risk to the administration of justice is the risk to the fairness of the proceedings. Indeed, the word 'fair' (or its cognates) only appear once in the guidance.

12. I do not suggest that changing the guidance will necessarily have any impact on the decisions of the Director. However, in order to ensure that the approach of the

Supreme Court is properly reflected in the guidance, I would support amendments to the PPS's guidance to reflect these points.

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