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Rule 9 submission to the

Committee of Ministers of the Council of Europe

November 2020

Execution of Judgments of the European Court of Human Rights

Group of cases:

McKerr v UK, 2001

Jordan v UK, 2001

Kelly and others v UK, 2001

Shanaghan v UK, 2001

McShane v UK ,2002

Finucane v UK, 2003

Hemsworth v UK, 2013

McCaughey and others v UK, 2013

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Introduction

Relatives For Justice (RFJ) is a human rights' framed victim support NGO that provides holistic support services to the bereaved and injured of all the actors of the conflict on an inclusive and non-judgemental basis. We also seek to examine and develop transitional justice and truth recovery mechanisms assisting with individual healing, contributing to positive societal change, and ensuring the effective promotion and protection of human rights, social justice and reconciliation in the context of an emerging participative post-conflict democracy.

As part of our engagement with human rights bodies, RFJ has made several submissions to the Committee of Ministers (the Committee), most recently in April 2020. The current submission seeks to provide an update of developments since then, for consideration at the 1383th meeting in September 2020. However, it is noteworthy that updates contained herein do not change the overall situation of delay and prevarication by state agents that have been mentioned submission after submission.

Only consistent international scrutiny is likely to encourage the UK to implement its international human rights obligations in respect of legacy issues. We therefore welcome that the Committee is maintaining its interest and pursuing its mandate by maintaining regular scrutiny of the UK's record. Without this, the UK Government's own approach to dealing with its actions would undermine the rule of law and respect for international human rights.

RFJ hopes that the Committee finds the following information of assistance in its continued monitoring of the UK Government's obligation to respond to the findings of the European Court in the variety of cases from this jurisdiction. Pursuant to our own mandate, the information we provide focuses on the situation in the North of Ireland with reference to arrangements for dealing with the legacy of the conflict.

Summary of developments since last submission

- The UK Government has virtually and unilaterally abandoned the Stormont House Agreement. Furthermore, it has failed to provide any details of its alternative proposal to deal with the legacy of the conflict in the North of Ireland, as requested by the Committee of Ministers in September 2020.
- The Office of the Police Ombudsman for Northern Ireland continues to be under-resourced and this is having a remarkable impact on that organisation's ability to investigate legacy cases.
- The Legacy Investigation Branch of the PSNI continues to be tasked with investigating legacy cases even though its processes are not Article 2 ECHR compliant.
- The Public Prosecution Service has decided not to prosecute a well known State agent, his handlers and a former PPS employee, thus raising reasonable doubts about the assured independence of police investigations and the general attitude of the UK Government to ensure State impunity.

Stormont House Agreement

As explained in previous submissions, RFJ welcomed the commitment to implementation of the institutional architecture agreed in 2014 by all parties in the North of Ireland and the UK and Irish Governments around dealing with the past as part of the Stormont House Agreement (SHA). This included the establishment of an Historical Investigations Unit (HIU), which would be the key element in terms of the UK's international human rights obligations and would benefit a greater number of victims and survivors from across the community.

Progress towards implementation should have been the task of the UK government through its Northern Ireland Office (NIO). Instead, the UK Government took the unilateral decision to withdraw from the SHA on 18 March 2020, in a further attempt to avoid its legal obligations by protecting those within its armed forces and those within illegal organisations they colluded with. This proposal was and still is hopelessly vague, presenting deep contradictions with the Government's international legal obligations in general, and with Article 2 of the ECHR in particular.

The UK Government has failed to provide any details about its new plan of action to deal with the legacy of the conflict in the North of Ireland as requested by the Committee of Ministers (the Committee) in September 2020. Moreover, in the latest document submitted for consideration of the Committee,[1] the Government did not even mention either the SHA or the alternative proposal. The wilful lack of any progress in this matter shows that the only 'plan of action' in the UK Government's agenda is the perpetuation of impunity for British soldiers and

[1] Information provided by the United Kingdom Government on 28/10/2020, found in: https://rm.coe.int/1390th-meeting-1-3-december-2020-dh-rule-9-2-mckerr/1680a0256f (accessed in November 2020).

a virtual amnesty for those who colluded with paramilitary organisations. Its ultimate aim is to prevent the truth from emerging about the British authorities' role in the conflict.

Another example of this agenda is the Government's highly controversial Overseas Operations (Service Personnel and Veterans) Bill, which seeks to limit the ability to prosecute British soldiers for offences committed overseas, including torture and war crimes. The Bill is currently in the third reading stage in the House of Commons, and if passed, it would breach several human rights treaties and legal obligations, not least Article 2 and 3 ECHR. It is an open attack to the rule of law, and it shows the direction of travel of this Government; it simply makes explicit what it has been doing in the North of Ireland for the last two decades.

The concerns that we have been outlining in past submissions, therefore, remain, and we expect an interim resolution against the UK Government in light of the latest (lack of) developments. We believe the Committee's scrutiny of the UK Government is and will continue to be an important oversight to a government that has thus far prevaricated and failed in fulfilling its legal duties in respect of its role during the conflict between 1968 and 1998. The British Government should once again be reminded of the international legal obligations it holds to victims and survivors of our conflict.

Office of the Police Ombudsman for Northern Ireland (OPONI)

As mentioned in previous submissions, the OPONI is under-resourced, and the lack of funding is having a remarkable impact on that organisation's ability to investigate. Following a legal

challenge in 2017, when the relatives of a victim shot dead were told the OPONI's inquiry was not expected to be completed until 2025 at least, the judge criticised the 'systemic and persistent' underfunding of the OPONI.[2] Despite this strong court ruling, the situation remains the same, according to the Office. No further funding stream has been identified nor has OPONI been able to employ more staff.

The Office has continuously requested appropriate funding and resources to effectively accomplish its mandate to investigate legacy issues, but those petitions have been ignored by civil servants and politicians. In a meeting with RFJ in January 2020, the current Police Ombudsman, Marie Anderson, informed us that the OPONI now has 437 historical complaints to be investigated, and still fewer than 30 members of staff to carry out that job.

More recently, in October 2020, RFJ have been made aware of the lack of progress in two particular cases that are within the remit of the OPONI due to lack of resources. According to staff of the Office, they have made a business case to the Department of Justice for resources to employ 18 more staff to assist in legacy investigations. The Department of Justice has still not agreed to allocate these resources. Thus, the solicitors involved in those cases are currently working on a judicial review against the OPONI, the Department of Justice and the Executive.

It is worrying that the UK Government failed to mention these issues in its last submission to the Committee in October 2020, and we respectfully ask the Ministers to question the Government in this regard.

[2] Bell's (Patricia) Application [2017] NIQB 38.

The Legacy Investigation Branch of the Police Service of Northern Ireland

The Legacy Investigation Branch (LIB) of the Police Service of Northern Ireland (PSNI) is still tasked with investigating conflict-related deaths, despite clear judicial ruling that it lacks the independence required by Article 2 of the ECHR.[3] These court cases have been unequivocal about the current lack of independence of the LIB, stating that it is not possible for the LIB, as part of the PSNI, effectively and independently to investigate any conflict-related cases.[4]

The UK Government's most recent submission in October 2020 emphasised the existence of necessary structures and procedures within the criminal justice system of the UK "to secure the requisite independence of investigating police officers from those implicated in the incidents", referring to the possibility of drawing investigative teams from across UK enforcement services. An example of this is the ongoing investigation known as Operation Kenova, led by former Chief Constable of Bedfordshire police Jon Boutcher, into a range of activities surrounding a State agent codenamed *Stakeknife*, who is believed to have been involved in the commission of criminal offences during the conflict with the knowledge and support of the British authorities. This mechanism, however, is no guarantee for Article 2 compliant investigations and does not solve the problem the courts have already pointed to.

It is important to reiterate that the RUC was an organisation that had to be fundamentally transformed and rehabilitated as part of the peace agreement precisely because of its

[3] McQuillan's (Margaret) Application [2019] NICA 13 https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Margaret%20McQuillan%20-%2019.3.19.pdf; Barnard's (Edward) Application [2017] NIQB 82 https://judiciaryni.uk/judicial-decisions/2017niqb-104; and McKenna's (Mary) application [2017] NIQB 96 https://judiciaryni.uk/sites/judiciary/files/decisions/McKenna%20%28Mary%27s%29%20Application.pdf.

[4] See, for instance, paragraph 191 from Barnard's (Edward) Application [2017] NIQB 82: "The ability of the LIB to continue the work of the HET is undermined by the fact that it has (i) less resources, (ii) significantly reduced scope and (iii) is not independent in the manner required by Article 2 and the package of measures."

sectarian make up and widespread involvement in human rights abuses including those under examination by the LIB. Further concerns exist as many former RUC officers are employed within the PSNI in a civilian capacity having left with huge financial severance packages to make way for change and new recruits; they then entered the PSNI shortly afterwards as civilian workers. As such, the Office of the Police Ombudsman, for instance, has no oversight of these former RUC officers, as they are technically not serving officers. Moreover, the Ombudsman does not have the power to compel such individuals to attend for interview.

One area where PSNI behaviour and policy demonstrates their commitment to protecting the supposed reputation of its predecessor, the RUC, and hiding its violations, is the question of disclosure. The PSNI is the custodian of all the records – amounting to many millions of documents – relating to investigations and intelligence arising from the conflict. Successive Chief Constables have said that they would be delighted to pass this information on to the HIU so that the PSNI could concentrate on day to day policing.

Yet the PSNI continues to operate byzantine arrangements for disclosure which frustrate not only victims and bereaved families who are suing the Chief Constable or seeking fresh inquests; the PSNI also frustrate court orders requiring discovery and disclosure. To RFJ's knowledge, there has never been a case where the PSNI are proactive in providing information. There is always effort to draw out the process, provide information piecemeal and redact excessively.

An example that has recently exposed the general attitude of the PSNI regarding legacy issues is the lack of action of the police service in the *Cairns case*. Brothers Gerard and Rory Cairns were murdered by loyalists at their home in County Armagh on the 28th of October 1993, with the participation of State agents. This aspect was revealed by the BBC 'Spotlight' programme in October 2019, in which a former loyalist killer and close associate of three agents involved

in the murder spoke exclusively to the programme. Despite all the evidence revealed to BBC journalists a year ago, the PSNI have not contacted the family, the BBC or the loyalist who gave the exclusive information, nor have they taken any further actions in the case.[5]

In all this, it is necessary to bear in mind that the Chief Constable of the PSNI is facing 900 civil cases in respect of legacy – a further indication that there is widespread public dissatisfaction with that organisation's approach to conflict-related incidents. While it is no doubt true that the PSNI has a statutory obligation to hold unsolved murder files, its capacity to investigate these in an Article 2 compliant manner remains contested by the families RFJ represents.

And whilst the PSNI implement a deliberate practice of stonewalling and playing politics with the past for State and strategic self-interest – maintaining its past narrative to which disclosure, truth and accountability all pose a threat and will certainly alter significantly that narrative – it is equally frustrating for bereaved families to have to witness the PSNI also publicly position themselves as then being the victims of huge demands and burdens they can't meet and for which they do not have the resources to deliver; that aside from not being Article 2 compliant.

We therefore respectfully request the Committee to urge the UK Government that the only way forward is for Article 2 compliant investigations. The PSNI has proved it is not the vehicle for this; the mechanisms agreed within the SHA are.

[5] See RFJ, *'No PSNI action on Cairns boys collusion and murders'* in https://www.relativesforjustice.com/no-psni-action-on-cairns-boys-collusion-and-murders/ (accessed in November 2020) and RFJ, 'Cairns family ask why PSNI did nothing to investigate the killings of Gerard and Rory' in https://www.relativesforjustice.com/cairns-family-ask-why-psni-did-nothing-to-investigate-the-killings-of-gerard-and-rory/ (accessed in November 2020). See also Andrée Murphy, *'Cairns double murder case shows that on legacy, PSNI and RUC are no different'* in Belfast Media (https://belfastmedia.com/on-legacy-the-psni-and-ruc-are-no-different) accessed in November 2020.

The Public Prosecution Service

As mentioned in the previous section, former Chief Constable Jon Boutcher is leading the investigation known as Operation Kenova, and he is responsible for the delivery of the final reports through the Chief Constable for the PSNI to the Director of Public Prosecutions (DPP). These can include files with prosecutorial recommendations for the consideration of the latter, as has recently been done. It is noteworthy, however, that the members of Operation Kenova have previously said they do not think prosecutions are the way forward.

On the 29th of October 2020, the DPP made a public statement to announce the first decision adopted by the Public Prosecution Service (PPS) in respect of four individuals reported on files received from the Operation Kenova investigation team.[6] The DPP decided not to take forward charges of perjury against the agent *Stakeknife* and charges of misconduct in public office regarding two members of security forces and one former employee of the PPS. This highly disappointing decision has left the bereaved families wondering, once again, if justice and truth are possible when State agents and their handlers are the subject of inquiry.

Indeed, one disquieting – but unfortunately, not surprising – aspect of the public statement regarding the independence of the investigation process can be found in paragraphs 3 and 4 of the document, where national security and the involvement of the Government are mentioned as reasons to inhibit a truthful public account which might be embarrassing or shows the commission of criminal offences by State operatives.

[6] PPS public statement: https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Public%20Statement%2029.10.20.pdf (accessed November 2020).

This is yet another example of 'national security' being used to close off investigations into criminal acts by State agents, allowing a *de facto* form of State impunity that RFJ have long been denouncing. Beyond the violation of human rights that this represents, it also creates considerable doubt regarding the assurances of independence given by the UK Government.

Apart from that, the questions we raised in our previous submission of August 2020 in terms of the DPP's reliance on the LIB for investigating legacy cases remain. We therefore invite the Committee to challenge the Government in these very serious matters.

Final observations

Unfortunately, the concluding remarks from our previous Rule 9 submissions - in August 2019, and February, April and August this year – remain apposite, and we repeat some of them below:

"This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in the North of Ireland. The evidence does not support a conclusion that a 'package of measures' is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among politicians. Rather, it points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state employees and agents.

"Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable."

We mentioned a blatant example on our previous submissions in April and August 2020; the fact that the UK Government had decided not to provide the requested information on the General Measures or the Finucane case to the Committee. The 'developments' since then – the brief and ignominious "action plan" of the British Government submitted to the Committee on the 1st of June 2020 and the failure to give further details since then, and the *intention* of the Secretary of State to respond to the Supreme Court judgement regarding the case of

Patrick Finucane by the end of November 2020 – have brought no advancement nor clarification into the scene but a dismal prospect of the intentions of the UK Government to once again avoid its legal obligations.

It is noteworthy in this regard another recent example of disregard for legal obligations and therefore the rule of law on the part of the British Government, which is not exclusive to legacy matters but instead, seems to be the general culture within structures of the State. In August 2020, the Home Office shared a video on social media referencing crossings of the English Channel by asylum seekers in small boats, with the caption: “We are working to remove migrants with no right to remain in the UK. But currently return regulations are rigid and open to abuse... allowing activist lawyers to delay and disrupt returns.” The video was widely condemned, and the Government was forced to take it down, but similar messages were aired during the Conservative Party conference in October 2020, when Home Secretary Priti Patel referred to "do-gooders" and "lefty lawyers" in a speech on what she called the "broken" asylum system.

This has been – and still is – the subject of fierce criticism, and the last disapproval has come from former Secretary General of the United Nations Ban Ki-moon, who condemned the issue during the opening of the annual conference of the International Bar Association on the 3rd of November 2020. He said that “labelling lawyers who are simply doing their jobs as ‘activists’ is both disingenuous and dangerous” and added that attacks on lawyers, “sometimes from the highest levels of government” assault the rule of law. Ban Ki-moon labelled this as a factor weakening “the fabric of our societies”. According to him, “if governments are genuine in their commitment to "build back better" from the pandemic, then they must uphold their

international human rights obligations and refrain from turning lawyers into political scapegoats".[7]

Indeed, the commitment to prevention or ending of impunity is the single greatest signal to victims and survivors that society and the State are committed to upholding their rights and willing to address their suffering. For decades family members of people killed and those who have suffered gross violations have lived with the impunity of the actors who caused them harm and systemic cover-up of those crimes. The UK Government has signed and ratified human rights conventions and treaties and it has legal obligations. It is therefore incumbent that the UK Government adheres to the rule of law, and it gets openly and honestly involved in the development and implementation of comprehensive transitional justice mechanisms in the North of Ireland.

"To sum up, this is a matter of absolute human rights, and its relevance and the gravity of the situation require a shift on the UK Government towards an unconditional, immediate and honest commitment to human rights and transitional justice, to adhere to its international legal obligations and the rule of law."

[7] Michael Cross, *'IBA: Ex-UN chief condemns 'activists' label'* in the Law Society Gazette (03-11-2020) (https://www.lawgazette.co.uk/news/iba-ex-un-chief-condemns-activists-label/5106244.article?utm_source=gazette_newsletter&utm_medium=email&utm_campaign=Deloitte+acquisition+coup+%7c+Ex-UN+chief+condemns+%e2%80%98activists%27+slur+%7c+Pro+Bono+Week_11%2f03%2f2020) accessed in November 2020.