RELATIVES FOR JUSTICE
The untold stories of Relatives, Victims, and Survivors

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Rule 9 submission to the

Committee of Ministers of the Council of Europe

September 2022

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 international human rights bodies, RFJ has made several submissions to the Committee of Ministers (the Committee), most recently in February 2022, as well as a brief letter sent in June 2022. The current submission seeks to provide an update of developments in light of the publication of the Northern Ireland Troubles (Legacy and Reconciliation) Bill.

We understand 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, and as we have been warning the Committee for years, 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.

General and individual measures

Our previous submissions have outlined and criticised the attitude of the UK Government regarding its international legal obligations in general, and its unilateral decision to abandon the Stormont House Agreement (SHA) in order to introduce a *de facto* amnesty proposal for all conflict-related deaths in particular. Since the first official announcement in March 2020 the British Government has offered little to no clarifications as to the justification, methodology, and desired outcomes of its plans, even presenting contradictory submissions to the Committee. These proposals have now been embodied in a Bill that is currently in the second reading in the House of Lords. Even at this critical stage, the UK Government failed to meet the deadline to submit information with the answers requested by the Committee in June 2022, despite having rushed a submission in an attempt to bypass full scrutiny by NGOs and therefore by the Committee itself a week prior to the 1436th meeting.

The *Northern Ireland Troubles (Legacy and Reconciliation) Bill* (the Bill) was tabled in the British House of Commons in Westminster on the 17th of May 2022. In keeping with the approach of the then British Secretary of State (SoS) at the NIO, Brandon Lewis, there was not even a statement in Parliament on that occasion, and the vote on the Bill showed high levels of division; it passed by 285 to 208, a majority of 77. Yet it was opposed by all MPs from the North of Ireland, the jurisdiction where it is of most relevance; a clear indication of the anti-democratic approach of the NIO. Then, on the second reading of the Bill a week later, it was announced that the Bill would be fast-tracked through the House of Commons in two days rather than – as is usual with most legislation – being considered in detail in a committee. Both of these incidents display the high-handed and arbitrary attitude of this Conservative British Government on the issue of the legacy of the conflict.

Furthermore, in his remarks in the House of Commons on the second reading of the Bill, the British SoS announced a brutal arrangement with arbitrary deadlines for closing down legacy inquests and civil cases. In the case of the former ones, the Bill would shut down inquests that have not reached a randomly chosen stage by 1st May 2023; for the latter ones, the deadline has been even more extreme, since cases lodged after first reading of the Bill (the day of or the day before the draft legislation was published; there is some confusion) have been declared null and void. One wonders at the notion that a piece of draft legislation can retrospectively decide what cases can and can't proceed based on a deadline that gave no notice. We expect these arrangements will be challenged in court in due course.

Unfortunately, the detrimental effects of the Bill are far more reaching.

The Bill is set to dismantle all the measures – general and individual – ordered by the Committee as part of the execution of judgements of the European Court of Human Rights. Furthermore, if passed, the Bill would be in breach of the European Convention of Human Rights (ECHR), as well as the provisions of the Good Friday Agreement (GFA) regarding the incorporation of the ECHR and the powers of the devolved institutions, as flagged not only by us but also by academics, lawyers, human rights experts, NGOs, national organisations, and the Irish Government. Specifically, the Bill is not compliant with Articles 2 and 3 of the ECHR; it is consequently in breach of the case law of the ECtHR too, which has developed a set of procedural requirements for state institutions to follow.

Principal among those procedural obligations is the independence, thoroughness and promptness of an investigation capable of identifying the perpetrator(s) and, if necessary, leading to a prosecution. This, contrary to what the UK authorities have stated in their last submission, is absent throughout the Bill. The promptitude requirement has already been

consistently breached by those same public authorities' delay in past and current processes. Independence is also compromised by the fact that the SoS has too much influence over the make-up and functions of the Independent Commission for Reconciliation and Information Recovery (ICRIR) proposed on the Bill. In fact, and despite having used the term 'independent' in the name of the body, the purpose of the act is to avoid a state obligation to investigate independently.

In developing their proposals, the Northern Ireland Office (NIO) did not consult, co-operate or work jointly with the Irish Government as required by the GFA as has been the practice when complex or controversial plans are being worked on. Unlike the SHA, there was no negotiation with political parties in the North; no co-guarantor-ship with the Irish Government; nor is there respect for the devolved structures under devolution. Whereas under the terms of the SHA key appointments to the Commissions were allocated amongst interested parties – the Executive Office, the NIO, the Irish Government, etc. – under the Bill, all appointments are in the gift of the SoS. S/He would appoint all the Commissioners and the Chief Commissioner of the ICRIR; s/he would appoint the Investigations Commissioner; s/he would issue guidance and regulations which were to govern various aspects of the ICRIR's work; s/he would have a say over what cases could and could not be taken on by the ICRIR; s/he could issue regulations concerning the handling and holding of information and evidence; and s/he would have a say over the putative destruction of evidence. Having included these wide functions in the Bill to now just express that the "ICRIR will have full operational independence" in a short paragraph of the UK Government's latest submission is no less than an insult.

Rather than building the capacity of the devolution settlement, this British Government has launched a power grab which also undermines the role of the police, the judiciary and the

courts. Indeed, this is a clear undermining of the rule of law as the SoS reaches through these significant legal institutions like a colonial governor grabbing authority from them to cast a blanket of secrecy over the role of the State during the conflict. All in all, the role and influence of the British Government over the ICRIR, its leadership, personnel and functions actively undermine the notion that this can be an independent body of the type that it is reasonable to expect to complete the functions of a transitional justice mechanism worthy of the name.

In addition, the Bill is a further blow to victims and survivors and adds to the trauma they experience as they wait, and wait, and wait for their loss to be addressed in the context of legacy proposals. Seeking to reveal the truth about their loved one's death, they have sought remedy from the available mechanisms while the UK Government delayed and delayed the implementation of the SHA; whether through inquests, civil cases, police investigations, and complaints to the Police Ombudsman (OPONI), victims and survivors have slowly and painfully been dragging the truth from the institutions of the British State. On each and every occasion, the State has deployed its solicitors and barristers – at public expense – to delay the timeous release of the information it holds about the actions of state agents in killings during the conflict. The Bill now proposes not only to block cases that have been waiting and battling for information for years, but it also proposes to close them off completely for a review in which the families have absolutely no legal redress and cannot have their own lawyers acting on their own behalf. The impact on relatives seeking redress is cruel in the extreme and we believe it amounts to psychological torture, hence breaching Article 3 ECHR.

The latest communication of the UK Government *explains* that the term 'review' "encompasses a full, police-equivalent criminal investigation – which may be needed in some cases to satisfy the Article 2 & 3 procedural obligation. However, it is right that the ICRIR also has flexibility to

determine how it can best fulfil the needs of victims and survivors in terms of the provision of information in each specific case, particularly where there is no procedural obligation."[1] That 'flexibility' and discretion contradicts the previously stated description of the 'reviews' of the ICRIR, and we believe it is yet another tool to avoid the Government's legal obligations. In fact, the latest submission of the UK Government adds that the procedural obligations mentioned above "are not absolute" and one can only "ensure the recovery of information about Troubles-related deaths and serious incidents" if immunity is granted.[2]

This is totally deceptive and misleading.

In his remarks in the House of Commons on the second reading of the Bill, the then SoS Brandon Lewis claimed that the Bill was necessary because the current system is not working. In fact, the problem for the British Government is that the system is beginning to work too well. Recent reports by the Police Ombudsman have revealed clearly how rotten the RUC was and the way in which collusion with loyalists happened on an enormous scale.[3] The Ballymurphy inquest exonerated the victims and called British Army killings "unjustified and

[1] Communication from the UK authorities (08/08/2022) concerning the case of McKERR v. the UK (Application No. 28883/95) in preparation of the 1443rd meeting of the Committee; question 2, paragraph 1. Bold lettering added by RFJ.
[2] *Ibis*., question 7, paragraph 2.
[3] Statutory Report relating to the Investigation into Police Handling of Loyalist Paramilitary Murders and Attempted Murders in South Belfast in the Period 1990-1998 (Operation Achille, published on 08/02/2022) available at https://www.policeombudsman.org/PONI/files/73/73f15f1c-4258-42ee-a415-9eb43f607eda.pdf; Statutory Report relating to the Investigation into Police Handling of Certain Loyalist Paramilitary Murders and Attempted Murders in the North West Of Northern Ireland during the Period 1989 to 1993 (Operation Greenwich, published on 14/01/2022) available at https://www.policeombudsman.org/PONI/files/e0/e0cb934a-760f-4885-b423-b4fa40375aa4.pdf; Statutory Report relating to the Circumstances of the Murder of Damien Walsh at the Dairy Farm Complex on 25 March 1993 (Operation Shiloh, published on 22/07/2022) available at https://www.policeombudsman.org/PONI/files/05/0506ab54-7811-4e3e-ac6e-5d4294d2e490.pdf.

unjustifiable".[4] Civil actions are resulting in major pay-outs by the State to victims of state violence.[5] The record of the British State is finally being noted in official records.

The only real problem with the current system is getting departments of the British Government to yield the information and documentation they hold in respect of the various incidents being examined by the courts and statutory institutions. In this process of discovery, the police, the Ministry of Defence, the NIO, the Cabinet Office, the security services (MI5) have all dragged their feet interminably and tried to obfuscate and procrastinate, coming up with more and more byzantine systems of disclosure. In that sense the arrangements in the Bill for holding and using information – especially sensitive information – is simply the latest iteration of an old song.

The architecture of the Bill would create a playground for those organisations that operated under the cover of state secrecy to bury their dirty linen. It would allow RUC and British Army intelligence handlers to continue lying, peddling misinformation, justifying illegal actions under cover of the provisions of the Bill. These are designed to prevent information emerging which would damage the British Government's propaganda about their role during the conflict. It would also allow for a settling of old scores with former comrades who have since fallen out. People could come forward with information, providing accounts that implicate others while

[4] Summary of Findings in the matter of a series of deaths that occurred in August 1971 at Ballymurphy, West Belfast, delivered on 11th May 2021 by Justice Keegan, available at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20findings%20-%20In%20the%20matter%20of%20a%20series%20of%20deaths%20that%20occurred%20in%20August%201971%20at%20Ballymurphy%2C%20West%20Belfast%20-%2011%20May%2021.pdf.

[5] See, for instance, Rory Carroll, '*Ballymurphy massacre: MoD to pay damages to bereaved relatives'* published in The Guardian on 13/06/2022, available at https://www.theguardian.com/uk-news/2022/jun/13/ballymurphy-massacre-bereaved-to-receive-damages-from-mod-belfast-northern-ireland; or BBC News, *'Bloody Sunday: £900,000 in damages for victims'* published on 25/10/2018, available at https://www.bbc.co.uk/news/uk-northern-ireland-foyle-west-45981720.

obtaining immunity for their own actions. In this way, it could actively undermine the peace process while legalising impunity.

There is yet another issue that has not been mentioned enough in the official commentary regarding the Bill; that is, the potential destruction of evidence the Bill will allow if passed. The Bill authorises the SoS to order the destruction of evidence, including biometric evidence, which may allow for future prosecution based on developments in forensic science. This is a major concern, given our view that the structures of the Bill are fundamentally flawed and will not work. It is therefore likely that a new process will have to emerge at some point. If, in the meantime, the SoS has exercised her or his powers to destroy evidence, it will not be available for future processes which may attract more consensus.

All in all, this is a bill that is anti-victim and contrary to the principles of transitional justice. It is a bill that contravenes human rights and the rule of law. It is a bill that cannot be fixed and must, therefore, be stopped.

The legal requirements are clear. The required mechanisms were already agreed. Legally compliant implementation of the SHA and its mechanisms is the only option forward