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

Head Office
39 Glen Road
Belfast
BT11 8BB

T: +44 (28) 90 627171
E: info@relativesforjustice.com
www.relativesforjustice.com

North Belfast Office
2-4 Brompton Park
Belfast
BT14 7LD

T: +44 (28) 96 949327
E: ardoyne@relativesforjustice.com
www.relativesforjustice.com

Mid-Ulster Office
42/44 Irish Street
Dungannon
BT70 1DQ

Tel: +44 (28) 8775 1697
E: dungannon@relativesforjustice.com
Twitter @RelsForJustice

Rule 9 submission to the

Committee of Ministers of the Council of Europe

May 2024

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

Relatives for Justice is recognised by the Inland Revenue as a Registered Charity NIC101311; And a Company Limited by Guarantee NI44611

1. 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 in 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 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 August 2023, for consideration at the 1475th meeting. Since then, the legal landscape regarding legacy issues has further deteriorated with the passing of the so-called Legacy Act. We are currently at a dangerous point where human rights and the rule of law are regressing, causing further trauma to victims and survivors of the conflict.

RFJ recognises that only consistent international scrutiny can compel the UK to fulfil its international human rights obligations regarding legacy issues. We are encouraged by the Committee's continued interest and pursuit of its mandate to maintain regular scrutiny of the UK's record. Without this, the UK Government's approach to its actions would erode the rule of law and respect for international human rights, a concern we have raised with the Committee for years.

RFJ hopes that the Committee will find the following information helpful in its continued monitoring of the UK Government's obligation to respond to the findings of the European Court in various cases from this jurisdiction.

2. General observations

RFJ welcomed the Committee's latest views and concerns in September 2023 regarding the McKerr group of cases and the then Northern Ireland Troubles (Legacy and Reconciliation) Bill. Unfortunately, the Bill has since been passed into law as the Legacy Act, effective May 1st, 2024, and the so-called Independent Commission for Reconciliation and Information Recovery (ICRIR) is now the only avenue for victims and survivors of the conflict seeking to exercise their rights to truth and justice, despite their fierce opposition to the new system.

This has had a substantial negative and re-traumatising impact on the victims and survivors we support and represent. Many of them are currently suffering severe distress and anguish as a consequence. For instance, our clinical psychologists, therapists and counsellors have observed a dramatic increase in suicidal ideation, with an increase of over 600% of victims and survivors being at risk of suicide ever since the UK Government published the command paper in July 2021, which then materialised in the Legacy Act.

In light of this, and for the reasons outlined in this and previous submissions, we respectfully submit that the Legacy Act must be repealed and the legacy mechanisms agreed upon at the Stormont House Agreement (SHA) reinstated and implemented.

3. Judgement of the High Court of Justice NI

As soon as the Legacy Act was passed in September 2023, the Belfast High Court received more than 20 applications for judicial review challenging different provisions of the Act. The Court, led by Justice Colton, selected a lead case encompassing the range of issues and grounds the applicants raised on the Legacy Act's relevant statutory provisions concerning inquests, civil

proceedings, Police Ombudsman investigations, criminal investigations, and immunity. Additionally, the Court granted leave for judicial review to six supplementary applicants, and several organisations, such as Amnesty International, were granted leave as third-party interveners.

Delivering the judgment at Belfast High Court in February 2024, Mr Justice Colton ruled that the Legacy Act's immunity scheme, which is the core feature of the Act and was ardently defended by the Tories during its passage through parliament as the crucial element to secure the truth, is unlawful and violates Articles 2 and 3 of the European Convention on Human Rights (ECHR).[1] Thus, the Court rendered sections 7(3), 12, 19, 20, 21, 22, 39, 41, and 42(1) of the Legacy Act of no force or effect.[2] The High Court judge also criticised the suggestion that the Legacy Act supports and promotes reconciliation; its broad opposition by all political parties, victims and survivors from across the entire community, and human rights experts would, in fact, suggest the opposite.

The judgement also declared that the Legacy Act was unlawful in the following matters:

> *"The court makes a declaration under section 4 of the Human Rights Act 1998 that section 43(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which provides that a relevant Troubles-related civil action that was brought on or after the day of the first reading in the House of Commons of the Bill for this Act may not be continued on or after the day on which this section comes into force is incompatible with article 6 of the European Convention on Human Rights. (…)*

[1] [2024] NIKB 11; delivered on 28 February 2024 by J Colton; para 710.
[2] *Ibid*.

"Section 43(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018, article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework has priority over this legislative provision, thereby rendering it of no force and effect. Section 43(1) shall therefore be disapplied. (…)

"The court makes a declaration under section 4 of the Human Rights Act 1998 that section 8 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 relating to the exclusion of evidence in civil proceedings is incompatible with articles 2, 3 and 6 of the European Convention on Human Rights.

"Section 8 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 is also incompatible with article 2 of the Ireland/Northern Ireland Protocol/Windsor Framework. Pursuant to section 7A of the EU (Withdrawal) Act 2018 article 2 has primacy over section 8, therefore rendering it of no force and effect. Section 8 should therefore be disapplied."[3]

Regarding the case of one of the applicants, Justice Colton ruled that: *"A declaration pursuant to section 4 of the Human Rights Act 1998 that section 41 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 in relation to the prohibition of criminal enforcement action is incompatible with article 2 of the ECHR."*[4]

Despite the outcry of conflict victims and survivors and the Labour Party's repeated intentions to repeal the Act if they win the elections, the UK Government has refused to reconsider its

[3] *Ibid*.
[4] *Ibid*, para 713.

position. In fact, the Secretary of State (SoS) has appealed to the Supreme Court against the High Court's judgement and has implemented the Legacy Act without the provisions found to be unlawful. This heinous course of action contrasts sharply with the depleting approach taken by the UK Government towards the Stormont House Agreement, which did have support from political parties and victims and survivors, unlike the Legacy Act.

One of the main pretexts used by the UK Government for establishing the ICRIR is the view of Justice Colton regarding the potential independence of the new body. However, it should be noted that the ICRIR has not yet conducted any reviews, and therefore, its level of independence remains to be determined, as pointed out by the judgement. Nonetheless, the High Court concluded that *"the proposed statutory arrangements, taken together with the policy documents published by the Commission, inject the necessary and structural independence into the ICRIR. At this remove the court concludes that the ICRIR is sufficiently independent to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR."*[5]

We respectfully disagree.

Not only is the ICRIR and its process strongly dependent on the Secretary of State – who has been the very person trying to prevent information being disclosed in legacy inquests until the very last day before the guillotine date of the Legacy Act – but also, the Commissioner for Investigations of the ICRIR, Mr Peter Sheridan, is a former RUC and PSNI officer who made controversial remarks about the real aim of the Act, that is, that is was designed by the

[5] *Ibid*, para 284.

Government to protect former British soldiers.[6] The recent High Court judgement recognised the extensive powers and discretion afforded to the Commissioner for Investigations. However, it also emphasised that the practical independence, public scrutiny, and overall adherence to the procedural requirements of Articles 2 and 3 of the ECHR will depend on how the Commissioner performs his reviews. The theory may seem plausible and appropriate, but our experience and collective memory suggest otherwise.

The Legacy Act was designed to secure state impunity and, rather than draw a line under the past, to strikethrough it. The immunity scheme was its star feature, and the Belfast High Court has deemed it unlawful. This aspect of impunity has been widely acknowledged and criticised internationally. A recent report on impunity published by an international expert panel and convened by the Norwegian Centre for Human Rights has found that "if its decision to effectively allow impunity for human rights abuses – through the Legacy Act – is allowed to go ahead, it is likely to be used by repressive regimes around the world to justify and legitimise their own policies of impunity. Similarly, the apparent lack of respect for human rights demonstrated by the Legacy Act could contribute to a human rights backlash in established democracies and also give succour to authoritarian regimes around the world."[7]

It is also of significance that Sir Declan Morgan willingly embraced the Legacy Bill (Act) in all of its iterations early on and would have undoubtedly implemented the immunity provisions had they not been indicted and found to be unlawful. We believe this to be instructive.

[6] Connla Young, *'Peter Sheridan: Legacy Law designed to protect British soldiers'* published in the Irish News on 28/11/2023, available at https://www.irishnews.com/news/northernirelandnews/2023/11/28/news/peter_sheridan_legacy_law_designed_to_protect_british_soldiers-3795547/ (accessed in May 2024).

[7] NCHR, *'Bitter Legacy: State Impunity in the Northern Ireland Conflict'* compiled by the International Expert Panel, published in April 2024, available at https://www.jus.uio.no/smr/english/about/id/news/2024/report-reveals-state-impunity-in-northern-ireland-.html (accessed in May 2024), p 8.

Therefore, allowing the Legacy Act and the ICRIR to be implemented would have significant risks, not only for the victims and survivors we support and represent but also for the wider international community. We respectfully request that the Ministers call on the UK Government to reconsider its position.

4. The inter-state case before the European Court of Human Rights

On 17 January 2024, the Government of Ireland lodged an inter-state application against the United Kingdom under Article 33 ECHR concerning the Legacy Act.[8] The Irish Government argue that the Act is not compatible with the European Convention, specifically with Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 6 (right to a fair trial), 13 (right to an effective remedy), and 14 (prohibition of discrimination). RFJ welcomed the Irish Government's decision, as did most victims' groups and political parties in the North of Ireland.

We note that the UK Government requested that the Committee consider pausing the supervision of the McKerr group of cases until the legal proceedings of the inter-state case and the Supreme Court are concluded in their letter dated March 28th, 2024. This would have been a fair request if the UK Government had paused the Legacy Act and reconsidered its position. Unfortunately, however, they have not paused any of the damaging steps. Instead, the UK Government has effectively closed off all previous means for victims and survivors to seek truth and some form of justice, thus re-traumatising entire families. It is currently encouraging them to engage with the ICRIR despite the legal proceedings against it. It appears that the UK

[8] Application no. 1859/24.

Government is trying to evade any scrutiny while acting recklessly towards the erosion of human rights and the rule of law.

We kindly urge the Ministers to exercise their monitoring role during the 1501st Committee meeting and to pressure the UK Government to reconsider their position regarding the Legacy Act and its implementation.

5. Independent Commission for Reconciliation and Information Recovery (ICRIR)

Following the unilateral process of creating and establishing the so-called Independent Commission for Reconciliation and Information Recovery (ICRIR), which the UK Government started even before the Bill had completed passage through parliament, the UK has continued to press ahead despite the judgment of the Belfast High Court and the inter-state case lodged by the Irish Government in the European Court of Human Rights.

As part of a round of meetings with stakeholders seeking to explain his decision to take on the role, RFJ accepted a request for a meeting with Sir Declan Morgan, now head of the ICRIR, in July 2023. When asked if he considered the new legislation compliant with the European Convention on Human Rights, Mr Morgan said that if the courts were to find the Bill (now law) to be in breach of Articles 2 and 3 ECHR, he would have no option other than to walk away. It seems that he has disregarded the judgement of the High Court, just as he has ignored the strong opposition to the Legacy Act and the inter-state case and, instead, has pushed for the implementation of the ICRIR.

This is most disappointing for the evident reasons set out in the following section, but also for the disregard it shows towards victims and survivors of the conflict.

6. The impact of the Legacy Act on general measures

6.1. Office of the Police Ombudsman (OPONI)

The Legacy Act has effectively ended the more than 300 legacy investigations into police misconduct and criminality that were part of the Office of the Police Ombudsman's caseload, leaving families devastated.

In a sample letter delivered to tens of bereaved relatives who had the reasonable expectation of being served with a report into their loved ones' deaths after an Article 2 compliant investigation, the Ombudsman informed that she was officially axing the cases. She also disclosed that her office has been working with the ICRIR in order to establish and implement a system for the transfer of cases and information, which were provided to the Office in confidence and trust by families who, in the majority, now oppose the Legacy Act and the ICRIR. It seems that the Ombudsman had concluded that the ICRIR was suitable for its intended purpose even before the courts had the chance to deliver a judgment.

This brings up concerns regarding the fairness and objectivity of the Ombudsman's decision-making process, adding to the trauma experienced by the bereaved and injured individuals who had sought answers from the Office in their respective cases.

6.2. Civil proceedings

Since its passage through Parliament last year, the Legacy Act has already prevented new civil cases from being lodged in court, thus denying families access

to truth and justice. It should be noted that before the UK Government introduced the new law, state agencies faced around 900 civil cases regarding legacy matters. These proceedings were delivering some truth to families, and many civil actions were resulting in significant pay-outs by the State to victims of state violence. This avenue, too, however, has now been shut down for the bereaved and injured of the conflict.

6.3. Police investigations

As with all the other general measures that the Committee has monitored, police investigations within the caseload of the Legacy Investigations Branch (LIB) of the PSNI, which involved hundreds of deaths, have also been halted since May 1, 2024.

6.4. Legacy inquests

Due to the Legacy Act, 36 legacy inquests involving 74 deaths were effectively halted on May 1, 2024. Fourteen had commenced but did not reach the findings stage required by the new law; four were part of the 5-year plan of the Legacy Inquest Unit (LIU). Still, they had not yet been allocated a coroner, and 18 were new inquest referrals made by the Attorney General. Many of the inquests from the first group sat right until the close of business on the 30th of April, with coroners expressing their disappointment as the legislation had stripped them of their powers, which prevented them from completing their work. The victims and survivors affected by the guillotine date were left frustrated and heartbroken. However, we believe some of those inquests could have been completed on time if state agencies had cooperated with the Coroner's Service *bona fide*.

RFJ has attended over a hundred inquest hearings in the last year alone, accompanying and supporting families in the courts and drafting and publishing reports, which can be found on our website. In doing so, we have observed recurring patterns and obstruction strategies used by the Ministry of Defence (MoD), the Secretary of State, and the Police Service of Northern Ireland (PSNI) that would indicate that the UK Government is, in fact, still involved in a crusade against the truth of their involvement in the conflict coming to light.

Several members of parliament, too, observed this, such as former SoS Peter Hain, who told the House of Lords that "State bodies appear(ed) to be openly running down the clock to May 1st when the due process that we set such store by in the United Kingdom will no longer apply in Northern Ireland, thanks to the shameful Legacy Act."[9] He added that "abject failure by the state officials and agencies to produce the necessary files in a timely fashion continue(d) despite the relevant state bodies being directed to do so".[10] In fact, one of the inquests, which was later shut down by the new law, revealed that the MoD only had one person dealing with sensitive materials for all Troubles-era inquests involving British army personnel in the lead-up to the cutoff date. This was a deliberate under-sourcing strategy that we have seen being used in other avenues, too; it was a straightforward tactic to sabotage the disclosure process in inquests to run down the clock as we neared the cutoff date of the Legacy Act.

[9] Freya McClements, *'Legacy inquests being 'sabotaged' by lack of resources, lawyer representing Troubles bereaved says'* published in the Irish Times on 14/02/2024, available at www.irishtimes.com/ireland/2024/02/14/legacy-inquests-being-sabotaged-by-lack-of-resources-lawyer-representing-troubles-bereaved-says (accessed in May 2024).
[10] *Ibid*.

Some of the inquest hearings that state agencies could not avoid revealed many more scandalous aspects, such as those heard in the inquest touching upon the death of Sean Brown, a 61-year-old GAA official abducted and murdered by loyalist paramilitaries in 1997. In an unprecedented disclosure, the court heard that a number of the individuals linked through intelligence to the murder were agents of the state. Further, the coroner also disclosed that the principle suspect in the murder had been under surveillance by MI5 for over a year save for the day Mr Brown was abducted and murdered; MI5 resuming their surveillance the day following the murder. The inquest then collapsed due to the heavy redactions carried out by state agencies, leading the coroner to call for a public inquiry as he was unable to carry out his duties. Several other coroners made similar calls in other inquests due to insufficient disclosure and heavy redactions by state agencies.

We observed yet another instance of obstructionism during the inquest into the murder of Liam Paul *'Topper'* Thompson, a 24-year-old taxi driver killed by loyalists in 1994, a case in which collusion is also suspected. Thirty years on, this was the first inquest ever to take place into the murder.

The first substantive hearings began in 2023, and the inquest was listed and expected to be completed by the guillotine date of May 1st, 2024. Shortly before the recommencement of proceedings for the last tranche of evidence in February 2024, however, the PSNI failed to provide relevant documents on time, despite having had 30 years to do so, and the inquest was once again delayed with the

prolongation of Public Interest Immunity (PII) hearings.[11] It would appear that the issue was in one folder which contained sensitive material – despite the usual redactions and the PII certificate, the coroner believed that its relevancy was significant enough to provide the next of kin with a summary of its contents, a gist, based on open justice and procedural fairness.[12]

Before any information was released, however, the Chief Constable of the PSNI and SoS Heaton-Harris challenged the coroner's ruling through judicial review, which further delayed the inquest. After looking into the matter in open and closed hearings, a High Court judge ruled that the coroner was right and that her decision to disclose the gist was, in fact, lawful.[13] This caused the Chief Constable to withdraw his original challenge and to agree on a second gist to be released to the family of Topper Thompson. Still, the SoS opposed this and brought a second challenge through judicial review. This challenge was, once again, dismissed on all grounds by the High Court.[14]

Only days from the Legacy Act's cutoff date and having already caused irreparable damage to the inquest schedule, the SoS decided to appeal that judgment in a last-

[11] Public Interest Immunity (PII), previously known as Crown privilege, is a legal principle that enables the courts to grant an order to one party, typically state agencies, allowing them to withhold evidence from the other party, usually the next-of-kin, in a legal case. This is usually "justified" on the grounds that its disclosure could be harmful to the public interest or pose a risk to national security. As we have been saying submission after submission, 'national security' has been used to close off investigations into criminal acts of state agents. There is no statutory definition of 'national security', and there has been a dramatic extension of 'national security' exemptions made to investigatory powers. The term is deliberately kept flexible. Indeed, the government has used it as a veto, trumping victims' rights to know the truth concerning the killing of their loved ones and allowing a *de facto* form of state impunity.

[12] A gist enables judges, in this instance acting as the coroner, to provide some information they believe to be relevant and necessary for open and transparent justice while also being cognisant of the duty not to disclose information that might otherwise breach 'national security'. Although a gist may not be ideal from the families' perspective, as it keeps the information secret, it still provides some insight into what information exists and is being kept from the family by state agencies.

[13] [2024] NIKB 18, delivered on 25 March 2024 by J Humphreys.

[14] [2024] NIKB 32, delivered on 25 April 2024 by J Humphreys.

ditch effort to prevent the summary of the material from being released. The Court of Appeal, which sat until the close of business on the 30th of April, dismissed the grounds presented by the SoS and ruled in favour of Justice Humphreys' judgement and the coroner's ruling – her decision had been correct and lawful all along. Despite the multiple judicial setbacks and the fact that the head of security (PSNI CC) in the North of Ireland believed national security would not be at risk if the gist were released, Mr Heaton-Harris opted to appeal that judgement in the Supreme Court. His lawyers also requested to hold the *status quo* regarding the gist, which the appeal court agreed to with the condition that the coroner can reveal the summary of the sensitive file in the future if the Supreme Court does not allow the case to proceed or if its decision supports the three judgements that different courts in the High Court in Belfast made.

It beggars belief, however, that the SoS would fight families and judges until the very last moment before the implementation of the ICRIR and the Legacy Act to conceal information that several judges and the Chief Constable of the PSNI deemed necessary, safe, and fair to release. Paul Thompson's only surviving relative, and we wonder what that file contains. Furthermore, are we now expected to believe that the Secretary of State, who fiercely opposed this and other families and has oversight over the ICRIR, will deliver all the files to the new body and, thus, to the public?

7. Conclusion

The Legacy Act is incompatible with the European Convention on Human Rights and breaches human rights, the rule of law and the fundamental democratic principles. The ICRIR, as the 'only show in town' for victims and survivors, does not comply with the procedural requirements set out by the European Court of Human Rights regarding Articles 2 and 3 ECHR. The system imposed by the new law is also contrary to the principles of transitional justice, which indicate that any such mechanism should be victim-centred. The victims of the conflict have opposed this Act since its inception, but the UK Government has played deaf ears to that outcry because it did not fit with its agenda of perpetuating state impunity.

The Legacy Act must be abolished, and the Stormont House Agreement reinstated.

We make this submission as an NGO working for human rights in the context of the peace process. Our focus, however, lies with victims and survivors, the families we support and represent, as they are at the heart of our organisation and of our holistic work. Beyond legal matters and political debates, we have witnessed an effective shutting down of the avenues the bereaved and injured of the conflict once had for truth recovery and justice, although limited, and as a consequence, we are currently witnessing a decline in the mental well-being of those who suffered the most during the conflict. Now more than ever, on behalf of the thousands of victims and survivors we are privileged to represent, we appeal for your help and your intervention in ensuring that their rights are upheld.