Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003

and

Hemsworth v UK, judgment final on 16 October 2013

McCaughey & Others v UK, judgment final on 16 October 2013

July 2019

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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 (FIDH). Its membership is drawn from across the community.

This Rule 9 communication is for consideration at the 1355th meeting (September 2019) of the Ministers' Deputies. CAJ has regularly made (most recently in February 2019) Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' concerning the actions of the security forces in the 1980s and 1990s in Northern Ireland. These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA).

We note that the Committee last issued an Interim Resolution in these cases in 2009 and we strongly urge it to pass a further resolution in consideration of the unimplemented individual and general measures which we outline below.

We also call upon the Committee to invoke its power to issue infringement proceedings against the UK for its delay in fully implementing the judgments in these cases under Article 46 (4) of the Convention. We respectfully submit that the contents of this Rule 9 submission, read in conjunction with our previous communications over the last 18 years, demonstrates a wilful refusal to abide by these final judgments on the part of the UK. The continued delay and obfuscation by the UK in implementing the general measures put forward as part of the 'package of measures' and the individual measures reflects a lack of 'good faith' in a manner compatible with the 'conclusions and spirit' of these judgments.

Of particular note is the UK's continued wilful failure to hold an Article 2 European Convention on Human Rights (ECHR) compliant public inquiry into the murder of Pat Finucane, despite a commitment to do so before the Committee of Ministers and an apology by a former Prime Minister for the 'shocking levels of collusion' in this murder.

The Committee of Ministers last examined the execution of these cases during its 1340th meeting, (12-14 March 2019) and adopted decisions as follows: (in summary):[1]

As regards *individual measures*

- Recalled serious regret that the investigations and related litigation in the cases of McKerr, Shanaghan, Jordan, Kelly and Others and McCaughey and Others have still not been completed;
- Recalled the decision of 2015 to resume consideration of reopening the Finucane case once the domestic litigation had concluded and UK had provided its response.

As regards *general measures*

- Reiterated serious concerns about the delay in the establishment of the Historical Investigations Unit (HIU) and other legacy institutions under the SHA;
- Noted that the public consultation on the SHA had concluded in October 2018, and the UK commitment to introduce legislation into the UK Parliament in the 'near future';

[1] CM/Del/Dec(2019)1340/H46-30

- Strongly encouraged the UK to act on the SHA commitment, to provide a timetable for next steps, and ensure SHA legislation guarantees HIU independence in law and practice to enable effective and accessible Article 2 compliant investigations;
- Noted the announcement on 14 February 2019 of the discovery of significant police documentation relevant to Police Ombudsman legacy investigations, including Shanaghan, and welcomed the announcement of an independent review of Police Service of Northern Ireland (PSNI) disclosure to the Ombudsman by the Criminal Justice Inspector;
- Recalled the NI High Court ruling of 8 March 2018 on legacy inquest funding, and noted with satisfaction the NI Department of Justice (DoJ) announcement of funding for the Lord Chief Justice's Legacy Inquest Unit proposals, and looked forward to further updates on implementation.

On the 21 June 2019 (in relation to Finucane) and on 9 July 2019 on broader measures the UK issued Communications in response to the above decisions.[2]

Summary of Key Developments since previous decisions

Individual Measures

- *Finucane* - the UK Action Plan makes no commitment to an Article 2 compliant investigation, and we would urge the CM to reopen consideration of this case.
- *Kelly & Ors* - inquest preliminary hearing listed on 18 September 2019 with no substantive hearing date provided and ongoing civil proceedings initiated by the next of kin.
- *Shanaghan*- further indeterminate delay in the provision of Police Ombudsman's report, and the next of kin still have not been provided with the HET report.
- *McKerr* – inquest preliminary hearing listed on 4 October 2019 with no substantive hearing date provided.
- *Jordan* - awaiting judgment since 2018 on whether damages are payable for a breach of the Article 2 requirement to hold an inquest promptly. The application to quash the inquest verdict was dismissed and a decision is still outstanding on whether the Public Prosecution Service will prosecute two police witnesses for perjury.
- *McCaughey* - an application was lodged with the ECtHR on 14 June 2018 and a decision on admissibility is still awaited.

General Measures

- The UK continues to delay the establishment of the HIU and other SHA legacy institutions. No legislation has been introduced into the UK Parliament, nor has a timetable been set for its introduction.
- On the 5 July 2019 the UK published its response to the SHA consultation document. This document is however limited to generally summarising the views of consultees (including demonstrating majority support for the SHA), but does not set out a UK

[2] DH-DD(2019)712, 25 June 2019; DH-DD(2019)772, 9 July 2019.

policy response to the consultation as to how, if at all, the UK intends to amend and introduce the SHA bill.

- Despite a proposed amnesty or 'Statute of Limitations' for members of the security forces conflicting with the SHA, and having previously been ruled out by the Conservative UK government, other legislation was amended in the UK Parliament with Conservative support, to place duties on UK Ministers to report on progress to amend the prosecutorial process with a view to progressing a security force amnesty in NI legacy cases;
- A new Police Ombudsman took up office in July 2019. The appointment was made by the Secretary of State, in the absence of devolved ministers. The delayed PSNI disclosure to the Ombudsman (on which the Criminal Justice Inspector is due to complete a review in August 2019) resulted in key legacy reports, including Shanaghan, not being published during the tenure of the outgoing Ombudsman. In late May 2019, the NI High Court ruled that the search and seizures of journalistic material from two investigative journalists relating to a leaked copy of an Ombudsman report had been unlawful. The Police subsequently announced they would discontinue the investigation against the two journalists.
- A further review of outstanding legacy inquests is being carried out by the Presiding Coroner and a Legacy Inquest Unit is to be operational by 2020, following the belated release of funding. Clarification is needed on what steps are being taken by the Ministry of Defence and Police Service of Northern Ireland to discharge their disclosure obligations to these inquests given the excessive delays experienced to date.

The Stormont House Agreement legislation

The Committee of Ministers in its March 2019 decision reiterated serious concerns about the delay in the establishment of the Historical Investigations Unit (HIU) and other legacy institutions under the SHA. The decision noted that the public consultation on the SHA had concluded in October 2018, and a UK commitment to introduce legislation into the UK Parliament in the 'near future'. No legislation has however been introduced to the UK Parliament nor is there a timetable for doing so. There have been a long series of delays by the UK and this pattern is continuing.

Previous Delays

Almost five years ago, in December 2014, the UK published the Stormont House Agreement (SHA), the result of talks involving the parties in the Northern Ireland Executive and the British and Irish Governments. The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit' (HIU) to conduct Article 2 compliant investigations into conflict-related deaths and an Independent Commission for Information Retrieval (ICIR). The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant.

Our previous submissions provide detail as to the series of events which have led to a delay in the implementation of the SHA legacy provisions. The central issue which originally delayed the legislation for the HIU was the proposed insertion by the UK of a ministerial power to redact the contents of independent investigation reports by the HIU on undefined 'national security' grounds. The then Secretary of State for Northern Ireland announced a further pre-requisite of 'political consensus' between Northern Ireland parties before moving to publish the consultation document on the SHA.

In early 2017, the Northern Ireland power sharing administration collapsed in part due to the context of unfulfilled commitments from previous agreements making up the peace settlement, including the SHA. In June 2017, after a snap UK General Election, the minority Conservative administration entered into a Confidence and Supply agreement with the Democratic Unionist Party (DUP – the largest NI party). This committed to the SHA consultation and the SHA's implementation, with the qualification that the SHA bodies did not "unfairly" focus "on former members of the armed forces or police."[3]

In February 2018, an agreement was briefly reached between the DUP and Sinn Féin (the two main NI parties) to restore power sharing. Reportedly this included commitments from the UK government to Sinn Féin to proceed with the SHA consultation; not to include the question of a 'statute of limitations' for the security forces in the consultation; and to release funding for legacy inquests for that financial year.[4] Within a few days, however, the DUP withdrew its support for the deal.[5]

The UK then further delayed the SHA consultation until May 2018 due to reported strong opposition within the UK Cabinet, primarily from the Ministry of Defence. This reportedly focused on the question of an amnesty (in the form of a statute of limitations) being added

[3] DUP-Tory Confidence and Supply Agreement – financial Annex, UK Financial Support for Northern Ireland https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/uk-government-financial-support-for-northern-ireland
[4] http://eamonnmallie.com/2018/02/questions-no-answers%E2%80%8B-legacy-deal-brian-rowan/
[5] http://eamonnmallie.com/2018/02/new-light-shone-draft-agreement-eamonn-mallie/

to the SHA.[6] The SHA consultation and legislation was eventually published in May 2018 without explicit reference to a statute of limitations. The consultation was set to run until September 2018, but was subsequently extended until October 2018.

Current delays

The UK received 17,000 responses to the SHA consultation and committed to publishing a 'response to consultation' document. This itself was significantly delayed and not ultimately published until the 5 July 2019.[7]

This document, however, does not set out the UK's response to the consultation, in terms of how it intends, if at all, to amend the draft bill in light of the consultation responses. Rather it is limited to general analysis on the views of consultees.

The document does state that, "Of those who expressed a view on the Stormont House Agreement (SHA) proposals, the majority indicated broad support for the institutional framework", and also "The clear majority of all respondents to the consultation argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters." There were other areas of consensus

Following the publication of this document, the UK issued its communication of the 9 July 2019 to the Committee of Ministers. This, however, contains no commitment nor timetable to introduce the SHA legacy bill into the UK Parliament.

The first section of this UK Communication also focuses in detail on talks to re-establish power sharing in Northern Ireland. The British and Irish governments reconvened talks in May 2019, following the killing of Journalist Lyra McKee by dissident republicans. The talks involve the convening of five working groups – none of which deal with legacy issues or the SHA.[8] The UK focus on these talks in its communication with the CM is therefore misleading as progress on the SHA bill, which will be introduced into the UK Parliament and engages the UKs international obligations, is not dependent on the talks to restore power sharing.

It is of particular significance that in its most recent Concluding Observations the UN Committee Against Torture has called for the State Party to:

> "…take urgent measures to advance and implement the Stormont House Agreement and to establish the mechanisms it contemplates for investigating conflict-related violations, particularly the historical investigations unit."[9]

It also remains seriously concerned that many allegations of torture, ill-treatment and killings in the 'Troubles' have not been effectively investigated, few perpetrators have been held to account and victims have not obtained redress.

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[6] https://www.theguardian.com/uk-news/2018/may/11/consultation-launched-unit-investigate-troubles-era-killings-northern-ireland

[7] Northern Ireland Office 'ADDRESSING THE LEGACY OF NORTHERN IRELAND'S PAST: Analysis of the consultation responses' 5 July 2019

[8] See 'Governments set out Northern Ireland talks plan' BBC News Online 7 May 2019

[9] CAT/C/GBR/CO/6, Para 41(a) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/GBR/CO/6&Lang=En

CAJ echoes its particular concern that:

> "...Even after it has been established, the mandate of a historical investigations unit will not extend to allegations of torture or ill-treatment in which the victim was not killed."[10]

The Ministers' Deputies may wish to press the UK for clarity and a clear timetable for the introduction of the SHA legislation, in an ECHR compliant manner, into the UK Parliament.

Proposals for security force amnesty and the SHA

Previous proposals for a 'Statute of Limitations' which would grant a *de facto* amnesty to the military or broader security forces were detailed in our previous submission. The UK government acknowledged a statute of limitations for the military only would conflict with international law. The Secretary of State therefore ruled out support for such a proposal.[11]

Despite this position, and the stated support for the SHA, Conservative and DUP MPs in July 2019 voted to amend other legislation in the UK Parliament to work towards the objective of the introduction of measures that would provide a level of immunity from prosecution for the security forces.

The Northern Ireland (Executive Formation) Act 2019 obliges the Secretary of State to publish a report on progress towards forming an NI Executive (Section 3). This provision was amended in the UK House of Commons to include two extra reporting duties, namely (in summary):

- Report on protecting the security forces from 'repeated' investigation through a presumption of non-prosecution where there is not compelling new evidence through a Statute of Limitations or by another legal mechanism;
- Report on progress towards developing prosecution guidance by the Attorney General for Northern Ireland in respect of certain Troubles-related incidents differentiating where the alleged offender had been lawfully or unlawfully 'supplied' with a weapon; [12]

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[10] Ibid, Para 40.

[11] Troubles legacy: Karen Bradley rules out statute of limitations BBC News 1 October 2018. https://www.bbc.co.uk/news/uk-northern-ireland-45701869 see also http://eamonnmallie.com/2018/09/exclusive-sos-karen-bradley-writes-for-eamonnmallie-com-on-legacy-of-the-troubles/

[12] Section 3 http://www.legislation.gov.uk/ukpga/2019/22/contents/enacted

3 Reports on progress towards forming an Executive and other matters

(1)The Secretary of State must, on or before 4 September 2019, publish a report explaining what progress has been made towards the formation of an Executive in Northern Ireland (unless an Executive has already been formed).

……

(8)The report under subsection (1) must include a report on progress made towards protecting veterans of the Armed Forces and other security personnel from repeated investigation for Troubles-related incidents by introducing a presumption of non-prosecution, in the absence of compelling new evidence, whether in the form of a Qualified Statute of Limitations or by some other legal mechanism.

The first amendment was pressed to division and carried by 308 votes (including all Tory and DUP MPs voting) to 228 by other parties. The second amendment was then also approved.

If progressed (as the statutory duty is limited to reporting on progress) the envisaged changes to prosecutorial process, limiting the independence of the Director of Public Prosecutions (DPP), would not only conflict with the SHA[13] and dismantle key reforms introduced by the peace settlement, but would also rollback the General Measures agreed to by the UK, in relation to independent prosecutorial decisions, as a result of the current group of cases.

A cornerstone of the current reformed justice system is that prosecutorial decision making is vested in an independent Director of Public Prosecutions (DPP) and that prosecutorial decisions are made on the basis of the statutory Code for Prosecutors. The Statutory Code for Prosecutors is issued by the DPP (not the Attorney General for Northern Ireland nor either legislature) under S37 of the Justice Northern Ireland Act 2002.

In *Shanaghan v the UK* the Court concluded the DPP was institutionally independent at the time, but went on to state that, "Where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making."[14] A General Measure on the giving of reasons for prosecutorial decision was closed in 2007 following the adoption of the statutory Code for Prosecutors.[15]

To progress the first envisaged provision of a presumption for non-prosecution for members of the security forces where there is not 'compelling' new evidence would usurp the function of decision making in the Code for Prosecutors. The provision also appears to confuse and conflate the investigative and prosecutorial functions. This evidential threshold is higher than the *Brecknell* threshold[16] that requires investigation and potential prosecution.

The current Attorney General for Northern Ireland (AGNI), John Larkin, has previously advocated for an unconditional amnesty.[17] In relation to guidance, it is no longer the role of the AGNI to issue *prosecutorial* guidance, rather, as above, this function is vested in the DPP. These reforms took place against a backdrop of controversial political interventions by former Attorney Generals to prevent prosecutions of members of the security forces. The Criminal Justice Review, an outworking of the 1998 Belfast / Good Friday Agreement,

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(9)The report under subsection (1) must include a report on progress made towards developing new prosecution guidance for legacy cases of Troubles-related incidents by the Attorney General for Northern Ireland to take into account whether or not the person who allegedly committed an offence had the means to do so because that person had been lawfully supplied with a deadly weapon, with a presumption in favour of prosecuting in cases where a person who has allegedly committed an offence had the means to do so because that person had been unlawfully supplied with a deadly weapon.

[13] The SHA maintains that in relation to legacy investigations by the Historical Investigations Unit (HIU) "the decision to prosecute is a matter of the DPP." Stormont House Agreement, paragraph 35.

[14] Shanaghan v United Kingdom (Application no. 37715/97, 4th August 2001), paragraphs 107-108.

[15] Committee of Ministers Interim Resolution CM/ResDH(2007)73.

[16] Namely evidence/ information / credible allegation relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing (Brecknell v UK, [71])

[17] For a critique see Professor Bill Rolston 'Amnesty: some thoughts in response to the Attorney General' Rights NI 2013

recommended that legislation should "confirm the independence of the prosecutor" and "there should be no power for the Attorney General to direct the prosecutor, whether in individual cases or on policy matters."[18]

A central tenant of the framing of the envisaged AGNI Guidance is to differentiate a presumption of prosecution on the basis as to whether the suspect had been lawfully or unlawfully 'supplied' with the weapon, rather than what is then done with the weapon. The intention therefore appears to be to introduce a presumption against prosecution in Troubles-legacy cases only where the accused person had been 'lawful supplied' with the weapon in question.

It is not clear if the scope of 'lawfully supplied' is only intended to cover service issue weapons to the RUC (police) or armed forces, or also to seek to stop prosecutions in 'collusion' cases where agents within paramilitary groups were supplied with weapons by members of RUC Special Branch or British Army intelligence, which were then used in killings (presuming such services still wish to try and maintain such activities were 'lawful').

For example, the report on the 1993 Ormeau Road Bookmakers Massacre by the Police Ombudsman is one of those currently held back by PSNI, material not having been previously disclosed to the Ombudsman. Legal representatives of a victim have argued the evidence in this case suggested that members of the loyalist paramilitary gang that carried out the atrocity were working as State Agents, and that the weapons used in the shooting, including a Browning handgun and VZ58 rifle, were supplied "to the murder gang as a result of deliberate actions and/or culpable omissions of the security forces and security services."[19]

Such a differentiation of presumption of non-prosecution on this basis would unduly interfere with the procedural duties under Article 2 ECHR, given as it would leave circumstances where it was not possible to prosecute killings that were unlawful by virtue of Article 2. The UN Committee Against Torture has recently stated that it:

> "..remains concerned by recent statements by high-level officials that they are contemplating measures to shield former public officials from liability."

And recommends that the UK:

> *"…*refrains from enacting amnesties or statutes of limitations for torture or ill-treatment, which the Committee has found to be inconsistent with the States parties' obligations under the Convention." [20]

On the 24 July 2019, a new UK Prime Minister took office and replaced both the Secretary of State for Northern Ireland and the Secretary of State for Defence. At the time of writing it remains to be seen whether the new office holders shift position in relation to the implementation of the SHA or the question of an amnesty for the security forces.

The Ministers' Deputies may wish to comment on how the proposed provisions would impact on the ability of the UK to comply with Article 2 in relation to the implementation of the present judgements.

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[18] Review of the Criminal Justice System in Northern Ireland. HMSO. March 2000 Para. 4.162-3
[19] Challenge to appointment by Karen Bradley of new Police Ombudsman KRW Law, 4 May 2019.
[20] Ibid, Para 40 and Para 41(f)

Police Ombudsman

Appointment of a new Police Ombudsman and delayed reports

The tenure of the third Police Ombudsman, Dr Michael Maguire, ended in July 2019, without the publication of key legacy reports. As previously reported, these reports were delayed again after the PSNI had withheld significant amounts of sensitive disclosure from the Ombudsman, understood to be covert policing materials. The belated appearance of these materials resulted in the delay of the publication of the reports, including Shanaghan, beyond the term of the outgoing Ombudsman.

As alluded to in the Minsters' Deputies March 2019 decision, an independent review of PSNI disclosure to the Ombudsman by the Criminal Justice Inspector was consequently announced and is due to conclude work in August 2019.[21]

A new Ombudsman, Marie Anderson, took up post in July 2019. The appointments process was to have been led by the NI First and Deputy First Ministers, but due to the absence of the NI Executive, the Secretary of State introduced legislation to grant herself powers to make the appointment.

This has been controversial for two reasons. Firstly, the last time a Secretary of State appointed the Police Ombudsman (the second Ombudsman Al Hutchinson, in 2007) there were significant irregularities in the process. Mr Hutchinson had queried the role of legacy cases and there was a subsequent crisis over the handling of such cases. The resignation of the Chief Executive and critical reports, first from CAJ and subsequently from the Criminal Justice Inspection - which among other matters found that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation - led to the suspension of the Ombudsman's Office's historic caseload, and ultimately the resignation of the Ombudsman.[22]

The second concern relates to the role of the Secretary of State for Northern Ireland, Karen Bradley MP, in herself appointing an office holder whose job entails investigating past police criminality and misconduct, given the Secretary of State's expressed views that no such criminality or misconduct existed. CAJ's previous communication recalled comments made by the Secretary of State to the UK Parliament in November 2018 that former police officers [and soldiers] "should not face harassment in the courts". Additionally, in relation to members of the security forces "having to go and face charges sitting police cells and being interviewed", she said she wanted "to get to a position where we stop all of that...". In March 2019, in the UK Parliament, the Secretary of State stated that conflict related killings at the hands of the military and police "were not crimes" but rather "they were people acting under orders and under instruction and fulfilling their duty in a dignified and appropriate way".[23]

Following the appointment, lawyers for a person shot in the 1992 Ormeau Road bookmakers killings announced they would consider a legal challenge to the role of the

[21] CJINI Business Plan for 2019-2020, page 14.
[22] See CAJ 'The Apparatus of Impunity' January 2015, chapter 6.
[23] 'Karen Bradley faces calls to resign over Troubles comments' BBC News 6 March 2019.

Secretary of State in the appointment.[24] The Ormeau Road case, like Shanaghan, is one of the cases where the Ombudsman's report had been delayed by the late PSNI disclosure.

Police investigation into journalists over leaked ombudsman report

As detailed in CAJ's previous communication, further to the findings of paramilitary collusion of the 2016 Police Ombudsman's report into the 1994 Loughinisland massacre, an award winning, Emmy nominated, documentary in 2017 – *No Stone Unturned* – revealed further evidence of human rights violations through collusion in the six murders.

Following this, there were no arrests of persons suspected of involvement in the murders, but the police launched an operation involving over 100 officers which arrested the journalists who made the documentary and raided their homes and offices of four media firms seizing significant amounts of confidential journalistic material, much of which did not relate to Loughinisland, but to other cases which may include evidence of human rights violations. The two journalists, Trevor Birney and Barry McCaffrey, were arrested in August 2018, and released on conditional police bail. The arrests related to the charge of 'theft' of an official document, as the documentary had relied on a leaked Police Ombudsman internal report. The Police Ombudsman had, however, not reported any theft.

Judicial review proceedings were then taken as regards the legality of the search and seizure of journalistic material. The arrests prompted significant concern from human rights and press freedom representative bodies, and drew international attention, including from the UN Committee Against Torture.[25] Further details are found on a Council of Europe alert and Media Freedom report.[26]

In late May 2019, the High Court in Belfast ruled that the police searches had been unlawful and ordered the return of all seized journalistic material. The court rebuked the police involved for their actions.[27] The police several days later announced they were dropping their investigation against Mr McCaffery and Mr Birney.[28] At the time of writing, remedies are still being progressed and a written judgment is not yet available.

The arrest of the journalists caused a public outcry and, although the court ruling has vindicated their position and that of Article 10 compliance regarding journalistic material, the police actions still leave a chill factor for journalists in relation to public interest work protecting sources and exposing human rights violations. There are concerns within the human rights and journalistic community, including CAJ, that as well as the intimidation of journalists, police actions also had the purpose or effect of 'getting at' the Police Ombudsman's office, to seek to have a basis for querying duties to disclose sensitive material to the Office. As such, police actions are as much of a concern as regards

[24] Challenge to appointment by Karen Bradley of new Police Ombudsman KRW Law, 4 May 2019.
[25] Ibid, CAT/C/GBR/CO/6, Para 40
[26] https://mappingmediafreedom.ushahidi.io/posts/22627
https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_sojdashboard_WAR_coesojportlet_alertId=39053000
[27] https://www.theguardian.com/uk-news/2019/may/31/northern-ireland-judge-rebukes-police-for-seizing-papers-from-journalists
[28] https://www.theguardian.com/uk-news/2019/jun/04/loughinisland-journalists-police-investigation-dropped-redacted-document-no-stone-unturned

interference in the independence of the Ombudsman's office as they are regarding press freedom.

The police actions also call into question the integrity of the use of the 'call in' process presented by the UK as part of its Package of Measures as a result of the present group of cases. The 'call in' process has been used by the PSNI, for cases where the PSNI would have a conflict of interest preventing an Article 2 compliant investigation.[29] In this instance however the PSNI retained significant involvement in relation to the case against the two journalists despite the operation formally being one that had called in another police service (Durham Police).

The Ministers' Deputies may wish to seek information from the UK as to how these actions have impacted on the 'call in' measure and the Police Ombudsman's office.

[29] For example see the terms of reference of Operation Kenova https://www.opkenova.co.uk/

Legacy Inquests

In February 2019, the Department of Justice stated that it would release funds to support the establishment of a Legacy Inquest Unit within the Coroners Service to address the outstanding 54 legacy inquests into 95 deaths that are currently awaiting hearing.

This followed a decision of the High Court of Northern Ireland in 2018, following an application for Judicial Review taken by Bridget Hughes, the widow of Anthony Hughes killed in Loughgall, the case which was the subject of the *Kelly and Others v UK* ruling. This successful challenge held that the actions of the former First Minister in preventing the release of funding for legacy inquests had been unlawful. This included a ruling that Ministerial actions had been unlawful by virtue of failure to take into account the duties to comply with ECHR Article 2 and erroneously subjecting the release of monies for legacy inquests to an 'overall package' to deal with legacy issues. [30]

It is worth recalling that, following his appointment in 2016 as President of the Coroners' Courts, the Lord Chief Justice of Northern Ireland, Declan Morgan, proposed the establishment of this dedicated unit, as part of a five-year plan for dealing with outstanding legacy cases. He expressed his deep frustration that there was a lack of political response to his proposals.[31] This political obstruction has now resulted in a further delay to that which many families have already suffered. We echo the analysis of the Lord Chief Justice that the failure to deal with legacy inquests has "cast a long shadow over the entire justice system".[32]

In 2016, the Lord Chief Justice instigated a review of all outstanding legacy cases by a senior judge, Lord Justice Weir. In June 2019, the Presiding Coroner, Mrs Justice Keegan, held a listing of all outstanding legacy inquests and provided an update on the work being carried out by the Legacy Inquest Unit and the review she is leading further to the 2016 review of legacy inquests.

Preliminary hearings into legacy inquests will commence in September and it is anticipated that appropriate structures and processes will be put in place to enable substantive hearings to begin in April 2020.

Disclosure

While we welcome the long awaited release of funds to establish a Legacy Inquest Unit to progress outstanding inquests, we call upon the Committee to seek clarification from the State Party what steps have been taken to ensure that the PSNI and Ministry of Defence will promptly and effectively discharge their disclosure obligations in these forthcoming inquests. Regrettably, the experience of next of kin seeking an inquest has been one of protracted delay in the provision of disclosure.

[30] Hughes (Brigid) Application [2018] NIQB 30 https://judiciaryni.uk/judicial-decisions/2018-niqb-30
[31] https://www.bbc.co.uk/news/uk-northern-ireland-41165119
[32] Opening Address by the Lord Chief Justice to the Legacy Engagement Event on 12 February 2016, as cited in DH-DD(2016)528

In a February 2016 address to families, waiting on legacy inquests, the Lord Chief Justice stated:

> "It is my assessment that provided the necessary resources are put in place and we obtain the full co-operation of the relevant state agencies - principally the Police Service of Northern Ireland and the Ministry of Defence - it should be possible to hear these cases within a reasonable timeframe, which I see as being about five years."[33] [emphasis in original]

In his 2016 review, Lord Justice Weir was highly critical of the UK Ministry of Defence (MoD), which had cited 'resource pressures' as a rationale for repeatedly missing deadlines for disclosing documents to inquests examining the actions of soldiers. Lord Justice Weir stated:

> "The MoD is not short of money. It's busy all over the world fighting wars and it's about to buy some new submarines with nuclear warheads - so it's not short of money.... [The disclosure of official records to legacy inquests] is obviously very low on their list of priorities."[34]

He stated that such disclosure "...is not an option - this is an international obligation on the State" and took the view that the argument of 'resource pressure' raised questions over the commitment to obligations under international human rights laws, stating that the practice "...doesn't suggest any great intent on the part of government to comply with their obligations".

The Judge raised concerns that the "MoD have been rather inclined to think they can thumb their nose at directions from the coroner and that they were quite free to abandon the promises they made". He told legal representatives of the Ministry that, "You want to avoid any suspicions that this approach is designed to prevent the matter being aired in a public arena, that it's a deliberate attempt to delay and obfuscate."

Lord Justice Weir was also critical of the practice within the Police of delaying disclosure, stating that it was 'disgraceful' that not a single sheet of paper had been disclosed to the next-of-kin in relation to one inquest.[35]

We call upon the Ministers' Deputies to seek confirmation from the State Party what steps it is taking to ensure that all agencies responsible for providing disclosure to the Coroners' Courts are complying with this obligation to identify, preserve and disclose potentially relevant material promptly.

[33] Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.
[34] MOD is not short of money for work on inquests into historic killings – Judge *Belfast Telegraph* 28 January 2016.
[35] As above.

Individual Measures

Finucane

As the Ministers' Deputies will be aware, on 27 February 2019 the UK Supreme Court (UKSC) delivered its judgment in the application for judicial review taken by Geraldine Finucane. It found that "there has not been an article 2 compliant inquiry into the death of Patrick Finucane", and indicated that the state now has to decide what form of inquiry is required to meet its Article 2 ECHR obligations.[36]

In its judgment, it held that the review carried out by Desmond de Silva did not comply with Article 2 ECHR as:

> "His was not an in-depth, probing investigation with all tools that would normally be available to someone tasked with uncovering the truth of what had actually happened. Sir Desmond did not have power to compel that attendance of witnesses. Those who did meet him were not subject to testing by way of challenging probes as to the veracity and accuracy of their evidence. A potentially critical witness was excused attendance for questioning by Sir Desmond. All of these features attest to the shortcomings of Sir Desmond's review as an effective article 2 compliant inquiry."[37]

We are therefore concerned to note the comments of the State party in it communication of 21 June 2019, repeated verbatim in its 9 July 2019 communication, which states that:

> "...it is too soon to draw any conclusions from this judgment for the supervision of the execution of the Finucane v United Kingdom case in the Committee of Ministers".

In its 51 page judgment, the UK Supreme Court (UKSC) has already examined in great detail the previous inquiries into this murder and has held that they, together with the De Silva review, do not discharge the Article 2 ECHR procedural requirements. It held that it was for the state to decide what form of investigation, if now feasible, was required to meet the requirements under Article 2 ECHR. The UKSC gave particular attention to the Committee of Ministers' consideration of this case and the reasons for closing its examination of this individual measure in 2009:

> "31. In the assessment report of 19 November 2008, it was also stated that the Committee of Ministers might strongly consider encouraging the UK authorities to continue discussion with Mrs Finucane on the terms of a possible inquiry into her husband's murder. That recommendation was accepted by the Committee of Ministers on 17 March 2009 and it was decided that the examination of the specific measures taken by the UK on foot of the decision of ECtHR should be closed. Importantly, however, this decision was made on the basis that the UK was actively working on proposals for establishing a statutory public inquiry." [emphasis added]

As the Ministers' Deputies will recall, supervision of this individual measure was closed in 2009 through Interim Resolution CM/ResDH(2009)44 on 19 March 2009:

[36] https://www.supremecourt.uk/cases/docs/uksc-2017-0058-judgment.pdf
[37] Ibid, para 134

> "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;
>
> "DECIDES to close the examination of this case with respect to individual measures;"

In its analysis of the 2009 decision of the Committee of Ministers, the UKSC noted:

> "143. At the time that the Committee was considering the matter, there was still in distinct prospect a public inquiry in which the full examination of all the circumstances of Mr Finucane's murder would take place. That is no longer the position. Indeed, the scene has shifted significantly since the time that the Committee considered the matter. As a result of Sir Desmond de Silva's review, it is now clear that many important questions remain unanswered. It would be simply wrong to fail to acknowledge the significant change in circumstances which has occurred since the Committee considered the issue fully ten years ago." [emphasis added]

A decade from the Committee's decision, and despite the unanimous UKSC decision in February 2019, the UK continues to obfuscate and undermine the rule of law by refusing to commit to the establishment of an Article 2 ECHR compliant public inquiry without further delay.

The family of Mr Finucane do not want or need another review. What they are entitled to is an Article 2 compliant inquiry into the murder of Pat Finucane. As the UKSC has stated, the De Silva review in fact raises more questions to be answered and we call upon the Ministers' Deputies to re-open its supervision of this individual measure as it committed to giving consideration to doing in its March 2019 resolution.

There is widespread local and international support for the Finucane family in their call for an Article 2 compliant public inquiry to restore public confidence in the rule of law given that in 2012 former Prime Minister David Cameron admitted that there were shocking levels of collusion in this murder:

> "The collusion demonstrated beyond any doubt by Sir Desmond, which included the involvement of state agencies in murder, is totally unacceptable. We do not defend our security forces, or the many who have served in them with great distinction, by trying to claim otherwise. Collusion should never, ever happen. So on behalf of the Government, and the whole country, let me say again to the Finucane family, I am deeply sorry.
>
> "It is vital that we learn the lessons of what went wrong, and for Government in particular to address Sir Desmond's criticisms of a 'wilful and abject failure by successive Governments to provide the clear policy and legal framework necessary for agent-handling operations to take place effectively and within the law'."[38]

[38] https://publications.parliament.uk/pa/cm201213/cmhansrd/cm121212/debtext/121212-0001.htm

In in its May 2019 concluding observations on the 6th Periodic Report of the UK, the Committee Against Torture recommended that the UK:

> "Ensure that effective and independent investigations are conducted into allegations of torture, ill-treatment and conflict-related killings to establish the truth and identify, prosecute and punish perpetrators, including with respect to the killing of Pat Finucane, following a recent decision by the Supreme Court that the State party has not carried out an effective investigation concerning this case."[39]

Thirty years after this murder, there is an urgent need for a fully independent Article 2 public inquiry and we call upon the Ministers' Deputies to re-open examination of this case without further delay.

Shanaghan

The next of kin still await the Police Ombudsman's report into the murder of Patrick Shanaghan. The family have engaged with the Police Ombudsman's office following the judgment of *Shanaghan v UK in 2001* and, despite repeated assurances, they have never received a completed Article 2 investigation report in any form in relation to this murder.

The HET was disbanded before delivery of its report into this death given concerns surrounding its independence and effectiveness and the family have requested a copy of the HET report which has not been provided and we call upon the Ministers' Deputies to call upon the State to provide this without further delay.

The Criminal Justice Inspection Northern Ireland (CJI) review into the methods the Police Service of Northern Ireland use to disclose information in respect of historic cases to the Office of the Police Ombudsman for Northern Ireland has delayed disclosure of the report into this death, which was to be made available to the family in early 2019. It is of regret that the next of kin of Patrick Shanaghan, one of many families directly affected by the contents of this review, were not invited by CJI to engage with it.

McKerr

There have been numerous preliminary hearings in this case since 2007, with the last such hearing taking place in January 2016 as part of the review of all outstanding inquests carried about by Lord Justice Weir. A further hearing is scheduled on 4 October 2019 to assess the state of readiness in this inquest as part of the wider review of outstanding inquests being carried out by the Presiding Coroner Mrs Justice Keegan.

McCaughey

On 14 June 2018, an application was lodged with the ECtHR in the name of *Gribben v UK,* taken by the sister of Martin McCaughey (deceased). A decision on admissibility is still awaited.

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[39] CAT/C/GBR/CO/6, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/GBR/CO/6&Lang=En

Jordan

On 31 May 2018 the Court of Appeal reserved judgment in an appeal by the Chief Constable on whether damages should be payable as just satisfaction for a breach of the Article 2 requirement to hold an inquest promptly, and also regarding the apportionment of damages between various public authorities who contributed towards the delay. The applicant received an indication from the Court that judgment would be delivered early in the summer vacation, but to date they have not received an update.

The applicant appealed the refusal of leave, by Keegan J to the Court of Appeal, in relation to the application to quash the verdict of the inquest. The Court of Appeal dismissed that appeal on 15 October 2018.

The Coroner after delivering his verdict in November 2016 referred two police witnesses, Officers M and Q, to the PPS to consider whether they should face criminal proceedings for perjury. A decision has not yet been taken. On 28 June 2019, the PPS advised the applicant's legal representatives that it had requested additional information from the PSNI and would advise it of the next steps.

Kelly & Others

Following delivery of the judgment in the judicial review proceeding taken by Mrs Hughes, as outlined previously, and commencement of contempt of court litigation arising out of a breach of the court order, inquest funding was released after further delay. The Preliminary Hearing in this inquest is listed on 18 September 2019 as part of the general review of all legacy inquests. No indication has been given for the timetabling of the full hearing of this inquest and the requirements under Article 2 ECHR remain to be discharged.

In the ongoing civil proceedings, an application has been made to apply a Closed Material Procedure (CMP). The case is listed in September 2019 for review and in October 2019 in relation to the application a CMP.

We would urge the Ministers' Deputies to consider invoking infringement proceedings given that 18 years have now passed since the judgments in the McKerr Group of Cases were delivered and the victims and survivors continue to suffer ongoing violations due to the failure of the UK to fully implement these judgments.

CAJ, July 2019