

**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 actions 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

October 2021

Introduction and background

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 1419th meeting (December 2021) (DH) of the Ministers' Deputies. CAJ has regularly made 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). The submissions also cover the unilateral departure by the UK from its commitment to implement the SHA in a Written Ministerial Statement on the 18 March 2020 and subsequent developments.

The Committee issued an Interim Resolution in December 2020 on this group of cases.¹ In summary the Committee of Ministers:

- EXPRESSED PROFOUND CONCERN the UK had not provided any further information on its proposed approach to legacy investigations since the Written Ministerial Statement of 18 March 2020, despite an express request from the Committee.
- CALLED UPON the UK to follow up on their previous commitments to introduce legislation in the UK Parliament to implement the SHA.
- NOTED information on Finucane, further to the UK Supreme Court ruling of February 2019, had only been provided shortly before the Committee meeting.
- RECALLED WITH PROFOUND REGRET that the inquests and investigations in the cases of *McKerr*, *Shanaghan*, and *Kelly and Others* have still not been completed, seeking progress without further delay.
- NOTED WITH INTEREST the plan for the conclusion of legacy inquests and urged in the context of COVID-19 a recovery plan to ensure continuity in a timely manner.
- NOTED information on the Police Ombudsman's budget and strongly encouraged the UK to take all necessary steps to ensure it has the capacity to conduct its legacy work.

A further meeting of the Ministers' Deputies took place in March 2021, including, in summary the following Decisions:²

- Reiterated profound concern regarding delays in *McKerr*, *Shanaghan and Kelly and Others cases* "due to systemic delays in inquest proceedings and [Police Ombudsman] (OPONI) investigations".
- Decided to reopen consideration of individual measures in *Finucane*.

¹ CM/ResDH(2020)367 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6

² <https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22004-2202%22%5D%7D>

- Closed without prejudice to general measures, examination of *McShane, Collette and Michael Hemsworth and Hugh Jordan* cases,
- Noted the UK had appeared to now confirm intention to introduce legislation in light of the SHA and reiterated profound concern at the delay.
- Underlined the importance that proposed legislation would enable effective ECHR-compliant investigations into all outstanding cases and sought full details to enable a comprehensive assessment to be made.
- Noted with interest that legacy inquests were resuming, encouraging a stepping up in efforts to progress them; and invited the UK to provide concrete information regarding steps to ensure statutory bodies are complying with disclosure obligations.
- In light of the ‘ongoing chronic delays’ in the legacy work of the Police Ombudsman many sought information on the response to the five-year review of powers; assessment of the revised MOU on Police-Ombudsman discoloured and the bid for additional staff;
- With regard to ‘called in’ police investigations from Great Britain sought further details on steps to ensure independence.

The Committee stated that:

“it is imperative that the authorities now take all measures to expedite the finalisation of the legislation to establish the HIU [SHA Historical Investigations Unit] and make sure that, it will enable, in whatever format, in the shortest possible timeframe, effective investigations into all outstanding cases in compliance with their obligations under Article 2 of the Convention.”

General Measures: Key developments

1. Our previous submissions chart the unilateral abandonment by the UK of commitments to implement the Stormont House Agreement (SHA), and its replacement with unclear proposals on information recovery set out in the Written Ministerial Statement (WMS) in March 2020. They also chart the lack of any further elaboration as to the UK's intentions since March 2020. This remained the case until May 2021.
2. The UK issued a response to the Committee on the 25 January 2021 deadline.³ Whilst unclear, this response appeared to recommit the UK to legislating for the SHA.⁴ The Committee's Decisions in March 2021 affirmed that the UK had confirmed it remained "their intention to introduce legislation in the light of the Stormont House Agreement."
3. In contradiction to this position, the UK authorities in early May 2021, through leaks to the London *Times* and *Telegraph* newspapers, announced a different policy intention. The media briefings, which coincided with elections in England, set out instead a policy intention to introduce an amnesty, in the form of a Statute of Limitations 'to end all conflict related prosecutions. Instead "all sides would be encouraged to come forward to talk about historical events without fear of prosecution" to a new legacy commission.⁵
4. On the 11 May 2021, the UK Government set out its updated legislative programme to the UK Parliament (the Queen's Speech).⁶ Despite the UK position to the Committee, this expressly removed the commitment in the previous December 2019 legislative programme to legislate for the SHA, replacing it with a general reference to Northern Ireland legacy legislation.
5. The consecutively published 163-page Prime Minister's 2021 Background Briefing Note on the legislative programme contained further details on almost every other proposed bill except the NI legacy bill. The Prime Minister's Introduction to the background briefing does make passing reference to purpose of the legacy bill being to 'deliver better outcomes for victims, survivors and [military] veterans.' A section of the background briefing on 'strengthening the Union (UK)' also makes passing reference to the purpose of the legacy bill expressly stating that the bill is aimed at ending 'investigations' 'in line with our commitments to veterans'.⁷ Again here the UK promotes the position that there has been a

³ [DH-DD\(2021\)101 Communication from the UK, 25 January 2021](#)

⁴ "In 2018, the **United Kingdom Government's public consultation Addressing the Legacy of Northern Ireland's Past sought views on draft legislation seeking to implement proposals set out in the Stormont House Agreement.** The Government received over 17,000 written responses, and in July 2019 the Government published an analysis of the consultation responses, which can be found on the website gov.uk. It was clear from this feedback that further work was needed to address the legitimate concerns of those who responded to the consultation. **It remains the intention of the United Kingdom Government to introduce this legislation as soon as possible** but, as noted by the Committee, it is clear that further engagement with key stakeholders including victims groups needs to take place before progress can be made." [DH-DD\(2021\)101 Communication from the UK, 25 January 2021](#) (emphasis added)

⁵ For further detail see: <https://eamonmallie.com/2021/06/nio-legacy-bill-a-blueprint-for-burying-the-and-impunity-for-veterans-by-daniel-holder/>

⁶ <https://www.gov.uk/government/speeches/queens-speech-2021>

⁷ <https://www.gov.uk/government/publications/queens-speech-2021-background-briefing-notes> P7 "We will introduce legislation to address the legacy of the Troubles in Northern Ireland, ensuring that our proposals deliver better outcomes for victims, survivors and veterans, while ending the cycle of investigations." P15: "We will introduce legislation to address the legacy of the Troubles in Northern Ireland, ensuring that our proposals deliver

‘cycle of investigations’ against the military, despite the findings of the Court and domestic courts that Article 2 compliant investigations have not taken place.

6. No further details were set out at this stage. Legislators from the ruling Conservative party stated to the UK Parliament that the Secretary of State for Northern Ireland had given private assurances to military veterans that legislation with the purpose of protecting soldiers who served in NI from proceedings would be introduced by Summer 2021.⁸ A former UK military Veterans’ Minister, who resigned in April 2021, has also asserted the purpose of NI legacy legislation was to protect soldiers from prosecutions, and that the UK Government had committed to doing so by the Summer 2021.⁹
7. In the run up to Summer 2021 it appeared that the UK was going to unilaterally introduce such legislation. There was a strong resistance to this, including from the Irish Government, co-guarantors of the SHA, who have not resiled from their SHA commitments.
8. On the 24 June 2021 there was a meeting of the British-Irish Intergovernmental Conference (BIIGC), which took place at Dublin Castle. The BIIGC was established under the Good Friday Agreement as a forum to promote bilateral co-operation, particularly on NI issues. As a result of the BIIGC a Joint Communiqué was published by both Governments on a range of issues. In relation to NI legacy the following statement was made:

Legacy

The Conference discussed the urgent need to make progress on a collective basis on Northern Ireland legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and that responds to the needs of victims and survivors, and society as a whole.

The UK and Irish Governments agreed there was a need for a process of intensive engagement in the period immediately ahead with the Northern Ireland parties and others on legacy issues. It was agreed that this would need to build on previous discussions around the implementation of the Stormont House Agreement and to take account of the views of all participants including new proposals which the UK Government intended to bring forward. They agreed that the interests and perspectives of victims and survivors, and all those most directly affected by the Troubles, had to be central to the discussions.

The UK and Irish Governments also discussed issues of concern in respect to a number of individual legacy cases.¹⁰

better outcomes for victims, and survivors, focuses on information recovery and reconciliation, and ends the cycle of investigations – in line with our commitment to veterans.”

⁸ See comments of Mark Francois MP Hansard 14 July 2021, column 401.
<https://hansard.parliament.uk/commons/2021-07-14/debates/DAD888A0-ED03-4052-8C36-AB90644BAB8B/LegacyOfNorthernIreland%E2%80%99SPast>

⁹ See for example: <https://www.standard.co.uk/news/uk/johnny-mercere-northern-ireland-londonderry-conservative-british-b943939.html>

¹⁰ <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2021/june/joint-communicue-of-the-british-irish-intergovernmental-conference-.php> <https://www.gov.uk/government/news/joint-communicue-of-the-british-irish-intergovernmental-conference>

9. It appears therefore that the UK pulled back on unilaterally introducing legislation on the basis of the Irish Government agreeing a process whereby the new UK proposals would be discussed alongside the SHA. This was followed on the 14 July 2021 by the publication of the UK Command Paper on legacy detailed below.
10. In relation to the above ‘process of intensive engagement’ there have been a number of meetings over Summer 2021 involving the two governments and the five parties to the Northern Ireland Executive. CAJ as part of the ‘Model (SHA) Bill Team’ engaged in these meetings, in a format whereby we presented our views and took questions from the parties. Up to the time of writing the NIO have stated there have been around 14 of these engagement sessions.¹¹
11. It appears such sessions have followed a similar format of external presentations and discussion. There have not been ‘talks’ or ‘negotiations’ as such on the Command Paper. This should be read in the context of a general rejection of the UK proposals by the vast majority of stakeholders, including the NI political parties and legislature,¹² the Irish government and human rights and victims’ NGOs. The Irish Government and four of five of the NI Executive political parties continue to support the implementation of the SHA, the implementation of which was also strongly supported in public consultation.
12. To date the only groups to support the UK Command Paper proposals are *some* groups representing military veterans. However, there are differing views among the veterans’ groups with many also opposed to an amnesty.¹³ The UK proposals may also be supported by some loyalist paramilitary groups.
13. There have continued to be conflicting and contradictory messages from the UK as to the objective behind and status of the Command Paper. At times the UK has argued its proposals are designed to further ‘information recovery’, a proposition critiqued below. On other occasions the UK authorities have continued to openly link the proposals to commitments to ending proceedings against military veterans. Whilst the official Joint Communiqué provides for the UK proposals to be considered alongside SHA implementation, and the UK has described its Command Paper as proposals, it has also on other occasions indicated that it nevertheless intends to introduce implementation legislation.
14. Since the publication of the Command Paper in July 2021 the UK has declined to elaborate further on the intended detail of the proposals it outlines. This includes in the UK submission to the Committee of the 18 October 2021 which provides no further detail.¹⁴ On the 27 October 2021, the Secretary of State again declined to elaborate on any aspect of the proposals but did state that the Command Paper did not represent the UK’s ‘final proposals.’

¹¹ Stated to Northern Ireland Affairs Committee of UK Parliament on the 27 October 2021

<https://committees.parliament.uk/event/5669/formal-meeting-oral-evidence-session/>

¹² On the 20 July 2021 the Northern Ireland Assembly was recalled from summer recess to debate a motion to reject the UK proposals and call for the withdrawal of the Command Paper. The motion stated that the proposals “do not serve the interests, wishes or needs of victims and survivors nor the requirements of truth, justice, accountability, acknowledgement and reconciliation” and was passed unanimously.

<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/07/20&docID=347308>

¹³ <https://www.belfasttelegraph.co.uk/news/northern-ireland/divide-between-veterans-across-uk-says-commissioner-kinahana-after-group-endorses-troubles-amnesty-plans-40765943.html>

¹⁴ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a43c4d

The Secretary of State also confirmed that the publication of the Command Paper did not constitute a ‘formal consultation’.¹⁵ On the same day the UK Parliament was however told that the intention was still to introduce legislation in the ‘Autumn’ of 2021.¹⁶

The process from the March 2020 statement and Equality Commission investigation

15. It appears that a bill had been prepared before the summer but was not ultimately introduced. As its content is not known it cannot be said for certain whether the Command Paper corresponds or diverges from it. The UK Parliament had been told in July 2020 that the NIO was preparing a legacy bill. Under the GFA implementation legislation an equality duty is placed on public authorities in NI, including the NIO, that requires transparency and equality testing of new or revised policies. The Equality Commission NI is the enforcement body. In July 2020 CAJ and the Pat Finucane Centre lodged complaints with the Equality Commission over the NIO failure to provide equality testing documents over its new policy.
16. In October 2021 the Equality Commission, in the exercise of its powers completed a formal investigation, and found that the NIO had breached its statutory equality scheme over the process applied to NI legacy bill following the March 2020 statement.¹⁷ The investigations report from the Equality Commission also revealed that the NIO had withheld documentation from the Commission investigators despite their exercise of formal powers of investigation.¹⁸ The investigation states NIO officials had argued the policy was in a state of ‘flux’ following the March 2020 statement, and that the reluctance to release the documentation was that it would reflect a previous policy position. It is not clear if this is a reference to an understanding the commitment to legislate for the SHA would be honoured at that time. The NIO maintained however in April 2021 that equality testing documentation on the legacy policy was *still* not ready to be released. One explanation is that the proposals for a broad unconditional amnesty and shutting down of all investigations (as provided for in the Command Paper) were part of the policy proposals much earlier than has been officially acknowledged, and at a time the UK was still indicating to the Committee it would introduce SHA implementation legislation.

The UK Command Paper: Addressing the Legacy of Northern Ireland’s Past¹⁹

17. The UK Command Paper was published on the 14 July 2021 and set out a proposal for a sweeping unconditional amnesty for all ‘Troubles-related incidents’ in the form of a statute of limitations. Notably this definition was not tied to the 1998 GFA and it is possible the UK intends to instead to legislate for an amnesty beyond that date to accommodate paramilitary killings and other abuses subsequent to the GFA.

¹⁵ Northern Ireland Affairs Committee of UK Parliament on the 27 October 2021

<https://committees.parliament.uk/event/5669/formal-meeting-oral-evidence-session/>

¹⁶ <https://hansard.parliament.uk/commons/2021-10-27/debates/81B40744-AE51-4F81-9E67-644B60B1CDD7/LegacyOfTheTroubles>

¹⁷ <https://www.bbc.co.uk/news/uk-northern-ireland-58724218>

¹⁸ [Complainants \(the Committee on the Administration of Justice and the Pat Finucane Centre\) & The Northern Ireland Office https://www.equalityni.org/Investigations](https://www.equalityni.org/Investigations) “The NIO representatives did not, either prior to, for the investigation meeting, nor afterwards, provide a copy of the draft screening documentation referred to. They were asked again during the preparation of this report, but again declined to release a draft document [4.16].”

¹⁹ <https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past>

18. The Command Paper also provided for legislating to end all meaningful investigations and legal proceedings, including:
 - a) Ending all prosecutions for conflict related offences, including stopping ongoing cases already before the courts.
 - b) Ending all police investigations for conflict related offences.
 - c) Ending all Police Ombudsman Investigations into legacy deaths.
 - d) Ending all conflict related coronial inquests.
 - e) Ending the power of affected families to take civil proceedings.
19. The Command Paper provides for the establishment of an Information Recovery Body (IRB) to conduct desktop reviews into some legacy cases. It is notable that the proposed IRB is far more limited in its powers than the existing package of measures or SHA mechanisms. The Command Paper provides that IRB powers will be limited to a desktop review of papers and an ability to take statements. In our view it is clear this would not constitute an ‘effective’ investigation under the terms of Article 2 ECHR.
20. Whilst the Command Paper presented by the Secretary of State states it would “expect all relevant parties” to make commitments to cooperate with the IRB, this was subsequently contradicted by the Secretary of State himself in a media interview in which he stated he had no expectation republicans would cooperate with the IRB.²⁰

Critique of the Command Paper by the CAJ/Queen’s University ‘Model Bill Team’

21. CAJ, as part of the SHA Model Bill team with academics from the School of Law in Queen’s University Belfast, launched a detailed critique of the Command Paper in September 2021. This is included as an appendix to this submission.²¹
22. In relation to the proposed “statute of limitations” the critique argues the use of this term in this context is a misnomer as what is being proposed by the UK is irrefutably a broad, unconditional amnesty. Drawing on comparative research it is noted that the proposed amnesty is even more expansive than that introduced under the dictatorship of General Augusto Pinochet.
23. The critique also notes that there are key elements of the Command Paper are deeply misleading. The official narrative of the proposals seeks to portray all existing mechanisms as focusing on prosecutions and convictions, rather than also encompassing information recovery. The Command Paper goes as far as arguing that retaining a route to justice itself is responsible for stifling information recovery. The critique also argues the proposed IRB would be the least effective of all proposed mechanisms in actually providing for information recovery.

²⁰ <https://www.thetimes.co.uk/article/justice-system-is-holding-back-peace-argues-brandon-lewis-lwrp5lh6n> “I am not suggesting for one minute that I can see republican terrorists stepping up and owning the heinous crimes they committed, which was what happened in South Africa. Much as I would like to see them do it I am not expecting that to happen,” Lewis says.”

²¹ Also available at: <https://www.dealingwiththepastni.com/project-outputs/project-reports/model-bill-team-response-to-the-uk-government-command-paper-on-legacy-in-ni>

24. The concern is expressed that the Command Paper:

“deliberately misrepresents both the existing ‘package of measures’ and the HIU as ‘focused on criminal justice outcomes’. Rather, as noted by the UN Special Rapporteur on Transitional Justice, Pablo de Greiff, in his report on legacy matters in Northern Ireland in 2016, they ‘resemble more truth-seeking initiatives than justice measures’. As he also noted, the ‘distinctions between truth and justice initiatives are more often than not overdrawn’. This chapter [of the critique] argues that that is precisely what occurs in this command paper. In a context where there has long been universal acceptance that only a small number of cases will ever result in a prosecution, the paper ignores and misrepresents the primary information recovery focus of much of the work of the SHA mechanisms and the ‘package of measures’ in order to justify and rationalise the proposed IRB which is much less likely to deliver information for families.”

25. The critique also notes deeply misleading comparisons in the Command Paper with the South African Truth and Reconciliation Commission, despite the proposals bearing no resemblance to this mechanism.

26. The critique notes that the Command Paper would provide for the immediate shutting down of all other forms of investigation and inquiry, including cases that are currently before the courts, investigations sitting with the Police Ombudsman and legacy inquests.

Response from UN Experts

27. In joint statement on the 10 August 2021 Mr. Fabián Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and Mr. Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions, expressed “serious concern about the UK Government's plan to ban all prosecutions, impede investigations, and preclude victims' civil claims in connection with "the Troubles" in Northern Ireland, which would effectively institute a *de-facto* amnesty and blanket impunity for the grave human rights violations committed during that period.”²²

28. The UN experts further stated:

"We express grave concern that the plan outlined in July's statement forecloses the pursuit of justice and accountability for the serious human rights violations committed during the troubles and thwarts victims' rights to truth and to an effective remedy for the harm suffered, placing the United Kingdom in flagrant violation of its international obligations," the experts said.

In his statement, the Secretary of State justified these measures, stating that criminal justice can impede truth, information recovery and reconciliation. The experts expressed concern that such a justification conflates reconciliation with impunity and noted that criminal justice is an essential pillar of transitional justice processes, alongside truth-seeking and reconciliation.

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https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E&utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

In this regard, they recalled the importance of adopting a comprehensive approach in a transitional justice process that incorporates the full range of judicial and non-judicial measures. "The essential components of a transitional justice approach - truth, justice, reparation, memorialization and guarantees of non-recurrence - cannot be traded off against one another in a 'pick and choose' exercise," the experts stressed.

... The experts urged the British authorities to "refrain from regressing on their international human rights obligations through the establishment of a statute of limitations for conflict related prosecutions and barring all related investigations, inquests and civil claims".²³

29. The UNSR for the promotion of truth, justice, reparation and guarantees of non-recurrence, subsequently presented a report to the 48th regular session of the UN Human Rights Council in September-October 2021, which reiterated such concerns.²⁴

Response of the Council of Europe Commissioner for Human Rights

30. In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, published correspondence to the UK in which she had warned that the proposals under the Command Paper "would undermine human rights protections and would cut off avenues to justice for victims and their families". Further stating that "If adopted, the plan would lead to impunity and cannot be the foundation on which transitional justice is built."²⁵

31. The correspondence raises concerns about the conflict with the UK obligations under the ECHR and the Command Paper proposals which include the introduction of:

"a statute of limitations for all Troubles-related crimes, which would put an end to all ongoing and any future attempts at prosecution. This is accompanied by a statutory bar on the Police Service of Northern Ireland (PSNI) and Police Ombudsman to investigate Troubles-related incidents, as well as further steps to end all judicial activity in this area with regard to current and future criminal and civil cases and inquests."

32. The Commissioner states that ECHR compliance is "particularly endangered by the proposed shutting down of the above-mentioned avenues, and their replacement with an information recovery body with limited investigatory powers that would fall short of the requirements under the ECHR, and which would mainly carry out investigations on request of next of kin."

33. The Commissioner notes the UK position on a shift away from justice outcomes, expressing concerns that:

"this approach is based on a false dichotomy between investigations and prosecutions on the one hand, and truth and reconciliation on the other, as well as on problematic assumptions about how these interact. In addition to being an international legal obligation, fighting impunity through criminal justice is one of the well-established pillars of transitional justice. Virtually every effective transitional justice effort to date has relied

²³ As above.

²⁴ <https://undocs.org/A/HRC/48/60/Add.2>

²⁵ <https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice>

on elements of both criminal justice and truth and reconciliation. Conversely, impunity and the absence of justice can be a major impediment to achieving lasting peace and reconciliation.

...The interaction between criminal justice and truth and reconciliation mechanisms in the Northern Ireland setting has been recognised, for example, in the report of the former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence following his 2015 visit to the United Kingdom. Some criminal investigations, even if they have not led to prosecutions, have had important consequences for truth recovery. And truth seeking efforts, not related to criminal justice as such, were sometimes instrumental in uncovering information that gave rise to further attempts to trigger criminal investigations. Importantly, whereas the command paper seems to suggest that information recovery cannot be effective without an end to criminal justice activities, the reverse may well be true: giving perpetrators unconditional guarantees against criminal prosecution may weaken incentives to participate in truth seeking. And the impunity this creates may undermine the trust necessary for truth and reconciliation efforts to be effective. As the command paper puts such a premium on truth seeking, to the detriment of criminal justice activities, oversimplifications of their relationship must be avoided.”

34. The correspondence from the Commissioner concludes by stating:

“I am concerned that key elements of the command paper would not bring progress on legacy issues, but would rather represent significant steps backward. Crucially, an approach that would undermine human rights protections and would cut off avenues to justice for victims and their families, thus leading to impunity, cannot be the foundation on which transitional justice is built. Rather than upending previously agreed approaches, I urge your government to focus on taking concrete action to remove barriers to a human rights compliant implementation of such approaches, with a view to delivering justice across all communities without further delay.”

Response of the NI legal profession

35. On the 24 September 2021 Mr Rowan White, the President of the Law Society for Northern Ireland, which represents all of Northern Ireland’s solicitors, issued a statement on behalf of the Society calling on the UK to uphold the rule of law and reconsider its legacy proposals.

36. The Law Society statement set out its position that the Command Paper proposals would contravene the UK’s duties under the ECHR “to hold independent and effective investigations into the deaths that occurred during the Troubles.”²⁶

²⁶ <https://www.lawsoc-ni.org/society-calls-on-uk-government-to-uphold-the-rule-of-law>

Individual Measures

Jordan v UK

37. The inquest is completed as are all related challenges to the verdict. On 15 November 2019 the Court of Appeal directed the Chief Constable of the PSNI to pay £5000 damages to the next of kin for breach of Article 2 ECHR arising from the delay in holding the inquest. An application for permission to appeal to the UK Supreme Court (UKSC) and a cross appeal by the Chief Constable was dismissed by the UKSC on 29 March 2021. The next of kin, Teresa Jordan, lodged an application with the ECHR on 27 September 2021. Separately a decision remains outstanding from the Public Prosecution Service (PPS) in relation to whether two police officers who were referred to PPS by the Coroner pursuant to s.35(3) of the Justice (NI) Act 2002 should be prosecuted for perjury.

Finucane v UK

38. Mrs Geraldine Finucane made an application for leave to apply for judicial review, on 19 February 2021, of the decision taken by the Secretary of State for Northern Ireland on 30 November 2020 not to hold a public inquiry ‘at this time’. Leave to apply for judicial review was granted by Mr Justice Scofield on 15 April 2021 and the case was fixed for hearing on 28 – 30 June 2021. The hearing date had to be vacated because the Secretary of State failed to file his evidence and an extension until the end of August was granted to the Secretary of State to file his evidence. The substantive hearing was re-fixed to take place on 15 – 19 November 2021. The Secretary of State failed to file his evidence until 19 October, resulting in the hearing date in November being vacated. A new date for hearing in 2022 has yet to be fixed.

McCaughey v UK

39. The ECHR has granted the Northern Ireland Human Rights Commission permission to intervene in these proceedings and a submission was filed on 13 December 2020. On 6 January 2021, the UK Government filed its replying observations on the questions posed by the Court and the applicants filed its response to Government’s submission and its claim for just satisfaction on 22 February 2021. A decision is awaited from the ECHR.

40. In October 2021 the Chief Constable of the PSNI agreed to pay the next of kin of Martin McCaughey and Desmond Grew £5,000 in damages to reflect the anxiety and stress caused to the next of kin arising from the delay in holding the inquests.

McKerr v UK

41. This case is now being case managed by Mr Justice O’Hara. A Public Interest Immunity hearing in respect of the deaths, which occurred in the Kinnego explosion, will take place in late November 2021. Further disclosure is anticipated in relation to the inquests in due course.

42. On 18 November 2020, the next of kin of Mr McKerr, Mr Toman and Mr Burns commenced judicial review proceedings challenging the delay in holding the inquest relying on Article 2 ECHR and domestic law. In October 2021, the Department of Justice in Northern Ireland agreed to pay £5,000 in damages to each applicant to reflect the anxiety and stress caused to the applicants arising from the delay in holding the inquests.

Shanaghan v UK

43. The public statement by the Police Ombudsman into the death of Patrick Shanaghan, who was killed by loyalist paramilitaries, is still outstanding. The Police Ombudsman's Office had previously advised of her intention to publish the public statement on 'Operation Greenwich', which includes the murder of Patrick Shanaghan, in October 2021. Unfortunately, the next of kin has since been advised that the fact checking and Article 2 ECHR assessment process in respect of the public statement is not yet complete. This is in part due to 'a specific issue that has arisen in relation to which the Police Ombudsman is taking legal advice'. The Office advises that it is hopeful that these matters will be resolved by the end of 2021 at which time the public statement will be published. This further delay has caused further distress to the next of kin, in particular given that on 12 August 2021 it was the 30th anniversary of Patrick's murder.
44. It is of particular significance that the delay in the Shanaghan case follows a pattern of delay, including in the publication of the Police Ombudsman's public statement into the murders at the Sean Graham Bookmakers on the Ormeau Road, Belfast also by loyalist paramilitaries. The 30th anniversary of this atrocity is on 5 February 2022. This Police Ombudsman investigation forms part of 'Operation Achille' and the public statement was expected in this case in the autumn with the PSNI fact checking being completed in August. However, recently the PSNI has raised with the Police Ombudsman the potential issues of a Public Interest Immunity certificate and Closed Material Proceedings, which would limit information made public and would involve sensitive information being discussed in hearings without all parties being present. The Police Ombudsman has sought clarification from the PSNI on this and also expert legal advice on whether the PSNI's position in these matters has been properly made²⁷.

Kelly & Ors v UK

45. The case management of the inquest and civil proceedings is being heard together with His Honour Judge McAlinden having been appointed to review the cases. The main issue at the centre of the case management hearings is whether the inquest or civil proceedings should proceed first. The Court has not yet determined this question.
46. The next of kin have requested a Closed Material Procedure hearing under Section 6 of the Justice and Security Act 2013. A review hearing took place on 13 October, which heard

²⁷ <https://www.irishnews.com/news/northernirelandnews/2021/10/26/news/psni-loyalist-murder-report-delay-branded-unacceptable--2489434/>

submissions on whether there will be a Closed Material Procedure in the civil proceedings or will this be delayed and whether there was a need for a Public Interest Immunity certificate. Representatives for the next of kin have requested that these matters be dealt with as soon as possible. The Court confirmed that any inquest is realistically 2-3 years away and if properly managed civil proceedings could proceed and it may be in the interest of justice that they are heard before the inquest.

Conclusion

45. We echo the CM's profound regret that the inquests and investigations in McKerr, Shanaghan and Kelly & Others have still not been completed, resulting in ongoing breaches of Article 2 ECHR. In Finucane the continued failure of the Secretary of State to provide evidence, as directed by the court and despite a number of extensions of time limits, demonstrates a pattern of obstruction and lack of respect for the rule of law. We repeat our call for infringement proceedings against the UK, under Article 46 (4) ECHR, given the demonstrable lack of good faith and pattern of delay and obstruction by the Government since the delivery of these judgments 20 year ago.

CAJ, October 2021