

**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

February 2022

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 1428th meeting (March 2022) (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. Most recently, we provided a submission to the 1419th meeting (December 2021) (DH).¹

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 unilaterally departure by the UK from its commitment to implement the SHA in a Ministerial Statement on the 18 March 2020, the UK 'Command Paper' of July 2021 setting out its intentions for an alternative legacy bill and subsequent developments.

The Committee issued an Interim Resolution in December 2020 on this group of cases.² 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 legacy inquests and urged in the context of COVID-19 a recovery plan to ensure continuity in a timely manner.

¹ <https://caj.org.uk/2021/12/02/submission-to-the-committee-of-ministers-october-2021/>

² CM/ResDH(2020)367

https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6

from the Stormont House Agreement in the authorities' latest proposals, in particular with regard to their proposal to introduce a statute of limitations bringing an immediate end to criminal investigations and prosecutions, as well as investigations by the police and Office of the Police Ombudsman of Northern Ireland (OPONI), inquests and civil proceedings but also noted that the authorities' position is not final and that they are engaging with stakeholders;"

"recalled that initiating new plans at this stage would appear to risk further delay when the need to avoid any setbacks is paramount and considering it vital that any proposals garner trust and confidence from the public, strongly encouraged the authorities to engage with all stakeholders in finalising any intended legislative proposals and to settle their position as soon as possible;"⁴

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, when leaks to the London *Times* and *Telegraph* newspapers announced a different policy intention, involving an amnesty in the form of a statute of limitations and 'all sides' being encouraged 'to come forward and talk about historic events' to a Legacy Commission.⁵
2. In June 2021 as the UK seemed poised to introduce such a new legacy bill without any public scrutiny, or engagement with other parties, there was a meeting of the British-Irish Intergovernmental Conference (BIIGC) in Dublin. This committed to a period of 'intensive engagement' with NI Parties and others, on the implementation of Stormont House Agreement and also taking the views of participants of new UK proposals.⁶
3. The UK Command Paper⁷ setting out its proposals 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. The Command Paper also provided for legislating to end all meaningful investigations and legal

⁴ https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4acb2

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

⁷ <https://www.gov.uk/government/publications/addressing-the-legacy-of-northern-irelands-past>

proceedings, including: ending all prosecutions for conflict related offences (including stopping ongoing cases already before the courts); ending all police investigations for conflict related offences; ending all Police Ombudsman Investigations into legacy deaths; ending all conflict related coronial inquests; ending the power of affected families to take civil proceedings. 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 any of the other mechanisms in the existing package of measures or SHA mechanisms.

4. As detailed in our previous submission CAJ, along with academic colleagues at Queen's University Belfast School of Law, have produced a detailed critique of the proposals, noting that the irrefutably broad, unconditional amnesty was even more expansive than that introduced by General Pinochet in Chile; that key elements of the Command Paper were deeply misleading in seeking to portray current mechanisms as focused on prosecutions rather than truth recovery; and that the IRB would be the least effective of all proposed mechanisms in actually providing for information recovery.
5. As also detailed in our previous submission UN special procedures experts also raised 'grave concerns' regarding the UK's proposals which they assessed as placing the UK in "flagrant violation of its international obligations".⁸ In September 2021, the Council of Europe Commissioner for Human Rights, Dunja Mijatović, raised concerns that the Command Paper proposals would "lead to impunity" and conflicted with obligations under the ECHR.⁹
6. In relation to the 'process of intensive engagement' to progress the SHA and to take views on the UK's alternative proposals committed to in June 2021 there were a number of meetings over Summer 2021 involving the two governments and the five parties to the Northern Ireland Executive. Views of rejection of the UK proposals were expressed by the Irish government, political parties in the NI Executive, the NI legislature in a unanimous motion¹⁰ and by almost all stakeholders, including human rights and victims NGOs.
7. 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. By October 2021 the NIO have stated there were around 14 of these engagement

⁸https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E&utm_source=miragenews&utm_medium=miragenews&utm_campaign=news

⁹<https://www.coe.int/en/web/commissioner/-/northern-ireland-legacy-proposals-must-not-undermine-human-rights-and-cut-off-victims-avenues-to-justice>

¹⁰ 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>

sessions.¹¹ It appears such sessions followed a similar format of external presentations and discussion. There have not been ‘talks’ or ‘negotiations’ as such on the Command Paper.

8. We understand that these sessions were wound down in late 2021. There has been no official public process of consultation or scrutiny or negotiation by the UK in relation to its legacy bill.
9. Whilst arguing that the Command Paper does not represent the UK’s final position on a legacy bill the UK has not brought forward or made public any proposed alterations or amendments.
10. This includes in the UK submission to the Committee of Ministers in October 2021, which provided no further detail,¹² and in the more recent holding letter and ‘short interim update’ to the Committee of the 2 February 2022 from the NI Secretary of State.¹³
11. This ‘update’ claims that ‘engagement with a wide range of stakeholders’ over views on the UK legacy bill ‘has continued at pace’.¹⁴ This appears to be entirely misleading.
12. Whilst a number of ad hoc meetings may have continued with some stakeholders it would be a stretch to describe this as engagement on the legacy bill, the content of which has been kept confidential within Government. It appears any meaningful ‘engagement’ on the content of the legacy bill is only occurring within the confines of the UK Government.
13. In late October 2021, Ministers, whilst also again declining to elaborate on any aspect of the proposals, told the UK Parliament that the intention was still to introduce legislation in the ‘Autumn’ of 2021.¹⁵ This did not occur.
14. In December 2021, the UK *Daily Telegraph* newspaper reported that the bill had been delayed due to disagreements within the UK Cabinet between the Northern Ireland Office and the Ministry of Defence.¹⁶ Whilst the Command Paper only provides for voluntary testimony to the legacy body, the dispute appears to be focused on new proposals to compel testimony and cooperation. It is reported the Northern Ireland Office had proposed fines for persons who do not engage with the legacy body, and the Ministry of Defence had opposed this as ‘unfair’ on the military who may be compelled to testify, whereas, defence sources reportedly argued, non state actors could evade fines by leaving UK jurisdiction

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

¹³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a564c0

¹⁴ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a564c0

¹⁵ <https://hansard.parliament.uk/commons/2021-10-27/debates/81B40744-AE51-4F81-9E67-644B60B1CDD7/LegacyOfTheTroubles>

¹⁶ <https://www.telegraph.co.uk/politics/2021/12/10/northern-ireland-prosecutions-bill-blocked-fears-preferential/>

and residing in the Republic of Ireland.¹⁷ It is reported that that the Defence Minister conditioned his support to the bill to an alternative approach of qualifying benefiting from the Statute of Limitations to engagement with the legacy body, in order to compel non state actors to engage with it, and leave open the option of prosecution for non-cooperation. Sources from the Northern Ireland Office argue that the proposals had now been agreed in Cabinet, including by the Defence Minister. It is not publicly known if and what proposals were ultimately signed off by the UK cabinet.

15. At this stage (December 2021) Conservative backbenchers, supportive of a military amnesty, also pressed for the legislation to be introduced, blaming the NI Secretary of State for the delay. In response a government spokesperson apologised for the delay and made reference to the issue protecting soldiers whilst not giving 'carte blanche to terrorists' stated "Getting this balance right in the legislation that we bring forward is not simple, so although I regret the fact that this Bill has not come forward to the timetable that was hoped for and anticipated, there is good reason for that..."¹⁸
16. Into January 2022, media reports claimed that the legacy bill had been delayed until Spring or Summer 2022, potentially after scheduled NI Assembly Elections in early May 2022.¹⁹
17. In the UK Parliament on the 13 January 2022, Northern Ireland Ministers denied they had briefed the press about a delay to the bill, and that the bill was being blocked. In addition to claiming there had been a 'massive amount of engagement' NI Ministers stated "*The delay is to ensure that we get this right and that it not only achieves the Government's objective to provide the necessary protections to those who served so courageously in Northern Ireland, but is also a*

¹⁷ Whilst there is limited information from the media reports, if they are correct, it would be remiss not to say the grounds for the apparent objections seem farfetched, being grounded in an understanding that republican suspects or witnesses would seamlessly be able to uproot and move house from Northern Ireland to the Irish Republic, presumably along with their families, to avoid paying a fine for not giving testimony to the UK legacy body. The contention is then that this is 'unfair' on British Soldiers who would want to remain living in the UK and hence would therefore be compelled to pay the fine for refusing to engage with the UK's own legacy body (or in the alternative cooperate with it). It is not clear if the circumstances of loyalist paramilitaries have been factored into the reported objections, as to whether he would consider they would also be at an 'unfair' disadvantage to their republican counterparts, or would in the alternative be considered more willing to give testimony, pay a fine, or relocate abroad. Should these reports be correct they provide a concerning insight into the levels of discussion that are taking place in Cabinet on such an important issue.

¹⁸ <https://www.theyworkforyou.com/debates/?id=2021-12-09b.575.0#g578.1>

¹⁹ <https://www.newsletter.co.uk/news/crime/troubles-legacy-legislation-delayed-until-after-assembly-election-claim-3525071>

measure that will advance the agenda of reconciliation and cross-community understanding in Northern Ireland.”²⁰

18. Whilst it is therefore presently unclear when the UK intends to introduce legacy legislation into the UK Parliament, the UK has not resiled from its approach set out in the Command Paper to unilaterally depart from the Stormont House Agreement. Far from a ‘massive amount of engagement’ there remains no formal consultation process and any changes to the proposals in the Command Paper have not been subject to any public scrutiny.

General Measures: work of existing mechanisms

19. The work of the existing Package of Measures, which will be curtailed by the UK proposals continued its work. Far from the UK assertion in the Command Paper that existing mechanisms focus only on prosecutions, the amount of information recovery that has resulted from these mechanisms has been particularly striking in this period.
20. This includes two major legacy investigation reports produced by the Police Ombudsman.

Police Ombudsman

21. In January 2022, the Police Ombudsman released her Operation Greenwich²¹ investigation report covering 19 murders and multiple attempted murders committed across several counties around the north west of Northern Ireland between 1989 and 1993 by the Loyalist paramilitary group the Ulster Defence Association (UDA), a legal organisation until 1992.
22. The Operation Greenwich report, which includes the death of Patrick Shanaghan, provides 338 pages of legacy information recovery and raises significant concerns regarding collusive activity by the Police in relation to the killings finding complaints by families that had led to the long running investigation had been ‘legitimate and justified’. The Ombudsman’s statement references the definition of collusion provided in the Stevens Inquiries as including the “wilful failure to keep records, the absence accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder”, and reports that the Ombudsman investigation has “identified all of these elements in the conduct of former RUC [police] officers” in relation to a number of the cases examined in the Operation Greenwich report.²²
23. The Police Ombudsman in particular upheld family members complaints about collusive activity in the following areas:

²⁰<https://hansard.parliament.uk/commons/2022-01-13/debates/8D0ECAD5-0305-4799-8A01-45E845B5032E/PublicProsecutionServiceAndLegacyInNorthernIreland>

²¹<https://www.policeombudsman.org/Media-Releases/2022/Collusive-behaviours-but-no-prior-knowledge-of-att>

²² As above paragraph 22.133.

- Intelligence and surveillance failings identified by [the previous Ombudsman] Dr Maguire in his report of the Loughinisland attacks;
 - The failure to adequately manage the risk to the lives of a number of victims outlined in this public statement, and in particular the failure to warn those individuals of the threats to their life;
 - The passing of information by members of the security forces to paramilitaries has been identified as collusion by Sir Desmond De Silva. The failure by police to adequately address the passing of UDR officers passing information is in my view a serious matter that can be described as collusive behaviour;
 - I have identified that the deliberate destruction of files, specifically those relating to informants that police suspected of serious criminality, including murder, is evidence of collusive behaviour. The absence of informant files and related documentation is particularly egregious, where there was suspicion on the part of handlers or others that informants may have engaged in the most serious criminal activity engaging Article 2 of the Convention;
 - Failures identified in this public statement by Special Branch to disseminate intelligence to the CID Teams investigating the murders;
 - Failures in the use and handling by Special Branch of an informant suspected of being involved in serious criminality, including murder;
 - Failures by Special Branch in the North West region to adequately manage those high risk informants, which they suspected of being involved in serious criminality, including murder;
 - The passive '*turning a blind eye*' to apparent criminal activity, or failing to interfere where there is evidence of wrongdoing on the part of an informant, in particular to the deliberate failure of informants to provide information on a specific attack, and the continued use of an informant suspected of involvement in serious criminality, including murder.
24. In February 2022 a further Police Ombudsman investigation report Operation Achille, provided a further 344 pages of information recovery in relation to 11 killings by the UDA in the south Belfast area in the 1990s including the Sean Graham Bookmakers massacre in 1992 in which five people were killed.²³
25. The Police Ombudsman's report identified "significant investigative and intelligence failures" and "collusive behaviours" by the RUC [police]" and found that the concerns of the complainants, representing families of the bereaved were "legitimate and justified". The report identified a range of collusive behaviours by the RUC including:

²³<https://www.policeombudsman.org/Media-Releases/2022/Investigative-and-intelligence-failures-and-collus>

- Intelligence and surveillance failings which led to loyalist paramilitaries obtaining military grade weaponry in a 1987 arms importation;
 - A failure to warn two men of threats to their lives.
 - A failure to retain records and the deliberate destruction of files relating to the attack at Sean Graham Bookmakers;
 - The failure to maintain records about the deactivation of weapons – “indicating a desire to avoid accountability for these sensitive and contentious activities”;
 - The failure of police to exploit all evidential opportunities;
 - Failures by Special Branch to disseminate intelligence to murder investigation teams;
 - An absence of control and oversight in the recruitment and management of informants;
 - The continued, unjustifiable use by Special Branch of informant(s) involved in serious criminality, including murder and the passive ‘turning a blind eye’ to such activities.
26. There are a range of Police Ombudsman legacy investigations still to report, which are complex investigations (i.e. dealing with multiple issues). In a media interview following the publication of the above report the Police Ombudsman Marie Anderson suggested that the outstanding investigations would ‘complete the picture’ regarding police conduct in relation to loyalist paramilitaries in the time period in question. The Ombudsman also asserted that the ‘collusive behaviours’ between police and paramilitaries identified in the Operation Achille’s report were ‘systemic’.²⁴
27. It is notable that the UK Command Paper proposes an instant closing down of all Police Ombudsman investigations as soon as legacy legislation completes passage. There would be no transitional period with Ombudsman investigations at a late stage rendered unable to report. It is difficult to conclude otherwise than the purpose of this UK proposal is to shut down information recovery mechanisms that are finally delivering accountability for human rights violations.
28. Notwithstanding the broader investigative work of the Police Ombudsman the legacy reports also continued to reveal some longstanding gaps in powers that restricted some aspects of the investigation. The first is in relation to the lack of powers to compel retired police officers to cooperate with Ombudsman investigations, there continue to be instances whereby such cooperation is refused. A second is that the Ombudsman is limited in her investigative powers only extending to Police Officers, and not to other state actors, including the

²⁴<https://www.irishnews.com/news/northernirelandnews/2022/02/08/news/police-ombudsman-collusive-behaviours-identified-in-operation-achille-are-systemic--2584061/>

military and informants (including police informants). A third area is a statute bar on the Ombudsman investigating complaints about the police if the matter in question was previously investigated by the police themselves, an issue that arose in the case of Shanaghan and is further detailed below.

29. Under statute the Police Ombudsman is to periodically review her powers, and remedial action can then to be taken by the Northern Ireland Justice Minister, through legislation if necessary. The above gaps in powers, and others, have been previously raised by the Police Ombudsman in past reviews, yet implementation of recommended changes has been blocked from progressing in the NI legislature due to opposition from unionist parties.²⁵ Indeed it is noted by the NI Department of Justice that the Police Ombudsman “has been in place for over 20 years without any reform of its powers.”²⁶ However, we would contend that remedial action to address such gaps in powers is a requirement to ensure effective investigations as required under Articles 2 and 3 ECHR.
30. The most recent Five Year Review of powers by the Police Ombudsman has been the subject of public consultation from December 2021.²⁷
31. At present however the Department of Justice is not proposing to remedy the above matters relevant to legacy. The consultation paper in part attributes this to the ‘context’ of the threatened UK legacy bill which would curtail all Police Ombudsman investigations.²⁸

‘Call in’

32. Another of the General Measures is the ability of the Police Service to ‘call in’ an independent policing team from outside Northern Ireland to undertake an investigation.
33. At present the team led by former Chief Constable Jon Boucher, named after its first investigation Operation Kenova (into the running of an alleged state agent in

²⁵ The current consultation document from the NI Department of Justice States “The existing legislation dates from 1998, with regulations put in place in 2000 and 2001, without substantive change. The Ombudsman is also required to review the workings of the legislation relating to their powers every five years and provide a report to the Department. There have been three such Reviews but the recommendations have not been acted upon due to a lack of political consensus for the package put forward” Review of Police Ombudsman’s Powers Consultation Paper, NI Department of Justice, December 2021 paragraph 59 <https://www.justice-ni.gov.uk/consultations/consultation-oversight-stocktake-and-oponi-review>

²⁶ As above, paragraph 63.

²⁷ <https://www.justice-ni.gov.uk/consultations/consultation-oversight-stocktake-and-oponi-review>

²⁸ As above paragraph 62. “The Ombudsman has taken on an increasing number of legacy cases, which have attracted debate. The Stormont House agreement 2016 included provision for a new Historical Investigations Unit (HIU), which would have taken over all outstanding legacy investigations. However, in 2021, the UK Government put forward new proposals for legacy arrangements. These included an end to the Ombudsman’s investigations and a new body to provide information to families. At this stage, the final detail is still to be confirmed and legislation is to be brought before Parliament. However, it is important to consider the proposed reforms to the Ombudsman’s powers in this context.”

the IRA) are “investigating and reviewing a number of historic offences which occurred during the Troubles including more than 200 murders as well as offences of kidnap and torture” across four major inquiries.²⁹

34. In October 2021, the Operation Kenova team conducted a public consultation on a draft Protocol on a process for publishing interim and final investigation reports. In relation to three investigations the draft Protocol states the content of interim reports will:

... address generic, high-level themes and issues and concentrate on organisations, rather than individuals, and confirm - at a relatively high level of generality and without going into specifics - our findings about what was, and was not, happening during the Troubles as between (a) organisations, (b) the Provisional IRA and its Internal Security Unit, (c) the police, armed forces and intelligence services and (d) their agents and informants. In particular, we intend to make clear where we have, and have not, found patterns of State intervention or non-intervention in particular types of circumstance and address types of circumstance in which steps were, or were not, taken in relation to the disclosure of intelligence about serious criminal conduct, either prospectively before it happened or retrospectively when it was being investigated.³⁰

35. Operation Kenova investigations have, and have used, full police powers. By October 2022 Kenova had “provided the Director of Public Prosecutions of Northern Ireland (DPP NI) with more than 50,000 pages of evidence relating to a total of 17 murder victims and 12 abductions.”³¹

36. In this context the Operation Kenova reports provide a further considerable vehicle for information recovery ‘with teeth’ though the planned reports, which are planned to be released by November 2022.

37. Despite these investigations being substantively progressed the Command Paper provides that all such police investigations would be curtailed, and by extension the reports not released.

Civil Litigation

38. Civil litigation on legacy issues also continued throughout the time period since the Committee’s latest decisions on this group of cases. This also progressed reparations, accountability and information recovery in relation to conflict related incidents. It is this civil litigation that the Command Paper intends to shut down.

²⁹ <https://www.kenova.co.uk/consultation-opens-into-kenova-plans-to-release-interim-report-of-findings> The four are: Operation Kenova ('Stakeknife'); Operation Mizenmast (Jean Smyth-Campbell); Operation Turma (Sean Quinn, Paul Hamilton & Allan McCloy); Operation Denton (The Barnard/Glenanne Series Review).

³⁰ <https://www.kenova.co.uk/consultation-proconsultation-exercise-draft-protocol-on-publication-of-reports>

³¹ <https://www.kenova.co.uk/more-than-200-murders-being-reviewed-by-kenova>

39. In December 2021 the UK Ministry of Defence and NI Police paid £1.5 Million GBP in damages to two of the three families of those killed and two survivors of the Miami Showband attack. This related to a sectarian gun and bomb attack on the popular music band the Miami Showband in 1975 killing three of its members and injuring two others. The survivors and relatives had taken a civil claim against state agencies alleging security force collusion with loyalist paramilitaries in the killings. In response the Ministry of Defence and PSNI agreed to pay out £1.5 million GBP in compensation as a settlement, meaning there was no final adjudication by the court.³²
40. One of the survivors of the Miami Showband attack expressly stated that the reason they had agreed to settle the case rather than run it to full adjudication was the UK Command Paper proposals, which risked shutting down the case whilst it was still in progress.³³
41. On the 15 December 2021, the UK Supreme Court gave its ruling in a number of cases concerning failures to investigate death, torture and ministerial authorisation of torture by the PSNI³⁴. The cases concerning torture (*McGuigan and McKenna*) related to the treatment of the ‘Hooded Men’ who were subjected to interrogation in depth; the ‘five techniques’ and who were the subject of *Ireland v UK 1978* and the revision judgment request delivered in 2014. CAJ represented the McKenna family, whose father Sean McKenna, died in 1975 as direct result of torture by the state, in the domestic judicial review proceedings.
42. This civil litigation provided detailed information recovery exposing a ‘seriously flawed’ PSNI investigation into the allegations. The Court ruling provides significant detail as to how the investigation had been conducted. It criticised the investigation for “a willingness to base conclusions on partisan assumptions rather than evidence”, and went on to find that, on the part of the investigator, a “lack of professionalism and impartiality discredited the work done”. It reveals the PSNI investigation had gone as far as suggesting some form of collusion between the makers of an RTÉ documentary (which had brought to light materials from UK national archives concerning ministerial authorisation of the policy of using torture), and possibly also researchers at the Pat Finucane Centre human rights NGO, with the former Sinn Féin President Gerry Adams. This insinuation in the PSNI investigation appears to have been grounded in social media posts by Mr Adams following the RTÉ broadcast (presumably made after watching the programme) which the Court dismissed as “baseless speculation”

³² <https://www.bbc.co.uk/news/uk-northern-ireland-59641564>

³³ “The threat of the current British government to shut down all cases with the command paper set out in July threatening to dispense with justice rather than to dispense justice was a factor I had to take into consideration,” cited in <https://www.theguardian.com/uk-news/2021/dec/14/miami-showband-massacre-uk-government-accused-lies-payout-northern-ireland-troubles>

³⁴ <https://www.supremecourt.uk/cases/docs/uksc-2020-0019-judgment.pdf>

that “gives further insight into the mind-set of the investigating officer.”³⁵ The Court held that the PSNI decision not to further investigate the allegations of ministerial authorisation of torture were ‘irrational’ and were quashed as unlawful.

43. The UK Command Paper proposes shutting down both PSNI investigations per se but also civil litigation into Troubles related incidents. It would therefore preclude both reparations and information recovery (including on past unlawful investigations), as has been seen in the above cases.
44. The Supreme Court judgment in the Hooded Men case recognised that the case concerned UK security forces being involved in practices that would today be recognised as torture.
45. It also declared that the ‘critical date’ in UK domestic law in relation to the ECHR procedural limbs for right to life and torture investigations is October 2000, when the Human Rights Act 1998 came into force. The Court held the investigative obligation under Article 2 and 3 ECHR did not extend as far back as 1971 when the men were subject to the ‘five techniques’. This ruling concerningly has also closed down, as a matter of domestic law, investigative obligations into suspicious deaths or ill treatment arising from the Northern Ireland conflict that happened 10 years before the Human Rights Act 1998 came into force.

Inquests

46. We understand that the Presiding Coroner intends to conduct reviews in all legacy inquests that have not been allocated a Coroner, or listed in Year 1 or 2 and to deal with ongoing case management in late February or early March 2022. We understand that there are 22 inquests into 34 deaths pending before the Coroners’ Court.

Individual Measures

47. We echo the CM’s profound regret that the inquests and investigations in the individual measures have still not been completed, resulting in ongoing breaches of Article 2 ECHR. We repeat our call for infringement proceedings under Article 46 (4) ECHR given the demonstrable lack of good faith by the Government since the delivery of these judgments nearly 20 year ago.

McKerr v UK

48. In McKerr, there were oral hearings before the Coroner, O’Hara J, on 25 November and again on 21 December 2021. The subject matter of these hearings related to a Public Interest Immunity certificate dated 27 October 2021 issued by the Minister of State at the NIO, Conor Burns MP, over materials relevant to the Stalker Sampson series of inquests. The next of kin of Gervaise McKerr formally

³⁵ In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2) [2021] UKSC 55, paragraph 237. <https://www.supremecourt.uk/cases/uksc-2020-0019.html>

issued pre-action protocol correspondence for judicial review against the Minister on 22 November contending that the Minister had applied the incorrect legal test when issuing the certificates. The next of kin has delayed issuing proceedings pending delivery of the Coroner's ruling. Dates for hearing of the inquests have yet to be set.

Shanaghan v UK

49. The Public Statement by the Police Ombudsman into the death of Patrick Shanaghan was published on 14 January 2022 as part of an investigation into a series of 19 deaths and 3 attempted murders by the Derry/North Antrim UDA/UFF between 1989 and 1993, known as 'Operation Greenwich'. The Shanaghan family issued a public statement³⁶ and media comment³⁷ in response to the findings of this report
50. The Shanaghan family has had their concerns about the occurrence of collusive activity acknowledged as 'legitimate and justified' within the statement about this group of cases, however they expressed disappointment and concern that key aspects of their complaints relating to the actions of (Royal Ulster Constabulary – police) RUC officers prior to Patrick Shanaghan's murder could not be dealt with due to the legislation restricting the ambit of the Police Ombudsman's investigation into matters previously investigated by the RUC itself and also due to the destruction of police records.
51. The Ombudsman concluded that the VZ58 assault rifle used in Patrick Shanaghan's murder was part of the loyalist arms importation from apartheid South Africa. In relation to the RUC preventing a local doctor from accessing Mr Shanaghan after the attack, the Ombudsman concluded, 'The decision not to afford Mr Shanaghan urgent medical assistance at the scene was incorrect', recording that one RUC officer subsequently received a disciplinary sanction.
52. The Ombudsman, citing gaps in her powers in the form of a statute bar in investigating complaints that were already previously investigated by the police themselves, was unable to investigate the family's complaints that prior to his murder there were beatings in custody and death threats against Mr Shanaghan from RUC officers.
53. In relation to the allegations of assaults in custody the Ombudsman stated (with reference to the RUC (Complaints etc.) Regulations 2001³⁸:

³⁶ <https://caj.org.uk/2022/01/14/shanaghan-family-responds-to-police-ombudsmans-statement-on-operation-greenwich/>

³⁷ <https://highlandradio.com/2022/01/14/greenwich-report-highlights-failings-in-patrick-shanaghan-death/>
<https://twitter.com/CAJNi/status/1481988787089678339>

³⁸ <https://www.legislation.gov.uk/nisr/2001/184/regulation/5/made>

The 2001 Regulations state that complaints received under Section 52 of the 1998 Act can only be considered if ‘the complaint has not otherwise been investigated by the police.’ My Office cannot, therefore, investigate the assault allegations made by Mr Shanaghan as they were investigated by RUC Complaints and Discipline Branch at the time.³⁹

54. The Ombudsman cited the same reason as precluding her from investigating the allegations that police officers threatened to kill Mr Shanaghan. Both complaints directly relate to matters occurring in the run up to Mr Shanaghan’s death at the hands of loyalist paramilitaries, that the family consider are linked to his death.
55. We consider this a limitation in the Ombudsman’s powers to conduct effective investigations into deaths and hence the gap in powers should be remedied in order to ensure full compliance with Article 2 ECHR in such cases whereby complaints may engage matters previously investigated by the Police themselves, and hence cannot be looked at by the independent Police Ombudsman’s Office. As noted above despite a review of the Ombudsman’s powers there is presently no proposal to legislate to remove this provision debarring Ombudsman investigations of such matters.
56. The Ombudsman was also unable to reach a conclusion on the family’s complaints that the actions of the RUC in the run up to Mr Shanaghan’s murder constituted harassment. This was on the basis of factors including the absence of records relating to arrests and repeated stop and searches. The Ombudsman does, however, ‘fully acknowledge the family’s perception that the nature and frequency of interactions with police amounted to harassment’.
57. We call upon the CM to continue its supervision of this individual measure given the limitations on the Police Ombudsman’s investigation as outlined above, and in particular would ask the CM to consider calling on the UK authorities to remove the statute bar on the Police Ombudsman investigating complaints previously investigated by the police themselves.

McCaughey v UK

58. The related case of *Gribben v UK* was lodged with the ECtHR in June 2018 and the Northern Ireland Human Rights Commission was granted permission to intervene and a submission was filed by it on 13 December 2020. Judgment is to be delivered on 17 February 2022.

Jordan v UK

45. We understand that a decision is still outstanding from the Public Prosecution Service Northern Ireland on whether two former police officers are to be

³⁹ Operation Greenwich report, Paragraph 11.60

prosecuted and it is appropriate that this Individual Measure remains under the supervision of the CM.

Kelly & Others v UK

46. A High Court Judge has been appointed to review the case however, like other pending inquests, there has been limited progress in recent months. We understand that the primary cause for delay is due to a failure by the MOD and PSNI to provide disclosure to the inquest, despite having already conducted this exercise in earlier civil proceedings. The matter is next listed for review on 21 March 2022 and the issue for consideration is the venue for proceedings and whether the civil or coronial proceedings should be given priority.

Finucane v UK

47. We understand that there have been problems with the Government's evidence before the Judicial Review Court. There have been numerous redactions to the papers but the basis for the redactions is unclear; whether Article 2 ECHR, Article 8 ECHR Public Interest Immunity relevance is being asserted. An incomplete schedule of material was provided to Mrs Finucane and ciphers have not been applied to the papers making it impossible to cross-reference to other relevant documents including those generated through the De Silva Review. The Court has directed that the Government must set out its position in correspondence and position papers are to be lodged in advance of a Review hearing on 1 March however, no substantive hearing date has been given.

We call for all of these Individual Measures to remain under the supervision of the CM and request that the CM given consideration to issuing infringement proceedings in relation to the above general and individual measures.