CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

Addendum Rule 9 Submission to the Committee of Ministers

McKerr group v. the United Kingdom (Application No. 28883/95)

Supervision of the execution of the European Court's judgments

September 2022

Introduction

1. 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.
2. This Addendum Rule 9 communication is for consideration at the 1443rd meeting (September 2022) (DH) of the Ministers' Deputies and is to be read in conjunction with our July 2022 Rule 9 submission, largely focusing on the introduction by the UK of the Northern Ireland Troubles (Legacy and Reconciliation) Bill.[1]
3. This addendum is issued in the context of two further Communications from the UK on this group of cases since our Rule 9 submission was filed namely on the 08/08/22[2] and the 31/08/22[3]

Response to the UK's Communication (08/08/2022).

4. The first UK communication focuses on responses to the list of questions sent by the Committee to the UK on the 16th June 2022 on the Independent Commission for Reconciliation and Information Retrieval (ICRIR) and ECHR compatibility.[4]
5. It is our view that this document consistently presents the (ICRIR) in the best possible light, and glosses rather problematically over and fails address key concerns raised regarding how it will not meet Article 2 ECHR requirements. The document also makes assertions that are not supported by the legislative language in the Bill.
6. In relation to independence (question 1) the UK makes the assertion that the "The ICRIR will have full operational independence in all aspects of its work" in reference to its reviews but also "all decisions relating to the consideration and granting (or otherwise) of immunity applications."[5]
7. The response makes an assertion on independence but provides little detail on how the ICRIR's independence will be protected in the legislation. There is no mention of the range of SOSNI powers to intervene in this section, which pose threats to the ICRIR's

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[1] DH-DD(2022)830 Communication from an NGO (Committee on the Administration of Justice) (29/07/2022) in the case of MCKERR v. the United Kingdom (Application No. 28883/95). https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)830E%22]}

[2] DH-DD(2022)810 Communication from the authorities (08/08/2022) concerning the case of MCKERR v. the United Kingdom (Application No. 28883/95). https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2022)831E%22]}

[3] DH-DD(2022)905 Communication from the authorities (31/08/2022) concerning the case of MCKERR v. the United Kingdom (Application No. 28883/95). https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a7ceda

[4] https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a6ec1b

[5] UK Communication 8/08/22, paragraph 1.

independence and fetter its operational independence in how it conducts 'reviews', considers grants of immunity, or issues its reports.

8. For example, under clause 28(3) of the Bill (clause numbers relate to Bill as originally introduced) the SOSNI is empowered to issue Guidance to the ICRIR about how it must exercise its functions in a manner which does not breach a prohibition clause 4(1) on the ICRIR doing 'anything' (including within its review functions) which would risk or prejudice 'the national security interest of the United Kingdom'.

9. Clause 20 of the bill, on how requests for immunity are to be determined, contains a number of references to how Guidance issued by the SOSNI must be followed.

10. The UK response seeks to justify the Bill vesting all the appointments of the ICRIR Commissioners solely in the SOSNI, by stating this is the same for other public authorities. The Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland are referenced. However, firstly neither body is tasked to carry out Article 2 ECHR investigations. Secondly the role of the SOSNI in making such appointments has been criticised. In relation to the Human Rights Commission this includes appointments in 2021 where half the appointees, far from reflecting the criteria of the UN Paris Principles, had formerly served with the NI police.[6] As set out in our previous communications the UN accreditation committee has subsequently refused to renew the Commission's 'A Status' as an NHRI, citing largely cuts to funding and the issues of such appointments.

11. The UK response makes reference to funding coming from previous UK government commitments to legacy bodies. It is not clear how much of this amount will be made available and for what timescale. There is no reference in the UK Communication to the financing of the ICRIR being in fact under the direct control of the SOSNI (see c2(7) of bill). This needs to be viewed in light of previous concerns whereby the withholding of resources has hampered legacy investigations.

Reviews

12. The UK communication states that the UK government understands 'reviews' as an umbrella term including investigations. This is the first time that we have been made aware of this definition. As set out in our previous communication 'Reviews' in the Northern Ireland policing context have always referred to desktop reviews of papers. The term 'investigations' has referred to criminal investigations using police powers.

13. It is notable that the UK communication itself uses the word 'investigation' where its Bill uses the word 'reviews'. It may be the UK will seek to change the language in the Bill whilst still retaining the substance of intention regarding the ICRIR to conduct limited 'reviews'.

Immunity Process

14. The UK communication concedes that the ICRIR review will not be capable of leading to prosecution or punishment when immunity is granted, which conflicts with the ECHR. The UK argues that granting immunity in a 'limited and specific' way is justified on the

[6] https://www.theguardian.com/uk-news/2021/jan/11/high-status-of-northern-ireland-human-rights-body-being-put-at-risk

basis it will lead to information-recovery that would not otherwise come to light. However, as set out in our previous submission, the broad and subjective provisions for the granting of immunity in the Bill are not in any way tied to the provision of new information.

15. **Corroborating immunity requests:** The UK communication cites the obligation in the Bill (c 21) that when deciding whether to grant immunity, the Immunity Requests Panel of the ICRIR must take into account any information gathered by the ICRIR through previous reviews and any information obtained through 'any investigation that has previously been carried out by any other person.' It does not note that the legislation states that 'in order to form a view on the truth of P's account, the immunity requests panel is not required to seek information from a person other than P' (c20(4)). Also in a situation where previous reviews have not been effective, and the ICRIR does not open a full review into the facts of an immunity request or link the immunity request to an open review, this could be a very light touch corroboration exercise.
16. **Naming names:** The UK communication states that individuals who provide information to the ICRIR can be named in review reports, subject to the UK government's obligations to protect life. This was not explicit in the Bill, explanatory notes, or Human Rights Act Memorandum. This comes closer to the ECHR requirement that investigations must 'identify those responsible'. However, it contrasts to what was envisaged in Stormont House Agreement, which offered confidentiality and anonymity. It is unclear whether the possibility of being named will impact on offenders' willingness to provide information.
17. **Engaging with victims:** The UK states that whilst not provided for in the Bill, it expects the ICRIR to inform families if an individual has been granted immunity and keep them informed of the process. If this happens it is possible victims may only be informed after the immunity process is complete. This contrasts with South African Truth and Reconciliation Commission amnesty process under which victims had a right to be informed when amnesty applications were made and a series of rights relating to their involvement in amnesty hearings.
18. **Giving reasons**: The UK communication states that the ICRIR is to give reasons for decisions to grant immunity. However, it does not specify whom these reasons are to be given to, whether it is the immunity applicant, victims or the public or how this is reflected in its Bill.
19. **Limited immunity:** the UK communication addresses an ambiguity within the Bill regarding how far general immunity could extend by contending that the immunity would only be granted for eligible disclosed offences. This would mean that general immunity could not be granted to an individual for all their crimes in the Troubles, i.e., the scope of the immunity for a specific application would be dependent on the information provided. Immunity applicants would not receive immunity for undisclosed offences. However, this apparent position on this point is not reflected in the legislation.
20. **There is nothing to say that an individual can only apply for immunity once.** This could raise the possibility that an offender who is guilty of multiple serious violations relating to the Troubles may apply for immunity in relation to one incident when they become aware that that incident is being reviewed by the ICRIR, but may refrain at that time from disclosing other incidents. If they subsequently become aware that other offences

for which they are responsible are the subject of separate reviews, it may be possible for them to submit additional immunity requests, even after the five-year window (with respect to immunity requests that remain open at that time).

21. The UK communication suggests that the ICRIR may approach people and 'offer immunity in exchange for cooperation'. While such cooperation would be voluntary, this is a different model to individuals coming forward to provide information on their own initiative. In addition, this language raises the possibility that the nature of the information provider's engagement with the ICRIR could be in response to questions posed by the ICRIR. Where this approach is used we query whether it would steer information providers towards providing more minimal forms of information, i.e. disclosing only offences that investigators already know about.

22. **ECHR compliance:** The UK government restates its position that its proposals are compliant with ECHR case law and it refers directly to the *Margus* case. Paragraph 139 of the Grand Chamber decision in the *Margus* case stated:

> A growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[7]

23. This shows that the court has a presumption against amnesties. The rather unwieldy hypothetical suggests that there may be space for the court to recognise amnesties granted within a reconciliation process. However, we think this should be understood with the court's *Tarbuk* decision which stated:

> even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.[8]

24. This suggests that the amnesty must be 'necessary' and must balance the interest of members of the public, including victims, with the interests of the state. A high bar is therefore necessary. It would relate to reconciliation processes that are needed to end violent conflict, which is not the case in Northern Ireland. Also, the widespread public opposition to the proposals within Northern Ireland undermines claims that they may promote reconciliation or reflect the interests of the public.

[7] CASE OF MARGUŠ v. CROATIA (Application no. 4455/10), GC, Judgment 27 May 2014.
[8] Tarbuk v Croatia (Application no. 31360/10), Judgment 11 December 2012

Inquests

25. The UK communication says the ICRIR Chief Commissioner 'will be able to preside over findings in a manner similar to a coroner'. The Chief Commissioner will be of high judicial standing, but as the ICRIR will not be a court, we question the accuracy of this statement.

Response to the UK's Communication (31/08/2022)

26. The second brief UK communication of the 31 August 2022 focuses on the issue of engagement over the proposals, largely enumerating a number of meetings the UK authorities have had with stakeholders.

27. In response to this we can only reiterate the concerns in our Rule 9 submission that both that the holding of ad hoc meetings is no substitute for the formal processes that have been bypassed in the introduction of the Bill. This includes the bypassing of the role of the NHRI; the Northern Ireland Human Rights Commission, the legal duties under the statutory equality duty, the devolved justice arrangements and formal consultation processes. In addition, meetings have not followed a format that could be considered meaningful consultation.[9]

28. We also address in our Rule 9 submission, and do not consider credible, the UK assertion that changes made between the Command Paper and Bill have been in response to concerns from stakeholders.[10]

29. CAJ along with academic colleagues in the Model Bill Team recently met Northern Ireland Office Minister Lord Caine to discuss the bill. Having set out the widely held concerns regarding non-ECHR compliance we asked the Minister to withdraw the bill. Far from engagement being centred on an open mind and ensuring legal compliance, the Minister was unwilling to consider any alternative policy to the present Bill being progressed through the Parliament, arguing that to do so would be politically untenable given the drive for the Bill from the Conservative party backbenches. Instead, the Minister suggested Government was open to considering amendments that might make the Bill "less unpalatable" to victims. Clearly tweaking the Bill to improve its presentation will not remedy the issues of ECHR incompliance that run through the core of the bill. We remain concerned that the Bill is being politically driven by a lobby openly seeking the curtailment of Article 2 ECHR compliant investigations into military veterans, rather than ensuring compliance with the UK's ECHR obligations.

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[9] CAJ July 2022 Rule 9 submission, paragraphs 21-49.
[10] CAJ July 2022 Rule 9 submission, paragraphs 49-59.