

**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***  
**November 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 Rule 9 addendum communication is for consideration at the 1451st meeting (6-8 December 2022) (DH) and is to be read in conjunction with our October 2022 Rule 9 communication.<sup>1</sup>
3. The focus is on the UK Northern Ireland Troubles (Legacy and Reconciliation) Bill ('the Bill').<sup>2</sup>
4. This addendum submission is made in light of the Second Reading general debate stage of the Bill having taken place in the upper chamber of the UK Parliament (House of Lords) on the 23 November 2022.<sup>3</sup>
5. The UK also issued a submission to the Committee of Ministers on the 10 November 2022 in the form of brief correspondence. This set out the date for Second Reading on the 23 November and declined to detail any proposed amendments to the Bill. The correspondence alluded to future stages of the Bill being dependent on 'other Northern Ireland legislative priorities' alluding to other bills being 'particularly urgent.' The UK therefore 'expected' to be able to update regarding its intentions to amend the Bill in March 2023.<sup>4</sup>
6. This correspondence was consistent with broader indications from the UK authorities that the passage of the Bill would be slowed down to 'carefully consider' amendments. It was expected therefore that future stages of the Bill would proceed in 2023.
7. The Committee of Ministers (CM) Decision of September 2022 urged the UK to devote 'sufficient time' before any progression of the Bill.

**Future stages of the bill**

8. Despite previous indication at the Second Reading of the Bill on the 23 November the Government unexpectedly announced the Committee stage of the Bill would in fact take place on just two days on the 12 and 14 December 2022.<sup>5</sup>
9. As within the House of Commons, the Bill will be dealt with quickly by a Committee of the whole chamber, rather than a Committee that would take evidence, hear from witnesses and produce a report. In the House of Commons all remaining stages

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<sup>1</sup> [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)1224E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)1224E%22%5D%7D)

<sup>2</sup> <https://bills.parliament.uk/bills/3160/stages>

<sup>3</sup> <https://bills.parliament.uk/bills/3160/stages/16831>

<sup>4</sup> [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)1262E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)1262E%22%5D%7D)

<sup>5</sup> <https://bills.parliament.uk/bills/3160/stages/17158>

following Committee were dealt with in one day. It is possible such a fast tracking of the Bill will continue.

10. At the Second Reading stage UK Ministers set out four areas where they now intend to amend the Bill in very general terms.<sup>6</sup> Despite the length of time since the previous stage in July, Ministers claimed that the text of proposed government amendments were not yet drafted and hence not available.<sup>7</sup>
11. The text of amendments can be tabled at any time in the House of Lords. It is possible Ministers will make the text available shortly. It is also possible the text of amendments will not be provided until a very late stage, or even the day of the Committee stage.
12. The UK authorities told the CM in September they were open to ‘constructive engagement with stakeholders’ on the Bill. However, since this time no formal pause or consultation process has been opened. The same pattern of Ministers and officials holding meetings about the Bill has continued. However, as illustrated by the very limited amendments put forward by Ministers, whilst concerns about the Bill are articulated at such meetings, they continue to be in practice ignored by the UK authorities. The CM Decision had strongly reiterated calls on the UK for meaningful effective engagement with stakeholders *before* any progression of the Bill. This has clearly not occurred and there continues to be no meaningful engagement on the Bill.
13. The national equality body – the Equality Commission for Northern Ireland, in September 2022 triggered its own motion enforcement powers to formally investigate the Northern Ireland Office (NIO) for further breaches of equality legal duties in relation to the Bill.<sup>8</sup> These relate to duties under the Good Friday Agreement implementation legislation (the ‘Section 75’ statutory equality duty) to transparently formally consult and equality impact assess proposed policies *prior* to a policy being adopted. Ministers at the NIO proceeded to introduce the current Bill in the UK Parliament without first conducting and concluding the required consultation and equality law assessments, that would have, if undertaken correctly, obliged consideration of ‘alternative policies’ to the current Bill. This occurred despite the Equality Commission having previously investigated the NIO and found them in breach of their equality obligations in relation to the process followed in the earlier stage of development of the present Bill.

#### **First legacy conviction of soldier on 25 November 2022**

14. A few days after the Second Reading of the Bill the Crown Court in Northern Ireland found a former soldier guilty of the manslaughter of a civilian, Aidan McAnespie, in 1988. This is the first occasion a member of the security forces has been convicted in a legacy case relating to the Northern Ireland conflict.<sup>9</sup>
15. The soldier will be eligible for early release after two years under the terms of the early release scheme for conflict offences flowing from the Good Friday Agreement. The

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<sup>6</sup> [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill HL Second Reading Volume 825: debated on Wednesday 23 November 2022](#), Lord Caine Column 1293

<sup>7</sup> [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill HL Second Reading Volume 825: debated on Wednesday 23 November 2022, Lord Caine](#) Column 1465.

<sup>8</sup> Equality Commission for Northern Ireland Minutes of the Statutory Duty Investigations Committee, meeting 21 September 2022, EC22/10/09 – Item 4 SDIC/22/05/07

<sup>9</sup> <https://www.judiciaryni.uk/judicial-decisions/2022-nicc-29>

present Bill, once enacted, currently seeks to reduce this further to zero which may allow the convicted person to be released immediately.<sup>10</sup>

### **Proposed UK Government Amendments**

16. As alluded to above there are no details or text of the proposed amendments.
17. In addition to raising broader concerns about the Bill the CM Decision of September 2022 urged the UK authorities, if the Bill proceed at all, to make necessary amendments to comply with the ECHR.<sup>11</sup> In particular, the CM singled out the following areas:
  - ensuring that the Secretary of State for Northern Ireland's role in the establishment and oversight of the [Independent Commission for Reconciliation and Information Recovery] ICIR is more clearly circumscribed in law in a manner that ensures that the ICIR is independent and seen to be independent.
  - ensuring that the disclosure provisions unambiguously require full disclosure to be given to the ICIR.
  - ensuring that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny.
  - reconsider the conditional immunity scheme in light of concerns expressed around its compatibility with the European Convention.
  - reconsider provisions of the Bill that would prevent new civil claims and legacy inquests from continuing.
18. We will consider these areas in turn against the amendments proposed by UK ministers.

### **Independence of ICIR**

19. The CM urged that the UK amend the Bill to ensure the *“Secretary of State for Northern Ireland's role in the establishment and oversight of the ICIR is more clearly circumscribed in law in a manner that ensures that the ICIR is independent and seen to be independent.”*
20. The areas of concern in relation to the ICIR not meeting ECHR procedural requirements relating to independence include: the level of the Secretary of State's control over the resources of the ICIR; control over the caseload of the ICIR; powers to redact all reports emerging from the ICIR; powers to terminate the work of ICIR at any point; the issuing of Guidance that will structure and constrain the work of the ICIR.
21. Ministers do not propose any amendments to address any of these areas of concern.
22. Another area of concern relates to the Secretary of State directly appointing all of the office holders within the ICIR. Ministers propose one amendment in this area, it however does not change the appointments being made by the Secretary of State.

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<sup>10</sup> Whilst in our view reduced jail time could form part of an overall legacy mechanism involving ECHR compliant investigations, this is a different context to the present Bill whose provisions are broadly aimed at facilitating impunity. The [Joint Committee of Human Rights at the UK Parliament has raised criticisms that the provision in the current Bill will effectively allow for impunity](#) (section 5 of JCHR report).

<sup>11</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a831f5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a831f5)

Rather it is limited to the Secretary of State, 'consulting' with other unnamed persons before appointing the Chief (but not other) Commissioners.<sup>12</sup>

### **Disclosure provisions**

23. The CM urges the UK to ensure "that the disclosure provisions [in the Bill] unambiguously require full disclosure to be given to the ICRIR."
24. The UK authorities do not propose any amendments to address this issue.

### **Participation of victims and families**

25. The CM urges the UK to ensure "that the Bill adequately provides for the participation of victims and families, transparency and public scrutiny".
26. The UK authorities do not propose any amendments to address this issue.

### **Conditional Immunity Scheme**

27. The CM urges the UK to reconsider the conditional immunity scheme given the concerns of ECHR incompatibility.
28. The UK authorities do not propose any amendments to reconsider the conditional immunity scheme.
29. The UK authorities also do not propose any amendments to address the conspicuously low threshold that will allow an applicant to be granted immunity, without even offering any new information at all.
30. In relation to former members of the security forces it is foreseeable that veterans will be granted immunity from prosecution (and any prospect of an ECHR compliant investigation<sup>13</sup>) by simply providing copies of original statements given at the time of conflict-related incidents and declining no further information. This is despite the misgivings about the reliability and accuracy of such statements.<sup>14</sup> Provision of such statements would however meet the currently low threshold for immunity envisaged in the current Bill. Whilst this option would not facilitate information recovery and not be an option open to non-state actors, it is consistent with the immunities scheme having been designed entirely around facilitating impunity for state actors and the undertakings given by Ministers to military veterans that they will no longer face investigation following the passage of the Bill.
31. The sole amendments proposed by the UK authorities relate to the proposed creation of an offence, and the possibility of revocation of immunity, for persons who willingly mislead the ICRIR. This relates to a concern regarding the potential for individuals to deliberately give false and misleading information to the ICRIR and benefit from immunity regardless. Whilst the text of the amendment is awaited it appears to only

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<sup>12</sup> "We will strengthen the commission's independence by making clear that the Secretary of State should consult named individuals before appointing the chief commissioner."

<sup>13</sup> Whilst the UK has asserted that the ICRIR will be able to conduct ECHR compliant investigations using police powers, however in addition to broader misgivings of the ICRIR meeting ECHR standards for independent and effective investigations, as set out below it does not appear such police powers could be used against persons with immunity.

<sup>14</sup> Statements taken from soldiers by the internal Royal Military Police following military shootings in the early part of the conflict, where no police investigations at all took place, in particular have been found incompatible with the procedural requirements of Article 2 ECHR.

deal with such a circumstance, and the very low threshold of an applicant providing even information that is already in the public domain, or past statements, will remain.

### **Civil claims and legacy inquests**

32. The CM had urged the UK to “reconsider provisions of the Bill that would prevent new civil claims and legacy inquests from continuing.”
33. The UK authorities do not propose any amendments to address the concerns over civil claims and legacy inquests.
34. This includes not even reconsidering the termination of the many legacy inquests and civil claims that have already been opened before the courts.

### **Two amendments proposed by the UK**

35. There are two other amendments proposed by the UK. <sup>15</sup>
36. The first is that the Minister outlines that the UK will amend the Bill to ‘make clear’ the ICIR can carry out Article 2 & 3 compliant investigations ‘when it judges them to be appropriate’.
37. The UK has consistently maintained a position the ICIR will be capable of conducting ECHR compliant investigations, in the face of authoritative criticism that this is not the case. For example, whilst the UK authorities have talked up the addition of police powers to the ICIR, it is not clear how such powers could be used against persons with immunity. Persons can usually only be arrested, questioned etc on the basis of reasonable suspicion for offences they can be prosecuted for.
38. Whilst the text of any proposed amendment is not available the manner in which it is articulated appears to indicate its intention will be limited to a declaratory and permissive statement reflecting the UK’s position rather than the any substantive changes. As set out in previous communications the UK authorities have taken a position that as a matter of domestic law there are no duties to conduct ECHR compliant investigations before 1990, a period which covers most of the Northern Ireland conflict.
39. The second amendment proposed by the UK authorities would be to disapply the early release scheme derived from the Good Friday Agreement (whereby in practice persons convicted of conflict-related offences serve a maximum of two years).

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<sup>15</sup> Full text of Minister Caines commitments to amendments: “As a result of my discussions, and of those between my right honourable friend the Secretary of State and a number of groups within Northern Ireland, I intend to bring forward a series of proactive government amendments in Committee to address a number of concerns that have been raised. These will include amendments to underpin the Bill’s compliance with the ECHR, by making it clear that the commission will be able to carry out Article 2 and 3-compliant criminal investigations in cases where it judges them to be appropriate. We will strengthen the commission’s independence by making clear that the Secretary of State should consult named individuals before appointing the chief commissioner. To make the information recovery process and the provisions around immunity more robust, we will create an offence for those who choose willingly to mislead the commission and give the commission the power to revoke immunity where individuals have been found subsequently to do so. We will disapply the Northern Ireland (Sentences) Act 1998 for individuals who choose not to tell the commission what they know and are subsequently convicted of an offence, so that they face a full rather than a reduced sentence, as well as increasing the fine for non-compliance with the commission.” [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill HL Second Reading Volume 825: debated on Wednesday 23 November 2022, Lord Caine Column 1293](#)

40. The Bill presently reduces the jail time served to zero for those convicted. The amendment proposes that convicted persons would instead serve a full sentence if they 'choose not to' tell the ICIR 'what they know.' An increased fine for 'non-compliance' with the ICIR is also proposed.
41. It is not clear how this would or could work in practice. No conviction can occur if a person has immunity from the ICIR, which the UK is proposing to retain at a low and subjective threshold. The proposed amendment may therefore incentivise applications for immunity, and hence increase impunity, from any person fearing investigation. Such immunity could be granted under the present scheme without an applicant having to provide any new information.
42. Furthermore, it is not clear what a person telling the ICIR "everything they know" means, whether it relates to a particular matter they are subsequently convicted of or all their knowledge about any conflict related matter. There is a significant risk such processes could become selective and arbitrary, bypassing the safeguards provided for in the exercise of police powers. It is also not clear how the ICIR will be able to determine whether an individual has told them "everything they know." It is not clear how such a matter would or could become clear in a criminal trial on a specific offence. It is not clear if the UK authorities have thought through this amendment.
43. Beyond these limited areas it is notable that the UK authorities are not proposing any further amendments that would address any of the issues raised by the CM, the Commissioner for Human Rights, the Northern Ireland Human Rights Commission, the Joint Committee of Human Rights of the UK Parliament, the UN Special Procedures mandates holders, the Irish Government, victims' groups, academics and NGOs.

**In light in particular of the bad faith shown by the UK in the current fast tracking of the Bill, the ongoing areas of ECHR incompatibility of the Bill, and the potential for the Bill to have already been enacted by the next CM meeting in March 2023; CAJ would urge consideration by the CM of seeking an advisory opinion under Article 47 ECHR from the Court in relation to the Bill at the December meeting.**

**CAJ, November 2022**

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