

**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

May 2023

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. 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.
3. 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 on the 18 March 2020, the UK Command Paper of July 2021 and the consequent *Northern Ireland Troubles (Legacy and Reconciliation) Bill* (hereafter 'the Bill' introduced into the UK Parliament in May 2022.
4. This Rule 9 communication is for consideration at the 1468th meeting (June 2023) (DH). CAJ's previous Rule 9 submissions focusing on the Bill include:
 - July 2022 - providing a detailed critique of the Bill.¹
 - October 2022 with an addendum in November 2022 in light of the Second Reading in the upper chamber (House of Lords).²
 - January 2023 critiquing the amendments tabled by the UK authorities; and an addendum in February 2023 on the UK response to opposition amendments.³
5. Our previous submission set out our contention that amendments tabled by the UK were superficial and did not address the identified ECHR incompatibility of the Bill.
6. The Committee of Ministers (CM) Decision in March 2023 expressed serious concern that the UK amendments did not allay the CM's concerns regarding the Bill. The CM decided to resume examination in the June meeting and "*in the absence of tangible progress in the legislative process to sufficiently allay the concerns about the Bill's compatibility with the Convention by 3 May 2023, to instruct the Secretariat to prepare a draft interim resolution for consideration at that meeting.*"⁴
7. The UK issued a response, on the 4 May 2023, which did not provide for nor commit to any tangible progress or changes at all to the Bill.⁵
8. This Rule 9 Communication covers general developments from the previous CM Decision in relation to the continued passage of the Bill and the concurrent delivery of elements of the existing 'Package of Measures'.

¹ [https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD\(2022\)830E%22%5D%2C%22display%22:%5B%22%22%5D%2C%22EXECIdentifier%22:%5B%22DH-DD\(2022\)990E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXECIdentifier%22:%5B%22DH-DD(2022)830E%22%5D%2C%22display%22:%5B%22%22%5D%2C%22EXECIdentifier%22:%5B%22DH-DD(2022)990E%22%5D%7D) and Addendum: [https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B%22%22%5D%2C%22EXECIdentifier%22:%5B%22DH-DD\(2022\)990E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22display%22:%5B%22%22%5D%2C%22EXECIdentifier%22:%5B%22DH-DD(2022)990E%22%5D%7D)

² <https://caj.org.uk/publications/submissions-and-briefings/com-submission-oct-22/>

³ <https://caj.org.uk/publications/submissions-and-briefings/com-sub-jan-23/>

⁴ [1459 DH decision in McKerr group](#)

⁵ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c

Summary of issues raised: progress of UK Bill

- The UK Bill is designed to close down all current mechanisms for conducting Article 2 compliant investigations into the NI conflict which were established as a ‘Package of Measures’ further to the execution of the current judgements. The Bill will instead provide for a *de facto* amnesty through a ‘conditional immunity’ scheme with a low threshold, and a time limited Independent Commission for Reconciliation and Information Recovery (ICRIR) to conduct limited ‘reviews’ of certain cases.
- Despite commitments to substantively amend the Bill in the Committee stage in upper house Ministers ultimately tabled a raft of amendments at a very late stage in January which were superficial in nature and made no attempt to address any of the areas of ECHR compliance identified by the CM and others.
- The CM decision in March 2023 raised serious concerns regarding the Bill. It set a deadline of the 3 May 2023 for the UK to commit to tangible changes that would allay concerns about ECHR incompatibility, and if the UK did not do this instructed the secretariat to draft an Interim Resolution for consideration at the June meeting.
- The UK has since committed to no further amendments to the Bill. One day of Committee stage remains (now scheduled for the 11 May) and the final report stage of the Bill will take place in June.⁶
- The Minister Lord Caine, speaking to CAJ on the fringes of events commemorating the 25th Anniversary of the Good Friday Agreement, was quite clear that it remains the UK’s intention that the Bill will complete passage before the summer recess.
- It is notable also that although the Bill has not completed passage, the UK has already commenced in parallel recruitment processes for the ICRIR legacy body.
- In correspondence in response to the CM of the 4th May, no further changes to the Bill were committed to and there is no indication whatsoever to date that the UK intends to make any tangible changes to the Bill. The UK instead maintains the position the Bill is ECHR compatible.
- The UK correspondence of the 4th May 2023 suggests it is premature for the CM to issue an Interim Resolution in June, as the final stage of the Bill may not be complete by then and should instead defer consideration until the September CM meeting.
- However, should the Bill complete passage in June, as is intended, the Bill (as it stands) would lead to considerable damage occurring prior to the September CM meeting. Whilst the envisaged legacy body and amnesty scheme are unlikely to have been set up by then, the Bill will trigger within two months the shutting down of the central elements of the Package of Measures agreed with the CM.
- This existing Package of Measures has continued to deliver considerable information recovery and historical clarification in recent months. This includes a fresh historic report from the Police Ombudsman’s office; along with rulings and reparations from civil cases relating to practices of torture and the use of informants within paramilitary groups. The reports from the independent police investigation Operation Kenova are also awaited. Inquests are ongoing.

⁶ [UK Response to CM 4 May 2023](#) – also see <https://bills.parliament.uk/bills/3160/stages>

Committee of Ministers (CM) Decision (March 2023)⁷

9. By late 2022 both the Council of Europe Commissioner for Human Rights and UN Special Procedures mandate holders, called on the UK to withdraw the Bill,⁸ a call echoed by the UN High Commissioner for Human Rights.⁹ This added to the domestic concerns where the NI Human Rights Commission, Victims Commissioner, NI political parties, Irish Government and UK opposition parties have all opposed the Bill.
10. The CM Decision in March recalled the concern previously expressed at the UK's departure from the (UK-Ireland) Stormont House Agreement of 2014.
11. Responding to the UK amendments the CM Decision *“expressed serious concern that those amendments do not sufficiently allay the concerns about the Bill set out in the decisions adopted at the 1443rd meeting (DH) (September 2022) and 1451st meeting (DH) (December 2022) and emphasised again that it is crucial that the legislation, if progressed and ultimately adopted, is in full compliance with the European Convention and will enable effective investigations into all outstanding cases;”*
12. Consequently, the CM *“decided to resume examination of the group of cases at their 1468th meeting (June 2023) (DH) to closely follow all developments and, in the absence of tangible progress in the legislative process to sufficiently allay the concerns about the Bill’s compatibility with the Convention by 3 May 2023, to instruct the Secretariat to prepare a draft interim resolution for consideration at that meeting.”*
13. The UK issued a response on the CM on the 4th May 2023. This set out that a third day of Committee stage had taken place on the 29th March, but due to the overrun of a previous debate, this did not complete and has been rescheduled for the 11th May. The UK sets out that it expects the final substantive stage of the Bill (Report Stage) to take place in June. The UK therefore claims it cannot demonstrate ‘tangible progress’ with the Bill at this stage and suggests CM consideration of an Interim Resolution is deferred to the September meeting to consider the Bill after the Report stage.¹⁰
14. Notably however not only is the Bill likely to have completed passage before the summer recess but as it stands many of its damaging provisions will have already commenced by the September CM meeting, triggering the shutting down the work of the Package of Measures.

⁷ [1459 DH decision in Mckerr group](#)

⁸ <https://www.coe.int/en/web/commissioner/-/united-kingdom-commissioner-warns-against-regression-on-human-rights-calls-for-concrete-steps-to-protect-children-s-rights-and-to-tackle-human-rights-issues-in-northern-ireland>; <https://www.ohchr.org/en/press-releases/2022/12/uk-flawed-northern-ireland-troubles-bill-flagrantly-contravenes-rights>;

⁹ <https://www.ohchr.org/en/press-releases/2023/01/uk-rights-victims-and-survivors-should-be-centre-legislative-efforts-address>

¹⁰ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab245c

15. On its present formulation *two months* after the Bill is passed Part III will come into force.¹¹ This will mean - in relation to pre-1998 conflict-related incidents- that:¹²
- No criminal investigation may be continued or begun.
 - No public/family report of a previous criminal investigation can be produced. (After a relevant day that has already passed).¹³
 - No criminal enforcement action can be taken against a person for an offence when they have availed of the immunity scheme.
 - No criminal enforcement action can be taken against a person without immunity unless there is an ICRIR referral.
 - No criminal enforcement action can be taken for (Troubles-related) offences that are not serious or connected.
 - The above is qualified where a prosecution / criminal enforcement action has already initiated before this provision has come into force, a criminal investigation / enforcement action can continue for the purposes of that prosecution.
 - Any civil action that was brought on or after 17 May 2022 may not be continued.
 - No further civil actions can be brought.
 - A prohibition on new legacy inquests will come into force.
 - Existing inquests that are not at an advanced stage by (presently) 1 May 2023 cannot be continued.
 - Police Ombudsman legacy complaints investigations must cease.

Developments since the March 2023 Decision

16. 10th April 2023 marked the 25th Anniversary of the Belfast or Good Friday Agreement (GFA), leading to a major international focus on Northern Ireland. The International Federation of Human Rights (FIDH) with CAJ issued a statement of concern regarding the legacy Bill on this date.¹⁴
17. There was a large-scale conference in Queens University Belfast on the week of the 3rd April 2023 addressed by UK and Irish prime ministers past and present; President Clinton and other key international and domestic figures involved in the GFA.¹⁵
18. Whilst it is likely the UK did not wish for the legacy Bill to have entirely completed passage by the time of this conference (and hence be a further considerable focus at the time), the Bill continues to progress and is now scheduled to complete passage before the July summer recess.

¹¹ See Clause 57(2) Commencement: https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_6.html#pt5-l1g57

¹² See Pt III of the Bill (as brought to the House of Lords: https://publications.parliament.uk/pa/bills/lbill/58-03/037/5803037_en_4.html#pt3

¹³ The 'relevant day' for this in the Bill is presently the earlier of the 1 May 2023 or the date of the establishment of the ICRIR. The 1 May 2023 has already passed. (clauses 34(3)&(6)

¹⁴ <https://www.fidh.org/en/region/europe-central-asia/united-kingdom/northern-ireland-the-british-government-is-attempting-to-cover-up-its>

¹⁵ <https://www.qub.ac.uk/agreement25/about/>

19. At a legacy panel discussion at the conference the Minister taking the Bill through the House of Lords, Lord Caine, reiterated this intention for the Bill to complete passage before the summer recess. Whilst the Minister again stated the UK was open to further amendments, there is no reason why such amendments have not already been brought forward if there was a genuine intention to do so. Whilst a formal vote on amendments may not commonly take place until Report stage, amendments are routinely tested and discussed at the earlier Committee Stage. It appears the case therefore there is no intention to tangibly change the approach in the Bill and it will be pushed through in coming months, presumably after the June CM meeting.
20. Despite the Bill not completing passage the UK has pressed on and sought to recruit a Commissioner for Investigations to lead the proposed legacy body (ICRIR)¹⁶, advertising the position with a deadline of the 18th May 2023.¹⁷ Whilst it will clearly take time to establish a new institution and running operationally, it appears to be the intention to do so as soon as is as possible, and before a likely change in UK Government in 2024. The UK opposition Labour party have committed to repealing the Bill, if they win power.¹⁸
21. The Irish Tánaiste (deputy prime minister) Micheál Martin in his address to the conference raised the legacy bill emphasising Ireland and the UK ‘disagree fundamentally’ on the Bill, and recalling that a fundamental principle of the bilateral GFA agreed by both the UK and Ireland at the time was that *“all state action in Northern Ireland must be anchored in human rights, with the European Convention on Human Rights as the threshold.”*¹⁹
22. Following a meeting with victims organised by Amnesty International the Tánaiste Micheál Martin emphasised Ireland’s ‘very clear’ opposition to the legacy Bill, calling on the UK to halt the Bill. Amnesty in response emphasised that the Tánaiste had reiterated that an inter-state case against the Bill remains under active consideration.²⁰
23. Despite the emphasis from the UK authorities that process and due engagement is continuing on the Bill, it is notable that the national equality body (the Equality Commission for Northern Ireland – ECNI) for a second time found the Northern Ireland Office (NIO) had breached equality duties flowing from the GFA in relation to the Bill.
24. The statutory equality duty provided for under Section 75 of the Northern Ireland Act 1998 (the main implementation legislation of the GFA) requires the adoption of equality schemes which provide for consultation, equality impact assessment and the consideration of ‘alternative policies’ when a policy will likely cause

¹⁶ Independent Commission for Reconciliation and Information Recovery (ICRIR)

¹⁷ <https://www.russellreynolds.com/en/executive-opportunities>

<https://appointments.thetimes.co.uk/job/2585517/commissioner-for-investigations/>

¹⁸ <https://www.youtube.com/watch?v=SKZUoXoUMNA&feature=youtu.be>

¹⁹ <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2023/april/tanaiste-martins-speech-at-queens-university-belfast.php>

²⁰ <https://www.independent.co.uk/news/uk/micheal-martin-bill-irish-government-amnesty-international-northern-ireland-b2315666.html>

discriminatory detriment, *before* a policy is adopted. A properly conducted Equality Impact Assessment on the Bill's impact on categories of victims would have compelled the NIO to consider alternative policies. The required process was however not complied with prior to the Bill being introduced. The ECNI used its 'own initiative' enforcement powers to launch a formal investigation which concluded the NIO had breached its equality scheme duties.²¹ This is the second time the ECNI has made a finding, that the NIO has breached its equality duties over the Bill.

Ongoing work of the Package of Measures

25. A number of 'Package of Measures' mechanisms dealing with legacy cases have continued to deliver significant information recovery and historical clarification regarding patterns of human rights violations, in recent months.

Police Ombudsman

26. In April 2023 the Police Ombudsman issued a further historical investigations report into the 1974 loyalist killing of an independent elected representative Patrick Kelly. The investigation followed a family complaint, that suspects had not been investigated by the police as they were members of a local military regiment.

27. This report, running into 139 pages of information recovery, found a series of failures to investigate, including: latent bias in the senior investigating officer; failures to verify alibies of military suspects; forensic failures; failures to link cases; the withholding of intelligence from the murder investigation team which linked individuals, including soldiers to the murder. The Ombudsman concluded some actions were indicative of collusive behaviour.²²

28. The legacy Bill will curtail all such Police Ombudsman legacy investigations – including those already largely completed but yet to report.

Civil Proceedings

29. In March the High Court in Belfast awarded reparations of £350,000 GBP to the family of the late Liam Holden in a ruling that found he had been tortured by the British Army, including through the use of 'waterboarding'. The narrative verdict by the Court runs to 60 pages, providing substantive information recovery.²³

30. In a miscarriage of justice Mr Holden had been sentenced to death in 1973 having been wrongly convicted of the murder of a soldier, Frank Bell, on the basis of a confession. The sentence was later commuted to life imprisonment, and he was released after 17 years. In 2012 the conviction was quashed by the Court of Appeal. In 2022 he launched the civil proceedings in which the High Court has accepted the military tortured, including through simulated drowning ('waterboarding') Mr Holden into the confession. Mr Holden subsequently passed away in 2023. The

²¹ <https://www.equalityni.org/Footer-Links/News/Delivering-Equality/Legacy-Bill-process-breached-NIO-equality-scheme>

²² <https://www.policeombudsman.org/patrickkelly>

²³ <https://www.judiciaryni.uk/judicial-decisions/2023-nikb-39> [236]

posthumous damages included compensation for “waterboarding, hooding and threats to kill, malicious prosecution and misfeasance in public office.”²⁴

31. In a second case the High Court will also produce a detailed narrative verdict and awarded compensation of £90,000 GBP to a man who as a child had witnessed the sectarian killing of his grandfather Sean McParland in 1994. The killing involved an informant within the loyalist paramilitary UVF, run by the Special Branch of the then police service. Mr Justice Rooney held that the police knew that the informant had already confessed to his role in other killings, but had “*not only turned a blind eye to Informant 1’s serious criminality*” ... but also “*went further and took active measures to protect (him) from any effective investigation and from prosecution, despite the fact that (he) had admitted his involvement in previous murders and criminality.*”²⁵
32. Both these cases therefore provide levels of historical clarification and accountability in relation to practices of the use of torture by the military and collusive practices by the Special Branch of the police respectively.
33. All such civil proceedings will be debarred by the current bill, including, as it stands, the discontinuation of cases already before the courts.

Legacy Inquests

34. The five-year programme of legacy inquests continued to progress.²⁶
35. . The Springhill inquest opened in February 2023, investigating a military shooting, killing five persons, including three minors and a priest in July 1972. The Attorney General for Northern Ireland had directed a fresh inquest in 2014.²⁷
36. The Inquest into the death of Paul Thompson in 1994 resumed in April 2023. CAJ acts in this inquest. Mr Thompson was shot dead by loyalist paramilitaries with a submachine gun linked to five attempted killings, in circumstances where there are concerns regarding police actions and the lack of an effective investigation.²⁸
37. The present Bill will prohibit new legacy inquests and compel the discontinuation of existing planned inquests unless they are at an advanced stage by 1 May 2023.

‘Call in’ and Prosecutorial Decisions

38. The ‘call in’ facility – whereby the PSNI can call in an independent police team external to Northern Ireland, for independence reasons, is part of the package of measures.
39. Operation Kenova constitutes a major ‘called in’ investigations team, led by former Chief Constable Jon Boucher, into republicans (IRA) and state actors (army and

²⁴ <https://www.judiciaryni.uk/judicial-decisions/2023-nikb-39> [236] see also <https://www.theguardian.com/uk-news/2023/mar/24/liam-holden-waterboarded-tortured-british-army-belfast-high-court->

²⁵ <https://www.belfasttelegraph.co.uk/news/courts/belfast-man-awarded-90k-damages-over-grandfathers-killing-involving-police-informant/729726937.html>

²⁶ <https://www.judiciaryni.uk/legacy-inquests>

²⁷ <https://www.judiciaryni.uk/publications/press-notice-springhill-inquest-17-february-2023>
<https://belfastmedia.com/springhill-massacre-families-to-relaunch-their-campaign-in-fight-for-truth-and-justice/>

²⁸ <https://caj.org.uk/latest/inquest-into-liam-paul-topper-thompsons-death-resumes/>

security services). The investigation focuses on the involvement of an alleged state agent ‘Stakeknife’ within the unit of the IRA which interrogated suspected informers.²⁹ Kenova is examining more than 200 murders as well as kidnappings and torture. The investigation, using full police powers, has amassed over 50,000 pages of evidence passing the initial files to the Public Prosecution Service in 2019, and has now produced an interim report into the findings of the investigation. The publication of this report will be vital for accountability and non recurrence for such practices.

40. Operation Kenova released a protocol in October 2022 setting out an eight-stage process for the release of the report. The second stage of this process whereby agencies criticised in the report, are allowed to make representations (‘Maxwellisation’), was however delayed and was nearing completion in April 2023. On the basis of past practices, it is likely that specific state agencies delayed this process. Stage 4 of the process is security checking, which is currently underway.³⁰
41. The Bill, as it stands, would prevent the publication of the report from the Kenova investigation if the report is delayed beyond two months after the Bill completes parliamentary passage.
42. A total of 26 investigation files relating to Operation Kenova were submitted to the prosecution service from October 2019 to February 2022, but decisions as to whether to prosecute have largely not yet been taken.³¹ The delay in taking such decisions was brought into sharp focus with the death of a chief Stakeknife suspect, Freddie Scappaticci, in April 2023, leading to questions as to why prosecutorial decisions had not been taken earlier.³² If prosecutorial decisions on legacy cases are not taken before the commencement of provisions in the current Bill, they may be curtailed by the legislation.

CAJ, May 2023

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²⁹ <https://www.opkenova.co.uk/>

³⁰ <https://www.kenova.co.uk/update-on-progress-of-interim-report-release>

³¹ <https://www.kenova.co.uk/pps-update-on-consideration-of-operation-kenova-files>

³² <https://www.theguardian.com/uk-news/2023/apr/14/freddie-scappaticci-army-spy-inside-ira-stakeknife>