



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to the Committee of Ministers in
Relation to the Supervision of the Cases
Concerning the Actions of the Security
Forces in Northern Ireland**

May 2020

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC) is one of three A-status National Human Rights Institutions in the United Kingdom (UK). Established in 1999, the NIHRC, pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The NIHRC's mandate extends to all matters relating to the protection and promotion of human rights in Northern Ireland (NI), including within the competence of the NI Assembly and the Westminster Parliament. In accordance with this, the following update is submitted to Committee of Ministers regarding supervision of cases concerning the action of security forces in Northern Ireland.

2.0 Government Actions

- 2.1 Since the Committee of Ministers last examination of the execution of these cases in September 2019, there have been limited concrete government actions to address the outstanding issues.

Litigation

- 2.2 There have been no advances in the investigations and related litigation in the cases of *McKerr, Shanghan, Jordan, Kelly and Others*, and *McCaughey and Others*.
- 2.3 Regarding *Finucane*, in 2018, the UK Supreme Court unanimously made a declaration that there has not been an Article 2 compliant inquiry into the death of Mr Finucane.¹ It identified the lack of ability to compel the attendance of or cross-examine witnesses on the veracity of their evidence as limitations of the De Silva review.² The UK Supreme Court did not prescribe the form of an Article 2 compliant inquiry, noting that "it is for the State to decide... what form of investigation should take place".³ The UK Government has not provided a formal response to the UK Supreme Court's decision. In January 2020, the Finucane family were granted leave by the

¹ *In the matter of an application by Geraldine Finucane for Judicial Review (NI)* [2017] UKSC58.

² *In the Matter of an Application by Geraldine Finucane for Judicial Review (NI)* [2019] UKSC 7.

³ *Ibid*, at para 153.

High Court to judicially review the UK Government's delay in implementing the UK Supreme Court's decision.⁴ In February 2020, the UK Government stated that it would provide a formal response to the UK Supreme Court's decision "within a matter of weeks".⁵ The formal response continues to be awaited and the Finucane family's legal case continues.

Inquests

- 2.4 Funding for legacy inquests had been delayed for a number of years.⁶ On 28 February 2019, following a legal challenge,⁷ the Department of Justice NI announced the establishment of a new Legacy Inquest Unit within the Coroner's Service under the remit of the Lord Chief Justice. The Permanent Secretary of the Department of Justice NI identified the estimated cost would be £55 million over six years.⁸
- 2.5 In June 2019, there was a legacy caseload of 54 cases relating to 95 deaths, including three cases relating to three deaths referred to the coroner by the Attorney General for NI since December 2018. A schedule has been set to hear preliminary hearings into all the outstanding cases starting September 2019, with the exception of the nine Stalker and Sampson cases into an alleged RUC shoot-to-kill policy in the 1980s, a date for which is to be set in due course. Mr Justice O'Hara and Mr Justice McAlinden have since been allocated these nine cases, but these will not be able to progress due to COVID-19 restrictions.⁹
- 2.6 In September 2019, the Lord Chief Justice, Declan Morgan, confirmed that "representatives for the families and the relevant agencies have been asked to provide an update on each case in advance of these hearings".¹⁰ The Lord Chief Justice also

⁴ Cate McCurry, 'Government to respond to Supreme Court ruling over Pat Finucane death "in weeks"', *Belfast Telegraph*, 21 February 2020.

⁵ Ibid.

⁶ 'Legacy inquests in NI "can be dealt with in five years"', *BBC News*, 12 February 2016.

⁷ *In the Matter of an Application by Brigid Hughes for Judicial Review* [2018] NIQB 30, at para 12.

⁸ Department of Justice, 'Press Release: DOJ announces legacy inquest reform', 28 February 2019.

⁹ Judiciary NI, 'Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests', 4 May 2020.

¹⁰ 'The Lord Chief Justice, Declan Morgan's, Opening of Term Address 2019', Royal Courts of Justice, 5 September 2019.

emphasised that “it is important that all those involved work together to ensure that legacy inquest cases are prepared for hearing expeditiously and that disclosure issues are identified early and, through collaboration and dialogue, that reasonable and proportionate solutions are found”.¹¹

2.15 The first full hearings were to start in April 2020 and a thematic approach to the hearing schedule was being considered to avoid the potential of missing the bigger picture.¹² These initial hearings have been allocated to a Coroner or judge.¹³ However, due to COVID-19 all non-urgent court business, including legacy inquests, have been adjourned since 20 March 2020. This is subject to ongoing review, but there is no doubt that it will impact the legacy inquests.¹⁴ To mitigate the impact, the Presiding Coroner, Mrs Justice Keegan, who was due to leave this post is continuing in this role and consideration is being given to dealing with directions by way of written submissions and remote working. However, Mrs Justice Keegan has stated that “the task of case management will undoubtedly be difficult and take an appreciable period of time”.¹⁵

Historical Investigations Unit

2.7 On 23 December 2014, the Stormont House Agreement was reached.¹⁶ The Agreement sets out a structure for the effective investigation of conflict related deaths including a Historical Inquiries Unit.¹⁷ The UK Government has committed within the financial annex of the Stormont House Agreement to provide up to £150 million over 5 years to help fund the bodies to deal with the past.¹⁸

¹¹ Ibid.

¹² 'Families assured over timeframe for legacy inquests', *Belfast Telegraph*, 7 June 2019.

¹³ Judiciary NI, 'Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests', 4 May 2020.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Stormont House Agreement, 23 December 2014.

¹⁷ Ibid, at para 30.

¹⁸ NI Office, 'Stormont House Agreement: Financial Annex' (NIO, 2014), at 1. The Stormont House Agreement includes a further broad financial commitment to all sections covered within the Agreement. It is stated within the Financial Annex that: 'the total value of the Government's package is additional spending power of almost £2 billion'.

- 2.8 In May 2018, the NI Office launched a consultation entitled *Addressing the Legacy of NI's Past*, seeking views on draft legislation to establish the various legacy bodies proposed within the Stormont House Agreement.¹⁹ The Commission broadly welcomed the draft legislation, but raised that the provisions contained within the draft Bill were not fully human rights compliant in law and practice. In particular, the Commission raised concerns about the remit, resourcing, independence and use of closed material proceedings regarding the Historical Investigations Unit. The Commission recommended further consideration of the remits and operations of the Independent Commission of Information Retrieval, Oral History Archive and Implementation and Reconciliation Group. The Commission welcomed the proposals in the draft Bill to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973 and confirmation that the accelerated release scheme extends to the security forces.²⁰
- 2.9 In July 2019, the NI Office published a summary of the 17,000 responses to the legacy consultation. This document will be used to inform the UK Government's next steps, which will be set out "in due course".²¹ The overarching message from the majority of respondents was "the current system needs to be reformed".²² The NI Office accepted it has "an obligation to seek to address the legacy of the past in a way that builds for the future... [and confirmed that the UK] Government remains fully committed to the implementation of the Stormont House Agreement".²³
- 2.10 On 18 March 2020, the new Secretary of State for Northern Ireland, Brandon Lewis MP, issued a written Ministerial Statement on addressing Northern Ireland Legacy Issues. The text of the statement is set out in full within Annex 1. The statement states "it is clear that, while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation".

¹⁹ NI Office, 'Addressing the Legacy of NI's Past: Consultation Paper' (NIO, 2018).

²⁰ NI Human Rights Commission, 'Submission to NIO's Consultation on Addressing the Legacy of NI's Past' (NIHRC, 2018).

²¹ NI Office, 'Press Release: Government Publishes Summary of Responses to Legacy Consultation', 5 July 2019

²² NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses', (NIO, 2019), at 4.

²³ Ibid.

2.11 It continues that:

while there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones - while this is still possible.

Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement but with a greater emphasis on gathering information for families; moving at a faster pace to retrieve knowledge before it is lost; and doing more to help individuals and society to share and understand the tragic experiences of the past.

It is proposed that these measures should be carried out by one independent body to ensure the most efficient and joined-up approach, putting the needs of the individuals most affected at the heart of the process. This body will oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one.

2.12 Without the necessary fire-grained detail it is difficult to draw a definitive conclusion on how the new approach will meet the non-derogable Article 2 ECHR (right to life) investigatory requirements. Nonetheless, the NIHRC is deeply concerned that the new approach to legacy investigations may not readily meet the requirements of Article 2 ECHR.

2.13 The statement also sets out that:

the Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with

the past. Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible - though family reports would still be provided to the victims' loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process.

- 2.14 In practice, an Article 2 investigation must be effective.²⁴ Moreover, an investigation's conclusions must be based on thorough, objective and impartial analysis of all the relevant elements.²⁵ How an investigative process can be 'effective and thorough, but quick' as outlined in the statement appears to be counter-intuitive particularly so, in cases which have not yet been subject to a previous investigation.
- 2.15 Further, the conflating of the investigation process with a prosecutorial analysis goes against the grain of keeping investigations and the assessment of the evidence against a prosecutorial standard separate. How these two procedures can be readily combined in a single process is not manifestly apparent.
- 2.16 The ability and likelihood of identifying 'compelling new evidence' in a case which has never been significantly investigated in the first place is also, seems on the surface, a formidable challenge.
- 2.17 The European Court of Human Rights (ECtHR) has for example, in the past been presented with arguments from Turkey that it could not be expected to deal with in excess of 500 investigations at any one time as a reason for delays in dealing with investigations. The ECtHR, while expressing it was mindful of obstacles presented, confirmed that it remained incumbent on a contracting State to meet the Article 2 ECHR investigatory requirements. As a result,

²⁴ *Jelic v Croatia* (2014) ECHR 809, at para 63.

²⁵ *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v UK* (2016) ECHR 314, at para 234.

having to investigate a large number of cases simultaneously was not a basis for investigations to be ineffective and subject to excessive delays.²⁶

- 2.18 Any failure to achieve an Article 2 compliant process is likely to lead to litigation and further delays, an outcome which is not the interests of anyone who has been adversely impacted by the conflict in Northern Ireland. The longer the delay, the greater the frustration, pain and anger among those affected whether they seek justice, truth, reparations or other closure. Not for the first time, the NIHRC has highlighted the unacceptable nature of this protracted delay.

Biometric data

- 2.19 In February 2020, the European Court of Human Rights (ECtHR) issued its judgment in the case of *Gaughran v United Kingdom* (2020).²⁷ This case considered whether the indefinite retention of the applicant's DNA profile, fingerprints and photograph in accordance with the blanket policy of retention of personal data of any individual convicted of a recordable offence, amounted to disproportionate and unjustifiable interference with Article 8 ECHR (right to respect for private and family life). The ECtHR ruled that retention of biometric data is permissible where it is proportionate and necessary in pursuing a legitimate aim, but the blanket approach to indefinite retention without taking into account whether such retention was necessary given the circumstances was a violation of Article 8 ECHR.²⁸

- 2.20 The UK Government had argued that there was "a particular need to retain DNA in Northern Ireland, where the investigation of historic cases forms part of the UK's obligations under Article 46 [of the ECHR] in execution of the so-called 'McKerr group cases'. The ECtHR stated an examination of this particular aspect was outside its jurisdiction, but that "in the exercise of its competence under Article 46(2) ECHR, the Committee of Ministers is better placed... to

²⁶ *Mahmut Kaya v Turkey* (2000) ECHR 129.

²⁷ *Gaughran v UK* (2020) ECHR 144.

²⁸ *Ibid*, at para 94.

assess the specific measures to be taken”.²⁹ In undertaking this consideration, it is worth noting that indefinite retention of DNA is an ongoing issue in Northern Ireland.

- 2.21 The ECtHR found in *S and Marper v UK* (2008) that provisions in the Police and Criminal Evidence Act 1984 that enable retention of biometric data on an indefinite basis was a violation of Article 8.³⁰ In Northern Ireland, equivalent provisions are contained in the Police and Criminal Evidence (Northern Ireland) Order 1989. These provisions have been amended in England and Wales through introducing the Protection of Freedoms Act 2012 on 31 October 2013, which sets out new parameters for the retention of biometric data and introduced a Biometrics Commissioner to review how such data is being retained. However, similar measures have not been introduced in Northern Ireland, with the exception of the Biometrics Commissioner’s remit extending to Northern Ireland regarding retention of biometric data linked to terrorism-related offences.
- 2.22 An attempt was made to change the law in Northern Ireland through the Criminal Justice Bill, but this was not brought into effect. In 2018, the NIHRC took a judicial review against the Police Service NI on behalf of an individual who sought to have his biometric data destroyed on the grounds that the indefinite detention of his data was contrary to Article 8 ECHR. The NIHRC settled the case in October 2018, on the basis that the applicant’s biometric material would be destroyed and the Police Service NI would produce guidance on arrangements for reviewing detention of biometric data within 12 months. There was no admission of liability or that the current law and policy were contrary to Article 8 ECHR. The Police Service NI’s guidance based on the Criminal Justice Bill provisions has now been overtaken by the *Gaughran* judgment.
- 2.23 The retention of biometric material for legacy purposes is governed by the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (transitional, Transitory and Saving Provisions) (Amendment) Order 2018 which provides, in effect, that biometric material will be continue to be held for legacy

²⁹ Ibid, at para 90.

³⁰ *S and Marper v UK* (2008) ECHR 178.

investigations purposes until 31 October 2020. Under the 2018 Order, the Secretary of State for Northern Ireland makes provision for pre-commencement material taken under counter-terrorism powers in Northern Ireland to be retained for a time limited period. This approach was first introduced on a transitional basis on 31 October 2013 for a time-limited period and has been renewed periodically ever since. The NIHRC has written to the Secretary of State to ask what the UK Government intends to do in light of the comments of the Court in *Gaughran*, including whether the 2018 Order will be replaced by further legislation to retain biometric material for legacy investigations. The Committee of Ministers may wish to ask the UK government about its intentions on this issue.

Annex 1 – Written Ministerial Statement

Brandon Lewis MP, Secretary of State for Northern Ireland
18 March 2020

Today the Government announced the introduction of legislation to provide greater certainty for service personnel and veterans who serve in armed conflicts overseas. Alongside this, we are setting out how we propose to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into the Troubles in Northern Ireland that has failed victims and veterans alike - ensuring equal treatment of Northern Ireland veterans and those who served overseas.

We have heard from many across Northern Ireland and the rest of the United Kingdom that the current approach is not working well for anyone, and that it erodes confidence in public institutions that exist to support society as a whole. Discussions about how to change this have been ongoing for many years. The Stormont House Agreement in 2014 was an important milestone, but it did not stop the debate continuing.

Many families have waited too long to find out what happened to their loved ones, while those who defended the rule of law deserve certainty that there will be an end to repeated questions about what happened during their service. A better way to deal with the past is necessary, if we are to help the whole of society to effectively heal the wounds of the Troubles and become better reconciled with our difficult history.

In 2018, the Government carried out a public consultation on 'Addressing the Legacy of Northern Ireland's Past', inviting views on proposals based on the Stormont House Agreement. The consultation attracted over 17,000 responses - summarised in the Government's 'Analysis of the consultation responses', published in July 2019. We have carefully considered each and every one of these, and sought to identify a way forward that will deliver for all those affected by the legacy of the Troubles and enable all sides of the community to reconcile and prosper.

It is clear that, while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain

a broad consensus for the implementation of any legislation. We believe that the proposals set out below provide a framework for doing this.

It is the Government's view that to best meet the needs of all victims and of wider society, we need to shift the focus of our approach to the past. While there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones - while this is still possible. Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement but with a greater emphasis on gathering information for families; moving at a faster pace to retrieve knowledge before it is lost; and doing more to help individuals and society to share and understand the tragic experiences of the past.

It is proposed that these measures should be carried out by one independent body to ensure the most efficient and joined-up approach, putting the needs of the individuals most affected at the heart of the process. This body will oversee and manage both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one.

The Government wants information recovery and reconciliation to be at the heart of a revised legacy system that puts victims first. The Government is committed to the rule of law but given the considerable time that has elapsed since many of these incidents took place it is vital that we swiftly implement an effective information recovery mechanism before this information is lost forever.

The Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past. Only cases in which there is a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible - though family reports would still be provided to the victims'

loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process. The Government believes that this approach would deliver a fair, balanced, and proportionate system that is consistent with the principles of the Stormont House Agreement and deliver for all those who have been affected by the events of the past; striking a balance in enabling criminal investigations to proceed where necessary, while facilitating a swift transition to an effective information recovery mechanism before this information is lost forever.

The Government is committed to introducing legislation in line with our commitments in 'New Decade, New Approach', to move forward and deliver for all communities in Northern Ireland and beyond.

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