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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

Date: 03/04/2024

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Meeting: 1501st meeting (June 2024) (DH)

Communication from the authorities (02/04/2024) concerning the MCKERR group of cases v. the United Kingdom (Application No. 28883/95).

Information made available under Rule 8.2a of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1501^e réunion (juin 2024) (DH)

Communication des autorités (02/04/2024) relative au groupe d'affaires MCKERR c. Royaume-Uni (requête n° 28883/95) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



Northern
Ireland
Office

Legacy Group

1 Horse Guards Road
London
SW1A 2HQ

Erskine House
20-32 Chichester St
Belfast
BT1 4GF

E: correspondence@nio.gov.uk
www.gov.uk/nio
Follow us on Twitter @NIOgov

28 March 2024

Ms Clare Ovey
Department for the Execution of Judgments of the ECtHR
F-67075 Strasbourg Cedex
FRANCE

DGI

02 AVR. 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Dear Ms Ovey,

I am grateful to you and your colleagues in the Department for the Execution of Judgments for your continued dialogue and work on the *McKerr* group of cases. I write to provide the following update, ahead of the 1501st (Human Rights) meeting of the Ministers' Deputies 11-13 June 2024. I have also enclosed an update prepared and sent separately by the Independent Commission for Reconciliation and Information Recovery (ICRIR), who I understand visited Strasbourg in February, so that relevant information is in the same place.

Domestic Proceedings

The Northern Ireland High Court handed down [judgment](#) in relation to legal challenges by a number of individuals against the Northern Ireland Troubles (Legacy & Reconciliation) Act 2023 (the Act) on 28 February. In summary, the Court made the following key findings:

- the ICRIR is operationally independent of the UK Government, and is capable of carrying out ECHR compliant (Article 2 and Article 3) investigations into deaths and serious injuries.

- The limitation on civil claims post-commencement of the Act is lawful (Section 43(2)). Section 43(1) - which puts a bar on civil cases from the point of introduction of the Act (17 May 2022) - is incompatible with Article 6 of the ECHR.
- The immunity provisions in the Act are incompatible with Articles 2 & 3 of the ECHR.
- Section 8 of the Act, which excludes evidence in civil proceedings, is incompatible with Articles 2 and 3 of the ECHR.
- Section 41 of the Act, which prevents investigations into offences that did not result in death or serious injuries, is incompatible with Article 2 of the ECHR.
- Provisions in the Act related to Interim Custody orders are incompatible with Article 6 and A1P1 of the ECHR.

With the exception of the findings on Interim Custody Orders, the provisions found to be incompatible with the ECHR were also found to be incompatible with Article 2 of the Windsor Framework. As a consequence of this, the Court has chosen a remedy which disapplies the provisions, meaning they are currently extinguished from the Act.

While I acknowledge that elements of the judgment, particularly those relating to conditional immunity, contain adverse findings, I am sure the Committee will welcome the Court's conclusion that the ICRIR is operationally independent from the UK Government, and has the necessary powers to carry out reviews in accordance with the state's obligations with Articles 2 and 3 of the ECHR. Following consideration of all aspects of the judgment, the UK Government has lodged an application for appeal with the Northern Ireland Court of Appeal. The appeals are listed for case management review in early April, and the hearing for appeals is expected to take place in June.

To assist the Committee, **Annex A** contains further detail regarding the judgment as relevant to the issues raised by the Committee in CM/Notes/1475/H46-44, dated 21 September 2023.

Implementation of the Act

Significant progress has been made since the ICRIR's legal establishment (and the formal appointment of Commissioners) in December 2023, with the body expected to be operational from 1 May 2024. To that end, the UK Government is working towards a second set of commencement regulations in late April to commence the operational functions of the ICRIR, as well as to make transitional provisions. There will also be Statutory Instruments made at that time, relating to information and to biometric regulations.

Finucane

In February 2023, the Secretary of State for Northern Ireland appealed the Northern Ireland High Court judgment that, inter alia, there had still not been an Article 2 compliant inquiry into the death of Patrick Finucane. Hearing of that appeal commenced in the Northern Ireland Court of Appeal on 8 June and concluded on 19 September. We expect the Court of Appeal to deliver Judgment in Finucane w/c 8 April.

Interstate Case by Ireland

Finally, you will be aware that, on 17 January, Ireland formally lodged legal proceedings against the UK Government at the European Court of Human Rights (ECtHR) in relation to the Act. We await the Court's consultation with us on written procedure. While the UK Government respects Ireland's right to bring an inter-state case, the timing of such an application is in our view, premature - particularly given our domestic courts are expeditiously dealing with the same issues raised by Ireland in its interstate application, expeditiously. The Secretary of State, in response to Ireland's announcement on 20 December 2023, issued a statement, which can be read [here](#).

Now that the Act is subject to legal proceedings at the ECtHR, I would invite the Committee to consider pausing supervision of the McKerr group of cases until those proceedings are concluded. I would welcome your views on this matter, and would be happy to arrange a meeting to discuss further.

Yours sincerely,

RUTH SLOAN

**LEGACY GROUP
NORTHERN IRELAND OFFICE**

Annex A

Independence of the ICRIR

1. Paragraphs 259-284 of the judgment address the issue of the independence of the ICRIR. This includes the ability for the Secretary of State to request reviews by the ICRIR, which the Court described as “entirely appropriate” and “*essential to ensure that the ICRIR investigates so far as is possible all cases in which articles 2/3 obligations arise*” (paragraph 261).
2. The Court concluded that “*the proposed statutory arrangements, taken together with the policy documents published by the Commission inject the necessary and structural independence into the ICRIR...the ICRIR is sufficiently independent to comply with the requirement for independence to meet the procedural obligations under articles 2/3 ECHR*” (paragraph 284).

Powers of Disclosure

3. The Court considered the ICRIR’s powers of disclosure at paragraphs 306-319. The Court concluded, at paragraph 319, “*Having considered the disclosure powers of the Commission and the obligations of the state, in particular, it seems to me this is article 2/3 compliant and an improvement on the situation in relation to inquests*”.

Ability of the ICRIR to conduct ECHR compliant investigations

4. In considering the ICRIR’s ability to conduct ECHR compliant investigations, the Court, in paragraph 304, notes;

“the Act provides that the CFI [Commissioner for Investigations] will have all the powers and privileges of a police constable, as will any other ICRIR officer designated by the Commissioner...The Commissioner will have the power to compel evidence from witnesses, including oral or written testimony or physical evidence and documents (subject to safeguards to protect the right against self-incrimination, which also applies to inquests)”.

5. The Court proceeds to assess the ICRIR's obligation to '*look into all the circumstances of the death of harmful conduct to which it relates*', comparing this to the current coronial process;

"It is important to remember that inquests conducted under the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 only satisfied the requirements of article 2 as a result of developments in case law...(para. 286)

...The seminal case of R(Middleton) v West Somerset Coroner [2004] 2 AC 182 resulted in a marked change of approach in how inquests were conducted when an article 2 obligation arose...(para. 289)

...Just as the courts mandated a change of approach by interpreting "how" in the coronial Rules in a broad way to ensure article 2 compliance, so must the Commission do the same when carrying out its obligations under section 13 of the Act to "look into all the circumstances of the death or harmful conduct to which it relates." The policy documents which it has published demonstrates it is clearly alive to this obligation and is seeking ways to ensure compliance with the Convention."

6. The Court states, at paragraph 367, that the ICRIR has "*wide powers and a wide range of discretion/flexibility to carry out its reviews. Should it fall short of its obligations under article 2/3 then I have no doubt that they will be subject to the scrutiny of the court*". It concludes, at paragraph 370, that it is "*satisfied that the provisions of the Act leave sufficient scope for the ICRIR to conduct an effective investigation as required under articles 2 and 3 ECHR*".

Participation of Next of Kin & Public Scrutiny of the ICRIR

7. The Court considered the participation of victims and public scrutiny of the ICRIR at paragraphs 320-359.

8. Regarding victims' participation, the Court notes that the McQuillan judgment "envisages a degree of flexibility as to what is required to involve the next of kin in the relevant procedure "to the extent necessary." What is required will be fact specific" (para. 331). The Court further states, at paragraph 338-339;

"The ability of next of kin or victims to request a review, to request questions, the obligation of the Cfl to deal with those questions and the obligation to be consulted on prior to publication of the final report, all point to a degree of involvement by victims...the Cfl enjoys a very wide discretion as to the conduct of the review itself..."

...The fundamental obligation remains to ensure that the Cfl "looks into all the circumstances of the death or other harmful conduct to which it relates." In doing so, he is obliged to comply with the obligations imposed by the Human Rights Act 1998 which includes the requirement to ensure adequate victim participation in each review".

9. The Court also recognises, at paragraph 350 that *"in determining the scope of the investigation, an ICRIR review appears to allow for more involvement [compared to an inquest] of an interested person to frame the scope of an investigation by submitting specific questions in the request for a review".*
10. The Court states, at paragraph 339, that *"it cannot say that an article 2/3 compliant investigation in the context of victim participation is prohibited. All will depend on how the Cfl conducts his reviews based on the wide powers and discretion available to him".*
11. Regarding public scrutiny, the Court recognises that, *"public hearings are not precluded under the statute. Elements of public hearings may be appropriate in certain situations. This issue remains open"* (para. 359). The Court also highlight the recognition by the ICRIR that *"while it is not necessary to conduct all aspects of the investigation in public, "what is required is a sufficient element of public scrutiny of the investigations or the results to secure accountability in practice""* (para 354).

12. The Court acknowledges that public hearings “are not the only means by which the requirement for public scrutiny under the article 2/3 procedural duty can be fulfilled”, and that “under the statute, publication of reports into reviews is clearly an element of public transparency” (para. 359).

13. The Court concludes that, should the ICRIR adopt and implement its proposed policies, it will be “seen to do all that it can to ensure transparency and victim participation” (para 356).

Inquests

14. In relation to inquests, the Court recognised that, *“it is for the state to determine the actual means by which it carries out a compliant investigation. Inquests are not mandated as a means by which article 2 obligations are met. It is also important to recognise that not all reviews will concern allegations of involvement by state agencies which are the focus of inquests currently being dealt with by the Legacy Unit of the Coroners Service”* (para 303).

15. As noted above, the Court also noted the powers of the ICRIR in relation to the coronial system, stating at paragraph 349, *“It is quite clear from this document [‘Ideas for how the ICRIR could approach investigations linked to advanced stage inquests] that the Commission considers its powers of review to be broader in many respects when compared to those of a coronial inquest”*.

16. Regarding the transition of uncompleted inquests to the ICRIR after 1 May 2024, the Court notes, *“the Commission is alive to the very real concerns about the desire to complete inquests “and the Commission will be keen to work with those affected to ensure as smooth a transition as possible””* (para 346).

Conditional immunity

17. In reaching its finding of ECHR incompatibility regarding the Act’s conditional immunity provisions, the Court remarks at paragraph 187;
“the provision of information as to the circumstances in which victims of the Troubles died or were seriously injured is clearly important and valuable. It is arguable that

the provision of such information could contribute to reconciliation. However, there is no evidence that the granting of immunity under the 2023 Act will in any way contribute to reconciliation in Northern Ireland, indeed, the evidence is to the contrary.”

18. In the same paragraph, the Court also states, *“It may well be that a system whereby victims could initiate the request for immunity in exchange for information would be compliant with articles 2 and 3 ECHR, but this is not what is contemplated here”*.
19. Following consideration of all aspects of the judgment, including those which relate to the immunity provisions, the Government has lodged an appeal with the Court of Appeal in Northern Ireland. We remain of the view that an information recovery process is most effective when accompanied by some form of conditional immunity process to maximise the incentives to get information to families.



Tristan Pedelty
Chief Executive Officer & Commissioner

Email: tristan.pedelty@icrir.independent-inquiry.uk
Address: Clive House, 70 Petty France, London SW1H 9EX

Directorate General of Human Rights and Rule of Law

Department for the Execution of Judgments of the ECHR
Council of Europe
F-67075 Strasbourg Cedex
France

DGI

28 MARS 2024

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Sent via email to: Clare.Brown@coe.int; Clare.Ovey@coe.int dgi-execution@coe.int

28 March 2024

Dear Directorate General,

I am writing on behalf of the Board of Commissioners of the Independent Commission for Reconciliation and Information Recovery to provide an update on work to establish the Commission. The Chief Commissioner and I were grateful for your time and the dialogue we had on our last visit to Strasbourg in February to receive your further feedback on the Commission's proposals for how we will undertake our investigations.

Proposed approach to investigations

The Commission has recently published a detailed framework for how it proposes to approach investigations, including raising specific questions for formal consultation and feedback:
<https://icrir.independent-inquiry.uk/document/consultation-on-operational-design/>

The Commission is not a traditional law-enforcement organisation, but it will be thorough and far-reaching as it carries out its work, as encapsulated in its vision and mission. The Commission is taking a trauma-informed approach to its work with a focus on the needs of victims, survivors and their families.

There are also various other means by which organs of the state, such as coroners, law officers, or the Secretary of State, may themselves make referrals to the Commission, to ensure that article 2 and 3 investigative obligations may be satisfied.

In addition to the principal objective of promoting reconciliation, the Commissioners have committed to three essential principles in how the Commission works:

- Compliance with the European Convention on Human Rights
- Respect for the principles of the 1998 Belfast Good Friday Agreement; and
- Focus on providing useful information to those affected by the Troubles.

The first aspect of using the Commission is having enough information to understand the Commission's approach and what it might be able to do in any individual case. This needs to be done in a number of different ways, reflecting that people build their understanding through different types of information.

The Commission will undertake its investigative work with requesting individuals and families in three main stages, through three interlocking teams:

Stage 1: Support. This is the start of an individual's journey with the Commission. Dedicated Case Support workers will help individuals and families better understand how the Commission may be able to help them (and what it will not be able to do), the different options available to them and the information the

Commission will need to move to the next stage. While this is the first stage of the journey, that support will be available throughout the entire process. The case support team will provide a single point of contact and consistent, objective support for the requesting individual and family throughout their time with the Commission. They will respond to any questions and provide people with the space, time and information to make decisions that are right for them and the information recovery outcomes they seek.

Stage 2: Information Recovery. In this next stage, a team of investigators will gather information and evidence and seek to answer the questions the requesting individual and family have raised. The team will need a range of skill sets, to comb through archives, interview witnesses and secure evidence. Investigators will work across a range of different cases at any one time to maximise progress and efficiency. Each investigation will be overseen by a Senior Investigative Officer. Investigators will be able to require access to all material from any previous fact-finding and determination processes, as well as all material held by the state, no matter how sensitive. They may also undertake new investigative work. Investigative teams will follow defined terms of reference for each investigation, which will start with a scoping exercise, based on an approach to cold case reviews that follows internationally recognised best practice. This will inform the Commissioner for Investigations' decision on which of three investigative routes will be most appropriate for the case. All three routes will embed the features required for an ECHR compliant investigation.

Stage 3: Findings. The Chief Commissioner is responsible for the production of reports at the conclusion of investigations. In this work, they are supported by the Findings Team. A Findings Officer from the unit will be assigned to each investigation from an early stage and will independently challenge the direction of investigative work. As the investigation nears its conclusion, the Commissioner for Investigations and team will present their evidence to the Chief Commissioner who will assess and evaluate it to determine findings. Further investigative work may be requested. Reports will be produced to record the findings that have been made and to seek to address the requesting individual's questions.

The Commission has also adopted key elements of its approach in all cases:

The Commission will investigate each case referred to it independently, thoroughly, and fairly. The Commission and its officers leading and undertaking the investigation will be institutionally and practically independent from any interested party. The High Court has confirmed that the Commission's practice and policies achieve this. The investigation will examine all relevant material, exercise its statutory and police powers as it sees fit to obtain what it reasonably needs and follow any reasonable lines of inquiry. The investigation will act fairly and impartially.

The Commission will undertake investigations promptly and proportionately. Following the acceptance of a request, the Commission will carry out the investigation promptly and in accordance with its case categorisation principles. The Commission will take a proportionate approach to investigations, bearing in mind that in historical investigations, not all questions can be answered and not all evidence can be found.

The Commission will ensure requesting individuals are appropriately involved in the investigative process in order to protect their legitimate interests. Any requesting individual will be able to make suggestions as to the scope of the investigation and reasonable lines of inquiry. This includes by using the provisions in the Act to set out specific questions they would like the investigation to address.

The Commission will make factual determinations that are supported by the available material. The Commission will use its powers of information recovery to secure information from individuals and organisations that hold it, and to obtain information and witness statements from individuals who attend the Commission. It will assess evidence fairly and in a judicious manner, separate from the evidence gathering and investigative process, so that findings can be determined by the Chief Commissioner.

Findings expressed will always be at least to the civil standard of proof. The Commission will reach findings that are supported by the available material. Where the Commission makes a finding of fact, the starting point will be for the Commission to do so on the balance of probabilities (that the conclusion is more likely than not). Where the Commission is unable to reach a conclusion on the balance of probabilities, it may say that events have possibly occurred.

The Commission will compile and produce a report of its findings in relation to each investigation it carries out. Reports will answer, as far as possible, the questions that have been asked by the requesting individual. The Commission's reports will also need to set out an account of all the circumstances of the

death or harmful conduct, based on an analysis of the evidence the Commission has considered and set out in a way that is straightforward to understand. The reports will be published and the Commission will also offer other arrangements to support the publication, such as public press conferences and opportunities for individuals to read personal statements. The Commission will be as open as possible about the processes, policies and methodologies it adopts. Information will be published as well as explained and provided to each requesting individual or family. In *Dillon and Others*, the High Court held at paragraph 277; “these draft principles are clearly designed to align with, and are informed by, Articles 2 and 3 ECHR and the requirements of the Human Rights Act 1998.

Victim, survivor and family, and wider public involvement

It is important to the Commission that people across Northern Ireland, Great Britain, and wider have the opportunity to provide input to the design of how the Commission works. The Chief Commissioner, Commissioner for Investigations and officers from the Commission have met with a wide range of individuals and groups to hear their views on the Commission. Two public surveys have been carried out, focus group and polling work has been done, and the Commission has openly set out much of its proposed thinking and design considerations to provide for scrutiny and feedback.

On 14 March, the Commission launched a formal consultation, building on its open approach to design and, alongside setting out the Commission’s proposed approach, the consultation invites views and opinions on policies that will apply at points during the Commission’s investigations.

The Commission is already carrying out consultations about:

- embedding its trauma-informed approach;
- its proposed Disability Action Plan; and
- its proposed Equality Scheme.

In line with the judgment in *Dillon* the Commission’s latest publication sets out more detail about how requesting individuals and next of kin will be involved at each step of the Commission’s investigation. This will vary depending on the type of decision to be made. The dedicated Case Support Worker will assist the requesting individual to understand the next steps and process and ensure meetings with decision makers and relevant investigators in advance of decisions at each stage so they can input as appropriate. Opportunities to meet to have the decision explained and to be able to request reviews of key decision are also set out in the Commission’s process.

Independence

The Commission was established as a statutory body in December of last year. The power to make appointments of Commissioners rests, in law, with the Secretary of State, but the process for selection was undertaken so as to be independent of him with a final recommendation being made for him to confirm. The Board of Commissioners consists of the Chief Commissioner, Sir Declan Morgan, who was proposed by the judiciary, the Commissioner for Investigations, Peter Sheridan, and four Non-Executive Commissioners, Lindsay Todd, Kathleen Russ, Rogelio Alonso and Brice Dickson, who were all recommended by the Chief Commissioner following open competitions. I was appointed as the Chief Executive Officer on an interim basis, while an open competition is carried out, the outcome of which are expected in the next month.

In all appointment processes candidates were required to declare relevant interests and these were assessed by the panel to consider whether or not they could give rise to a perceived, potential or actual conflict of interest. In particular, Mr Sheridan’s experience as a senior police officer in Northern Ireland, made him very well qualified for the role, but also gave rise to the considerations of conflicts. A thorough assessment of this was made, including checking the previous roles that he had undertaken to confirm that he had not worked in roles or departments that could potentially be subject to investigation by the Commission. As with all officers of the Commission, Mr Sheridan will need to consider in each case whether there is still a perception of conflict meaning that he should be recused. The Commission has recruited and is continuing to recruit investigative officers from a range of backgrounds who can exercise the Commissioner for Investigations powers under delegated authority to allow for proper recusal of those officers who need it without impacting on operational capability.

All organisations spending public money need some form of accountability, ultimately to elected representatives, for use of public resources. The Commission is no different. But this must never stray into operational decisions. Our relationship with government is set out openly in a Framework Document, and

our budget for investigations is not controlled by Government, but uses a bespoke 'Annually Managed Expenditure' approach where we update the forecast of need, based on what our investigations require. That mechanism again is set out publicly. Concerns about premature closure of the Commission are similarly dealt with in the Framework Document, with requirement for the Commission's advice and a transparent, parliamentary process.

Next steps

The Commission considered it appropriate to wait until after the High Court's ruling in the legal challenges to the UK Government's Legacy Act so that it could take into account matters from that Court's detailed consideration of the legal position. The Commission considers that an eight week consultation is a proportionate approach to give time for proper consideration, while also recognising that the Commission will begin discussing individual cases with potential requesting individuals and families from May. The response to the consultation will be an important aspect of the Commission's initial operational activities in May and the Commission's officers will discuss the response and policies adopted with all those who are in the process of making a request to the Commission.

In its judgment, the Court confirmed that the Commission is independent and is capable of carrying out investigations which are compliant with the European Convention on Human Rights. The Commission is, therefore, now focused on getting ready to begin receiving requests for investigations from May of this year. The Commission will be setting out more information from April, about how to make a request of the Commission and in May will begin meeting with those who want their case to be investigated.

The Commission has a wide range of powers and practices at its disposal in order to thoroughly investigate cases. In addition to police powers, where merited, it has statutory powers to require information – both from individuals and from public authorities. The Court endorsed the wide range of powers at the Commission's disposal and the Commission is confident it can use these to good effect to recover information.

The opportunity for conditional immunity from prosecution for specific offences was another tool that the Legacy Act provided for the Commission to maximise recovery of information by providing an additional incentive for co-operation in return for setting out information about the case being investigated. The fact that – as a result of the Court's judgment – this tool is not available does not stop the Commission from using the other range of powers and processes to carry out effective investigations.

I hope that this update is of assistance.

Yours sincerely,

TRISTAN PEDELTY

CHIEF EXECUTIVE OFFICER & COMMISSIONER