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Meeting: 1419th meeting (December 2021) (DH)

Communication from the authorities (20/10/2021) concerning the case of MCKERR 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 : 1419^e réunion (décembre 2021) (DH)

Communication des autorités (20/10/2021) relative à l'affaire MCKERR c. le 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

DGI

20 OCT. 2021

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Clare Ovey
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FRANCE

18 October

Dear Clare

I am aware that the McKerr group of cases will come before the CoM at their next meeting on the execution of judgements. The UK Government welcomes your ongoing interest in this important issue.

The UK Government is committed to dealing with legacy issues in a way that supports information recovery and reconciliation, complies with international human rights obligations, and responds to the needs of individual victims and survivors, as well as society as a whole.

It is important that we remain in contact and that we update you on the actions which have been taken in order to address the issues which the court identified. We had hoped to be in a position to offer a full update to the meeting, however, work is continuing at pace to develop our policy - taking account of ongoing engagement - and legislation.

You will be aware that in the Command Paper published on 14 July we set out a series of proposals intended to inform a process of engagement. The UKG has set out its intent to bring forward legislation in order to help Northern Ireland address the legacy of the past and move forward towards reconciliation and rebuilding. Work on this, including engagement with a range of stakeholders, continues - meaning we are not in a position to confirm our final position at this stage.

In the interim, and while this work continues, I attach an initial response providing an update on the actions we have taken to date, seeking to provide information in response to the questions that were raised when the cases were last discussed. A more detailed response setting out the details of proposed legislation will be provided as soon as the engagement process has been completed and a finalised position confirmed.

Yours sincerely

A handwritten signature in black ink, appearing to be 'B. Lewis', with a long horizontal flourish extending to the right.

**THE RT HON BRANDON LEWIS CBE MP
SECRETARY OF STATE FOR NORTHERN IRELAND**

McKerr group of cases v United Kingdom

McKerr v United Kingdom (Application 28883/95), judgment final on 4 August 2001
Hugh Jordan v United Kingdom (Application 24746/94), judgment final on 4 August 2001
Kelly and others v United Kingdom (Application 30054/96), judgment final on 4 August 2001
Shanaghan v United Kingdom (Application 37715/97), judgment final on 4 August 2001
McShane v United Kingdom (Application 43290/98), judgment final on 28 August 2002
Finucane v United Kingdom (Application 29178/95), judgment final on 1 October 2003
Hemsworth v United Kingdom (Application 58559/09), judgment final on 16 October 2013
McCaughey and others v United Kingdom (Application 43098/09), judgment final on 16 October 2013

Information provided by the United Kingdom Government

Current Context

Following the signing of the Belfast (Good Friday) Agreement in 1998 there have been a number of attempts to help Northern Ireland society address the issues of the past to enable it to move forward to reconciliation. That none of these have been successful highlights the complexities and challenges of this issue. The UK Government has committed to moving this process forward and to introducing legislation in this parliamentary session that will address the issues of the past in Northern Ireland.

A meeting of the British-Irish Intergovernmental Conference (BIIGC) took place at Dublin Castle on 24 June 2021¹. At this meeting the UK and Irish Governments agreed there was a need for a “process of intensive engagement” with the Northern Ireland parties and others on legacy issues. This would build on previous discussions, take account of the views of all participants and include consideration of new proposals which the UK Government intended to bring forward.

To inform this engagement the UK Government published a Command Paper² on 14 July 2021 which sets out the UK Government’s proposals to address the legacy of the Troubles. In the statement³ which accompanied the paper, the UK Government was clear that the objective of the paper was to deal with legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and responds to the needs of individual victims and survivors, as well as society as a whole.

Any system for dealing with the legacy of the past must be fair, proportionate, focused on reconciliation and deliver for all those affected by the Troubles. The UKG proposals follow on from the principles set out in the Stormont House Agreement, while attempting to address the implementation problems within that agreement.

¹<https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference>

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002140/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf

³<https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-brandon-lewis-mp-oral-statement-wednesday-14th-july-2021>

Dealing with the legacy of the past in Northern Ireland is complex and challenging. Annex B of the Command Paper sets out the previous attempts which have been made since 1998. None of these have garnered cross-community support. The UK Government believes that now is the time for a bold step forward to address these issues and end the cycle, to promote reconciliation and deliver strong and stable relationships between communities ultimately building a better Northern Ireland for all. The Command Paper therefore sets out a number of proposals which are designed to help support reconciliation and provide families with the information which they seek.

The current system is not delivering for victims or families. The proposed establishment of a new independent body to focus on the recovery and provision of information about Troubles-related deaths and most serious injuries would help families to find out the truth of what happened to their loved ones. The body would be independent of Government. Importantly, this process would be guided by families and victims, allowing them to participate but respecting the wishes of those who do not want more information. It is envisaged that the body would have full powers to seek access to information and find out what happened to enable it to deliver. This would be a more efficient and focused method than judicial processes and would not require families to go through an adversarial court system to get the answers they seek.

There are many conflicting and overlapping narratives surrounding events during the Troubles. The UK Government has recognised the importance of oral history and memorialisation in supporting the transformation of a number of post-conflict societies. In line with provisions outlined in the earlier Stormont House Agreement, we have proposed that an oral history initiative should create opportunities for voices to be shared and heard. This would allow people from a variety of backgrounds to share their experience of the Troubles, highlighting voices that have not been heard before and allowing an opportunity for people to learn about others and their experiences. In order to make this process meaningful it is acknowledged that this must be handled in a manner that is sensitive and balanced.

Ongoing litigation relating to the Troubles often fails to deliver for victims and their families. The higher bar of proof in a criminal case means that few cases reach a prosecution and even fewer result in a successful conviction. We think the best way to help Northern Ireland move towards reconciliation is through information recovery rather than an adversarial court process. It is therefore proposed that a statute of limitations would apply equally to all Troubles-related incidents.

This is a challenging step but one which would allow resources to be focused on delivering information rather than putting families through a trial which is unlikely to end in a successful conviction. The recent decision by the Public Prosecution Service⁴ in Northern Ireland to end the prosecution of two former soldiers highlights how challenging it is to successfully prosecute so long after the event.

The engagement process which underpins the Command Paper involves not just the UK and Irish Governments and the NI parties, but also those directly affected by the Troubles. There

⁴<https://www.ppsni.gov.uk/sites/ppnsni/files/publications/Public%20Reasons%20for%20discontinuation%20of%20cases%202%20July%202021.pdf>

have been a number of challenging conversations as we explore the views of those most affected.

It is clear that there is no single approach which would garner the support of all and there are challenges in addressing some of the conflicting views of those involved in the process. The UK Government believes its proposed approach is grounded in the principles of the earlier Stormont House Agreement. The proposals are a bold and at times challenging attempt to set out a way forward to help NI address the legacy of the past, to move society forward and to ensure that the next generation does not have to deal with this issue.

Legacy Inquest Reform

The legacy Inquest Project is proceeding and is currently in the first year of hearing cases.

As of October 2021, of the 46 cases within the Legacy Inquest Project, six have been completed. A further three inquests have been completed and findings are awaited and one further inquest is at hearing. The completed inquests included the Ballymurphy inquest into the deaths of 10 members of the public. The Secretary of State made a statement⁵ in which he acknowledged the hurt that had been caused to the families by the wait for answers. The Prime Minister and the Secretary of State both apologised unreservedly on behalf of the state and expressed regret for the events, how the subsequent investigations into them were handled and the pain that the families have had to endure in decades long fight to clear the names of their loved ones.

In June 2021, The Presiding Coroner, Mr Justice McFarland, issued a statement following a review of legacy related inquests. Mr Justice McFarland noted that Covid 19 had caused significant delay and changes in the way that inquests have been progressed. The Courts in Northern Ireland closed for a period at the height of the pandemic and this has obviously affected the progression of cases. Moreover the limitations on working arrangements and social distancing for organisations providing information to the Coroner's service means that in some instances the disclosure process has been challenging, as staff are unable to be in the same room to work through items.

As a result of the challenging working environment created by the Covid 19 pandemic a number of the inquests which were set down for hearing this year (Year 1) were delayed and work on them is continuing. Mr Justice McFarland has identified 8 further cases which will be suitable for hearing in Year Two of the plan.

Police Independence

In response to the invitation at the March meeting to provide further details about the use of other police services from across Great Britain to ensure independence we are able to offer the following information.

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<https://www.gov.uk/government/news/statement-from-the-secretary-of-state-for-northern-ireland-on-the-findings-of-the-ballymurphy-inquest>

The UK continues to maintain the clear position that the current structures for investigating serious incidents including the alleged conduct of the military; police and security services are compliant with the State's investigative obligations under Article 2 ECHR.

The Patton reforms led to the creation of the Police Service of Northern Ireland (PSNI). The PSNI is institutionally independent of the former Royal Ulster Constabulary. While aspects of the practical independence of the PSNI to investigate certain deaths is the subject of litigation before the UK Supreme Court, we do not accept any claim that the PSNI is incapable of investigating any death where there are allegations of State involvement.

It is important that the PSNI demonstrate the necessary practical independence in respect of the specific facts of the issue to be investigated. This is considered on a case by case basis by the Chief Constable. In those cases where they are unable to demonstrate this independence, legislation ensures that independent police officers from a Great Britain police service can be appointed to carry out an investigation. Such an investigation will exercise all the powers of police officers in the PSNI, ensuring that an effective investigation can take place.

The PSNI have referred a number of legacy cases to the Operation Kenova Team in order to ensure that an effective Article 2 compliant investigation takes place. The Operation Kenova team, under the leadership of Jon Boutcher the former Chief Constable of Bedfordshire Police, has undertaken investigations in relation to the activities of the agent known as Stakeknife, Op Mizzenmast which relates to the military killing of Jean Smyth, Op Denton which relates to a review of the activities of the Glenanne Gang, and Op Turma which relates to the murder of 3 police officers in Lurgan. In addition Police Scotland were commissioned in the case of Op Klina, following a Section 35(5) referral from the PPS.

Police Ombudsman

At the March 2021 meeting we were invited to provide information relating to the Office of the Police Ombudsman (OPONI) and the Ombudsman's five-yearly legislative review of its powers, the impact of the OPONI PSNI Memorandum of Understanding and the response to OPONI's bid for additional staff.

OPONI offers independent investigations into allegations of misconduct or criminal action by the police in Northern Ireland. Decisions on the allocation of funding are a matter for the elected representatives of the Northern Ireland Executive and Northern Ireland Assembly.

The importance of ensuring the budget for the Office is protected has been recognised by the Department of Justice. The Department of Justice approved OPONI's business case for additional staff, and funding was provided to OPONI as part of the 2021-22 budget allocation

The Minister of Justice is currently considering the Police Ombudsman's Five Year Review report. This will be the subject of public consultation in the coming months. Once the consultation is completed it will be the next Assembly mandate before legislation to enact any of the recommendations could be brought forward. This would require cross-community support in the Assembly.

In November 2020 OPONI and the PSNI signed a Memorandum of Understanding which put in the public domain a clear framework for information sharing between the organisations. This is an operational matter for OPONI and PSNI, which are both operationally independent of the NI Department of Justice and the Northern Ireland Office. Any assessment would be made by Criminal Justice Inspection NI, which previously reported on this matter in April 2020⁶.

Finucane

On 27 February 2019, the United Kingdom Supreme Court (UKSC) gave its judgment in the matter of an application by Mrs Geraldine Finucane for Judicial Review (Northern Ireland).

In previous submissions of June 2019 and March 2021, the United Kingdom Government summarised the *Finucane* case and the UKSC judgment.

The Court found that, in respect of the issues relating to Article 2 of the ECHR and the application of the domestic legislation, the Human Rights Act, there had not been an Article 2 compliant inquiry into the death of Patrick Finucane. The Court further noted that:

“It is for the state to decide, in light of the incapacity of [the previous previous reviews and inquiries] and to meet the procedural requirement of Art.2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement”.

After considering this judgement in detail, on Monday 30th November 2020 the Secretary of State communicated his decision on the way forward first to the Finucane family and then, by way of an oral statement, to the United Kingdom Parliament.

The Secretary of State repeated the apology made in 2012 by the then Prime Minister, David Cameron for the levels of collusion that had been identified in the numerous reviews and previous investigations that have taken place in that case. These included a police investigation that led to the conviction of Ken Barrett, a loyalist terrorist who pleaded guilty to the murder.

The Secretary of State set out publicly that he was not minded to establish a public inquiry into the murder of Mr Finucane at this time and went on to confirm that he would continue to keep open the option of a public inquiry in future. The Government, also published further details - not previously in the public domain - relating to the conduct of previous investigations into the Finucane case⁷.

The position of the United Kingdom is that all necessary steps are being taken to ensure compliance with both the domestic and European Court of Human Rights' decisions in this case.

Mrs Finucane is exercising her right to challenge the decision made by the Secretary of State in the High Court of Northern Ireland.

⁶ <https://www.cjini.org/getattachment/f10ddb54-8eda-40e3-951d-9e75855e2c24/Disclosure.aspx>

⁷ <https://www.gov.uk/government/news/uk-government-response-to-judgment-of-the-supreme-court-of-the-united-kingdom-in-the-matter-of-an-application-by-geraldine-finucane-for-judicial-review>