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Contact: Clare Ovey  
Tel: 03 88 41 36 45

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Meeting: 1273 meeting (6-8 December 2016) (DH)

Communication from a NGO (Relatives for Justice) (18/10/2016) in the McKerr group of cases against the United Kingdom (Application No. 28883/95).

Information made available under Rule 9.2 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 : 1273 réunion (6-8 décembre 2016) (DH)

Communication d'une ONG (Relatives for Justice) (18/10/2016) dans le groupe d'affaires McKerr contre le Royaume-Uni (Requête n° 28883/95) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Relatives for Justice  
39 Glen Road  
Belfast  
BT11 8BB

Tel: 028 9062 7171  
Fax: 028 9060 5558

Email: [adminrfj@relativesforjustice.com](mailto:adminrfj@relativesforjustice.com)  
[www.relativesforjustice.com](http://www.relativesforjustice.com)



Rule 9 submission to  
the Committee of Ministers of the Council of Europe  
*October 2016*



Execution of Judgments of European Court of Human Rights  
*McKerr, Hemsworth, McCaughey, Grew, Kelly, McCann & (many) others v. UK*

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## Introduction

Relatives for Justice (RfJ) was established in 1991 by relatives and supporters of people killed by British soldiers, members of the RUC and by loyalist paramilitary organisations in circumstances where collusion with state forces is suspected. RfJ aims to provide appropriate therapeutic and developmental based support for the bereaved and injured of the conflict within a safe environment. It seeks to examine and develop transitional justice and truth recovery mechanisms assisting with individual healing, contributing to positive societal change, ensuring the effective promotion and protection of human rights, social justice, and reconciliation in the context of an emerging participative democracy post conflict.<sup>1</sup>

RfJ has made a number of submissions to the Committee of Ministers (CoM) of the Council of Europe over the last years, most recently in April 2016. The current submission seeks to provide an update of developments since then.

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<sup>1</sup> See [www.relativesforjustice.com](http://www.relativesforjustice.com)

As we have previously pointed out, regrettably, it has been RfJ's experience that only consistent international scrutiny is likely to encourage the UK to implement its international human rights obligations in respect of legacy issues and Article 2. It is therefore welcome that the CoM/CoE is maintaining its interest and pursuing its mandate with vigour; in stark contrast to the UK government's approach to scrutiny of its actions during the conflict.

RfJ hopes that the CoM finds the following information of assistance in its continued monitoring of the UK government's obligation to respond to the findings of the European Court in the variety of cases from this jurisdiction.

## 1. Developments around Legacy inquests

Much of the discussion on legacy issues this year has revolved around the plans outlined by Lord Chief Justice (LCJ) Declan Morgan to expedite the 56 inquests and "catch up" over a five year time horizon. These plans have been frustrated by the leader of the DUP and Joint First Minister Arlene Foster who has refused to allow the proposals to be discussed by the devolved government. Declan Morgan's frustration was clear in his speech to mark the inauguration of the new legal year<sup>2</sup>. A video clip of the Lord Chief Justice expressing his disappointment can be viewed here (<http://www.bbc.co.uk/news/uk-northern-ireland-37277655>) and in these related video links (<http://www.bbc.co.uk/news/uk-northern-ireland-36208777>). RfJ's response can be viewed here (<https://vimeo.com/181812111>).

RfJ has been fully supportive of the LCJ's proposals. We expressed hope that some momentum would be injected into the coronial process. We also were of the view that the involvement of judicial oversight would make it harder for the police, the NIO and the Ministry of Defence to delay and prevaricate over disclosure issues. We have also said that the matter is not one for the devolved authorities and is rather the responsibility of the

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<sup>2</sup> [http://www.courtsni.gov.uk/en-GB/Publications/Press\\_and\\_Media/Documents/Press%20Release%20-%20The%20Lord%20Chief%20Justice's%20speech%20marking%20the%20opening%20of%20the%20new%20legal%20year%202016/j\\_j\\_Press%20Release%20-%20LCJ%20Address%20-%20Opening%20of%20the%20New%20Legal%20Year%205%20Sep%2016.htm](http://www.courtsni.gov.uk/en-GB/Publications/Press_and_Media/Documents/Press%20Release%20-%20The%20Lord%20Chief%20Justice's%20speech%20marking%20the%20opening%20of%20the%20new%20legal%20year%202016/j_j_Press%20Release%20-%20LCJ%20Address%20-%20Opening%20of%20the%20New%20Legal%20Year%205%20Sep%2016.htm)

[http://www.irishtimes.com/news/crime-and-law/north-s-top-judge-wants-troubles-inquests-fast-tracked-1.2780193#.V82K\\_JzUL0w.mailto](http://www.irishtimes.com/news/crime-and-law/north-s-top-judge-wants-troubles-inquests-fast-tracked-1.2780193#.V82K_JzUL0w.mailto)

British government and its local arm the Northern Ireland Office (with the current Secretary of State James Brokenshire) to respond to the LCJ's initiative. Rather than waiting for agreement from the local politicians, the British government should simply release the money and get the inquests going. The European Court has urged movement on a number of occasions. It is not right that the British government and its agencies continue to prevaricate and hide the truth about the activity of its overt and covert agents and agencies during the conflict. Using the excuse of devolution to prevent movement on this is particularly disingenuous.

RfJ met with then Secretary of State Theresa Villiers in February 2016. We most recently met with the current British emissary, James Brokenshire on 9<sup>th</sup> October. We emphasised the British government's duties and obligations irrespective of local disagreements between politicians. Our Director brought copies of all the reports that had so far been produced outlining the extent of collusion and mal-practice on the part of British state forces during the conflict. He pointed out that, in each investigation, there had been resistance to independent oversight, prevarication in provision of documentation and efforts to ensure impunity and immunity for the actions of its overt and covert agents. (<http://www.itv.com/news/utv/2016-10-10/victims-group-calls-for-release-of-stormont-house-agreement-funding/>, see also RfJ's Twitter feed at: <https://twitter.com/RelsForJustice/status/785481214677352448?lang=en-gb>) It can therefore be no surprise that victims do not trust the British government's intentions in this regard.

Emblematic of such mistrust was the reaction of the families of those 11 victims of the British military killed in August 1971 in the incident that has become known as the Ballymurphy Massacre. The British Secretary of State, as part of his round of induction meetings on taking up his post, met with the Ballymurphy Massacre families last month. The families were so deeply hurt and disheartened by the lack of urgency displayed by Mr Brokenshire and his officials that they walked out of the meeting, reckoning it to have been a waste of time<sup>3</sup>. This case is one of the new inquests ordered by the Attorney General over five years ago on the basis of new information likely to change the original view of what

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<sup>3</sup> See: <http://www.belfasttelegraph.co.uk/news/northern-ireland/ballymurphy-massacre-families-walk-out-of-james-brokenshire-stormont-meeting-35061384.html>; and <http://www.bbc.co.uk/news/uk-northern-ireland-37412736>

took place; a view that currently maintains a false narrative that a Catholic Priest, and ten other civilians including a mother of nine children, were all gunmen and bombers.

Consequently, the Ballymurphy families have now been forced to initiate legal proceedings by way of judicial review against the UK government over the delay. Their lawyer had earlier given the UK government 14 days to respond<sup>4</sup> to the lodging of judicial proceedings. The initial legal action also includes joining the devolved Executive in the application given that the Joint First Minister, Arlene Foster MLA of the Democratic Unionist Party (DUP), has also blocked the funding requested by the LCJ as part of his plan to hold legacy inquests<sup>5</sup>. As it currently stands the UK government has requested more time to respond.

As already noted the UK government representative James Brokenshire made the release of any funding conditional on the agreement of the local parties; many families and commentators feel this merely facilitated a veto for unionists, who also happen to fully support the position of the UK government in not holding legacy inquests.

## 2. Developments around the Police Ombudsman

The major problem here has been a deliberate lack of resources in an attempt to stifle the independent work of this office. The staff numbers in the Historic Directorate dealing with legacy complaints has reduced drastically, at a time when the Ombudsman's credibility has never been higher; as a result of which increasing numbers of complaints are being developed in the hope of a properly independent scrutiny, for the first time. The current caseload is 391 and growing. Letters are being sent to families warning that, at current rates of progress, it will be anywhere between 2025 and 2035 before their cases receive proper attention. This is unacceptable.

This has led to a number of judicial review proceedings seeking to force the allocation of adequate resources to process legacy cases. In a particularly significant case, RfJ is supporting the family of Stanislaus Carberry in their attempts to bring judicial pressure on

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<sup>4</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-37442184>

<sup>5</sup> <http://www.irishnews.com/news/northernirelandnews/2016/09/22/news/families-take-legal-action-over-stalled-troubles-inquest-funding-705491/>

the British government to establish a properly independent investigation into their father's murder by British soldiers in 1972. We are following the case closing and have provided information to the Committee of Ministers previously on the perennial delays in bringing the matter to full hearing.

The resistance of professional police bodies to independent investigation also continues. Thorough reports from the Ombudsman have uncovered questionable police efforts at investigating loyalist crimes and at best turning a blind eye to agent activity within loyalist groups. Indeed, such is the consistent revelation of thematic patterns that it is becoming ever more clear that there was a policy and practice of procuring and directing murder through loyalist agents. Despite the seriousness of these findings, the Ombudsman routinely finds himself subjected to legal challenges by the NI Retired Police Officers Association (NIRPOA) and its members. Many of these former officers were prominent in intelligence policing structures (e.g. RUC Special Branch) during the conflict.

In seeking to challenge such obstruction and obfuscation by former RUC officers (including some current senior PSNI officers who have remained in position), and their professional organisations, the Ombudsman has been seeking further powers to compel retired RUC officers to co-operate with his inquiries. It is an extraordinary fact that former officers, paid and pensioned through public monies, feel they can refuse to account for their activities while wearing a public uniform, and particularly when the charges are so serious.

Again the DUP First Minister and her party have sought to block and frustrate any efforts by the Police Ombudsman to secure resources, fulfil and maximise his statutory remit. It is clear that this DUP approach has been developed at the behest of these retired, and serving, police officers including their respective organisations and union the Police Federation.

The most notable report by the police ombudsman in the recent period has been the investigation into the loyalist killing of Adrian Rogan, Daniel McCreanor, Eamon Byrne, Patrick O'Hare, Barney Greene and Malcolm Jenkinson in the Heights Bar at Loughinisland in 1994<sup>6</sup>. This report was released in June 2016. It found significant levels of collusion between loyalists and police officers. It found that the RUC were primarily interested in targeting the

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<sup>6</sup> <https://www.policeombudsman.org/Media-Releases/2016/The-murders-at-the-Heights-Bar-in-Loughinisland-Po>

IRA and tended to turn a blind eye when loyalists were planning and carrying out murders. This failure to police in a fair and impartial manner led to loyalists having – at least – a free hand to develop their targets and attack them. However, the report also tracks the importation of South Africa weapons by loyalists through the oversight and assistance of British intelligence services and RUC Special Branch. Significant numbers of the weapons were let through and, at current estimates, at least 94 loyalist killings can be laid at the door of these weapons. This has enormous thematic implications that go well past the murders in Loughinisland in 1994.

These are the devastating findings that emerge when independent investigations are carried through to their conclusions; these are the reasons for the anxiety and resistance of the British government, the Ministry of Defence and vested RUC interests – including in the PSNI – from wishing to see legacy cases properly dealt with. The NIRPOA are currently seeking to legally challenge the findings of the Police Ombudsman's report into the Loughinisland atrocity, despite the UK government having to accept the findings.

Without the continued scrutiny of the Committee of Ministers of the Council of Europe, there would be little reason for the British authorities to, at least, give the impression of doing something. It is for this reason that RfJ is grateful for your continuing interest.

### 3. The general environment for legacy issues

Post-Brexit, the political environment within the Conservative UK government has become toxic to any European oversight. Little concern is expressed that the ECHR is different from the EU. For many Conservative Party members, it all amounts to "Europeans telling us and our troops how we must behave". This applies up to and including the current Prime Minister, Theresa May.

In response to the collection of allegations of physical abuse, torture and summary execution by British troops in Iraq, levels of hysteria about English legal firms "ambulance chasing" and developing false allegations against "our boys" has been whipped up. Statements in Parliament have openly and viciously criticised legal firms involved in advising Iraqi victims.

These incidents of accusation against legal firms involved in human rights cases echoes the demonization of Pat Finucane and other Belfast-based lawyers that occurred in months leading up to his murder in 1989.

The default instinct of Conservative politicians, up to and including the Prime Minister, has been on display defending the actions of British service personnel<sup>7</sup>. An increasing campaign is seeking, ultimately, to ensure impunity for the actions of British troops<sup>8</sup>.

This is simply the most recent manifestation of the protection provided by the British state to its overt and covert agents in the military, the police and the intelligence services for their crimes and human rights abuses during domestic and international conflicts. In the north of Ireland, we are experiencing a rearguard action against the findings of the European human rights institutions seeking to extend the protections for citizens against an over-weening state. The British government does not mind when other states are thus condemned. However, it cannot countenance its activities in the north of Ireland being scrutinised.

#### 4. Current prospects for implementation of the Stormont House Agreement (SHA)

The SHA was agreed two years ago, to include the establishment of a legacy architecture tailored to addressing the legacy of the conflict about British involvement in Ireland between 1968 and 1998. The shape of the agreement included an Historical Investigations Unit (HIU), an Independent Commission on Information Retrieval (ICIR), an Oral History Archive (OHA) and an Implementation and Reconciliation Group (IRG). Notwithstanding general agreement, the detail was to be worked out in later discussions. While much was relatively unproblematic, nevertheless the emerging shape of the HIU was felt by RfJ to have the capacity to provide Article 2-compliant investigations into outstanding cases, including those involving the British state and its overt and/or covert agents.

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<sup>7</sup> <http://www.telegraph.co.uk/news/2016/09/29/theresa-may-announces-crackdown-on-no-win-no-fee-law-firms-that/>

<sup>8</sup> <https://twitter.com/IanCobain/status/783717349010571264?lang=en-gb>



These hopes were dashed when, during a further round of negotiations a year ago, agreement stalled over the British government's insistence on a veto over disclosure of what it called "national security" issues. These were not defined and led to immediate concerns about the British state's default approach to revealing its crimes and misdemeanours.

There the matter has rested, pending elections in the north of Ireland in May and the calamity of the EU referendum in June. Now, the new Secretary of State, Mr Brokenshire has announced that, instead of a renewed negotiation between the parties and the British government – as expected – the NIO will simply carry out a public consultation on its proposals for the SHA. It is likely that it will then push ahead and impose its own wishes on the scope and independence of the activities of the HIU<sup>9</sup>.

It is worth pointing out the way that the British government invokes the devolved institutions and politicians when they wish not to do something (i.e. pay for legacy inquests), yet ignore local sensitivities when there is a danger that the activities of its overt and covert agents may be exposed to the light of independent scrutiny.

Having now met with the new Secretary of State and his officials, RfJ is concerned that the initial hopes for a human rights and Article 2 compliant legacy process enhanced from the days of the Historical Enquiries Team (HET) will not be met.

Noting the necessity to scrap the HET after it was proven to have acted illegally and with procedural bias in terms with how it dealt with killings by the state, many victims' families now see the UK Government trying to continue this approach through the statutory national security veto it is attempting to impose on the new investigation structure.

Indeed, for many families this was well summed up when the Irish Foreign Minister described the UK Government as seeking to use a "smothering blanket of national security" to hamper the independence of the HIU; Minister Flanagan rightly held that this was unacceptable<sup>10</sup>.

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<sup>9</sup> <http://www.sinnfein.ie/contents/41987>

<sup>10</sup> See "Charlie Flanagan critical of national security 'smothering blanket'" John Manley The Irish News 27/11/2015 <http://www.irishnews.com/news/2015/11/27/news/flanagan-critical-of-national-security-smothering-blanket--334991/?param=ds441rif44T>

Whereas the promise in the text of the SHA was for an investigative body that would meet the requirements of Article 2, it is apparent that the British government has now realised that this would reveal secrets about the crimes and misdemeanours of its overt and covert agents during the course of the conflict. It seems, therefore, prepared to force through its own preferred arrangements, which will tend to maintain the cover up it seeks.

## 5. Conclusion

It is RfJ's overall sense that the British authorities have little genuine desire to address the judgments of the European Court against them down the years. Their strategy is to delay and prevaricate until the relatives of its victims die and public interest wanes. The negotiation last year broke down over the issue of onward disclosure. In our opinion, reasonable proposals to address the impasse came forward from Sinn Fein and that party has consistently asked for further discussions. Instead the British government has decided to take forward its own proposals and intends to present a *fait accompli* to local interest groups and, indeed, the Committee of Ministers. This is regrettable, though in keeping with its usual dismissive approach.

We ask the Committee to question closely the representatives of the UK government. Without this international scrutiny, the prospects for final resolution of legacy cases in relation to the conflict will be drastically limited.

*October 2016*