Submission to Commissioner for Human Rights Nils Muižnieks

Tuesday 6th February 2018

Concerns in relation to British Government compliance with article 2 of ECHR in respect of legacy issues in Ireland.

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The *McKerr* group of cases[1] was adjudicated by the European Court of Human Rights between 2001 and 2003, with definitive findings of investigative failures by the United Kingdom, pursuant to Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in relation to killings by security and police forces during the Conflict in the North of Ireland.

Since then, and under the continuous supervision of the Committee of Ministers of the Council of Europe, a number of 'remedies' have been proposed, created, and subsequently disbanded amid abject failure to execute the judgments of the European Court.

It is with regret that we attend, to communicate a serious crisis which has developed in recent weeks, with we regretfully serves to undermine public confidence in the administration of justice, in respect of Britain's breach of its internationally binding legal obligations, specifically with regards to the State's approach to its role in our past.

For background information purposes, a detailed analysis as to the state of affairs with regards to British Government's compliance with those ECtHR rulings per the date of our last attendance on 12th April 2016, is appended hereto, with further periodic analyses appropriate to their time of presentation, also appended, per 11th March 2014, 24th November 2014.

Please further find attached a summary of press clippings which will inform as to the current state of appreciation by the civic populace, to afford a sense of the crisis.

[1] 1. Hugh Jordan v. the United Kingdom (application number 24746/94) [2001] ECHR 327
2. Kelly & Others v. the United Kingdom (application number 30054/96 [2001] ECHR 328
3. McKerr v. the United Kingdom (application number 28883/95) [2001] ECHR 329
4. Shanaghan v the United Kingdom (application number 37715/97) [2001] ECHR 330
5. McShane v. United Kingdom (application number 43290/98) [2002] ECHR 469
6. Finucane v. the United Kingdom (application no. 29178/95) [2003] ECHR 328

CURRENT CRISIS

Our previous submissions, have focussed very specifically on the broader architecture which the State has proposed to the Council of Ministers, in discharge of the found failings on *McKerr and others*, namely;

- Legacy Inquests
- Historical Enquiries Team (disbanded September 2014)
- Police Ombudsman
- New legal institutions – Historical Investigations Unit, Independent Commission for Information Recovery, as politically agreed at Stormont House Agreement and Fresh Start Agreement.

It would be our respectful contention to approach matters as they have occurred chronologically in the last fortnight, to communicate the deep sense of concern and indeed outrage at the ongoing justice vacuum. Whereas the scandal of each presents as a fresh crisis, closer examination demonstrates that the issues are interconnected, and a holistic understanding of them exposes the underlying problem.

• *Thursday 25th January* Westminster[2] debates a bill that would accord impunity for soldiers for their actions here. Notwithstanding the abject illegality of such an attempt, it is wholly against the agreements made at Stormont House and Fresh Start.

• *Friday 26th January* Mr Justice McCloskey recuses himself from Loughinisland Police Ombudsman judicial review, taken by Retired Police Officers having excoriated the statutory powers of the Police Ombudsman in an interim judgment on 21st December 2017.

• *Monday 29th January* RUC informer Gary Haggarty sentenced to 6 ½ years for what should have been a 35 year sentence, for 5 murders and in respect of which he immediately eligible for release! The investment of faith by the families in the SOCPA process was that ALL of the evidence of Haggarty would have been the subject of trial process which would have seen his Special Branch handlers prosecuted. That didn't happen and the families are left with the vista of a serial killer walking out of prison, with impunity for state actors.

• *Monday 29th January to Wednesday 31st January* The family of Anthony Hughes, a civilian passer-by shot dead by the British Army at Loughgall in 1987, are engaged in a High Court judicial review challenge to the decision by former First Minister Arlene Foster to refuse to countenance the request for funding for legacy inquests, by the most senior law officer, the Lord Chief Justice. *"For political reasons she was prepared to prevent a legal process"*

• *Tuesday 27th January* Families awaiting delayed inquests are notified by the Judicial Communications Office, that the PSNI have been in receipt of an MOD intelligence database for ten years and have not disclosed same to the Coroners Court.

[2] Westminster Hall Debate : Seventh Report of the Defence Committee, Investigations into fatalities in Northern Ireland involving British military personnel, HC 1064, Session 2016-17, @ HMG Response, HC 549

POLICE OMBUDSMAN

Investigations Skewed – A Pernicious Counter Narrative?

A core thesis which underpins many of the aforementioned crises, is the false impression that has been allowed to develop and fester, that legacy investigations are solely focussed on state actors. This is simply not true and the evidence from Professor Kieran McEvoy of Queens University Belfast, to the House of Commons Defence Committee on 26th April 2017 in respect of this was crystal clear[3], wherein he recited the facts in respect of contemporary prosecutions;

"There has been some critical commentary concerning a perceived imbalance in conflict related prosecutions against state actors since the Good Friday Agreement, particularly since the current Director of Public Prosecutions took up his post in 2011. The DPP recently issued a statement detailing the following."

- There have been 17 prosecutorial decisions on legacy related cases since 2011.
- 8 cases relate to alleged offences attributed to republicans, in 7 of the cases decisions were taken to prosecute;
- 3 cases relate to loyalists and have resulted in prosecutions;
- 3 cases relate to soldiers, two of these have resulted in decisions to prosecute and one a decision not to prosecute.
- 3 cases relate to police officers, in two decisions were taken not to prosecute.

A Pernicious Counter Narrative?

In a key note speech[4] on Dealing with the Past, in February 2016, the then Secretary of State Theresa Villiers told an audience that we today faced *"a pernicious counter narrative"*, wherein she stated that there were some who proposed a *"version of the Troubles that seeks to displace responsibility from the people who perpetrated acts of terrorism and place the State at the heart of nearly every atrocity and murder that took place"*

She went on to say that *"It wasn't the RUC or the Army who pulled the trigger at Loughinisland."*

That she would invoke the Loughinisland atrocity was exceptionally insulting to those victims and survivors but also very telling as to the State's mind set at that time. Just four months later, the Police Ombudsman on 9th June 2016 would issue a report, in accordance with his legal powers under section 62 of the Northern Ireland Act 1998, wherein he concluded that he had

[3] http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Defence/Investigations%20into%20fatalities%20in%20Northern%20Ireland%20involving%20British%20military%20personnel%20%E2%80%8B/written/48436.html#_ftn16

[4] https://www.gov.uk/government/speeches/villiers-a-way-forward-for-legacy-of-the-past-in-northern-ireland

'*no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders'*

In the context of Theresa Villiers statement, four months previous, on consideration of the Police Ombudsman's Report, the families would now state that

- It was the British Army whose agent was involved in importing the weapons and
- It was the RUC who failed to follow intelligence on those weapons leaving them in circulation to commit these atrocities including the murder of at least 70 people.
- It was RUC paid agents who pulled the triggers and
- It was the RUC who failed to investigate the atrocity, with houses not searched and no arrests made for a month, despite having names within a day. Alibis weren't checked out and evidence was persistently destroyed by the police.
- It was the RUC who destroyed the getaway car after 10 months denying future police investigations the opportunity to test for DNA.

The Police Ombudsman's report is not a pernicious counter narrative. It corrects a carefully constructed official state narrative which is based on a lie. History is rectified by facts and the real truth emerges.

This report is now part of a factual matrix that joins the truth published by Baroness Nuala O'Loan in her Operation Ballast report[5], and also the limited public findings that have been permitted to be published following the investigations by Lord Stevens and Sir Desmond de Silva.

- Sir Desmond de Silva advises us that in 1985, MI5 assessed that 85% of UDA intelligence used to target nationalists originated from within the security forces.
- During his three investigations Lord Stevens and his team arrested 210 paramilitary suspects. Lord Stevens has stated on the record that 207 of them were agents or informants for the State.
- Baroness Nuala O'Loan in her Operation Ballast touching upon the activities of the Mount Vernon UVF revealed the truth pertaining to Informant 1, since unveiled as Mark Haddock, who received £79,840 from the RUC over a 12 year period during which he committed or was involved in 10 murders and 10 attempted murders.

Far from being a catalyst for change, the first legal action in respect of the Police Ombudsman's report came in the form of a Judicial Review challenge from the Retired Police Officers Association, who applied to the High Court in Belfast to have the report quashed.

The Retired Police Officers Association are a private organisation which represent the interests of Retired Police Officers and have been proactive in a campaign to ensure that the authorities

[5] Operation Ballast report - 22nd January 2007 https://policeombudsman.org/PONI/files/9a/9a366c60-1d8d-41b9-8684-12d33560e8f9.pdf

are dissuaded from reflecting too closely on the actions of the State during the conflict. A parliamentary question asked by Jeffrey Donaldson MP on 4th July 2012 records-:

"Last night we had a briefing from senior retired police officers about the threat to national security from evidence that is being given in inquests in Northern Ireland that opens up the whole modus operandi of our security forces and security services. What do the Government intend to do to protect national security from this threat?"

This sentiment was complimented in October 2013 when NIRPOA representative Raymond White, former Assistant Chief Constable Raymond White and Head of RUC Special Branch, advised the BBC[6] that the association representing retired police officers will **not** encourage members to engage with the Police Ombudsman on certain historical investigations where breaches of the European Convention on Human Rights are *alleged*. This is the same NIRPOA that asserted that truth may be incompatible with reconciliation and further maintains the stated position[7] that Collusion per sé is a republican myth solely propagated to undermine the reputation of the RUC.

Shortly after the publication of the PONI report in June 2016, Raymond White resumed his ideological campaign against the Police Ombudsman, lodging a challenge for judicial review.

On 21st December 2017, the High Court delivered an excoriating and damning analysis of the Police Ombudsman's powers and how he ought to discharge his responsibilities. In the judgment he found at paragraph 103 (page 49);

"I hold that the Police Ombudsman's promulgation of the "Public Statement" of the second investigation into the Loughinisland atrocity was, by reason of the contents of the statement, unlawful as it was not authorised by the statutory regime. Stated succinctly, the Police Ombudsman exceeded his statutory powers."

Notwithstanding the devastating critique contained within the judgment that the Police Ombudsman report was *"unsustainable in law",* Mr Justice McCloskey also branded the report *"careless, thoughtless and inattentive in the language and structuring of the document".*

The integrity of the judgment itself also came into sharp focus, when it was disclosed in an Irish Times article on 6th January 2018, that the Judge had previously represented Raymond White, in a challenge of the same nature, against the Police Ombudsman, in relation to a s62 statement published on 13th December 2001 by the then Ombudsman in respect of the 1998 Omagh Bomb, which killed 31 people. The Chief Constable at the time, Ronnie Flanagan had stated at a press conference that he would publicly commit suicide if the findings of the report

[6] Former Officers withdraw Ombudsman help – 24th October 2013
http://www.bbc.co.uk/news/uk-northern-ireland-24652883

[7] "It is apparent that republican propagandists are desperate to ensure that their narrative should predominate. They are therefore using all their political muscle to skew the work of the relevant institutions in Northern Ireland in order to create a false narrative and the myth of "collusion". NIRPOA submission to Dr Haass.

were to stand. When this fact, that the Judge had represented the same applicant, in the same challenge, against the same respondent, the families applied to the court that the Judge formally recuse himself from concluding the judgment. The case had been listed for Friday 12th January 2018, for remedies, with the applicant Raymond White, applying to the court, that the report be quashed in its entirety. Instead of remedies being delivered, the case was heard against the backdrop of intense public scrutiny and interest, across three successive Fridays, 12th, 19th and 26th January, culminating in the decision by the trial Judge to refuse to recuse himself, but agreeing to step aside solely on the basis that same would be in the interests of the families.

> I consider that the families cannot be expected to grasp the legal intricacies and complications of the court's evaluation of the application to recuse.
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> While it is evident that the families have travelled this lengthy, unpredictable and uncertain litigation road with both fortitude and admirable dignity and restraint, the toll on the persons concerned – surviving spouses, children, nieces, nephews and others – must have been immense. I would expect that they have found their six year encounter with our legal system bewildering and confusing.
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> In these circumstances, I consider it necessary to reflect on the question of whether the families can have genuine confidence in the outcome which would follow if the court were to give effect to its judgment and choice of remedy by the usual medium of a formal final order. In considering this question, it is essential for the court to detach itself as far as humanly possible from the conscientious and dispassionate judicial exercise which has given rise to its substantive judgment and, further, its assessment that the test for apparent bias is not satisfied. I consider that, in the truly unique and unprecedented circumstances of this case, the interests of justice will not be furthered by a formal and final outcome which gives effect to the court's substantive judgment and choice of remedy. Trust and confidence in the legal system are critical ingredients of the rule of law which binds and governs all of society.
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> In these circumstances, yet another balancing exercise falls to be performed by the court. It is a complex and challenging one, admitting of no obvious or easy answer. Following anxious reflection, my evaluative conclusion is that ***our legal system will not have served the families well if they are not given the opportunity of having this case heard by a differently constituted court.***

The import of this index judicial finding of 21st December, however, cannot be underestimated. The outworking of this judgment is such that the Police Ombudsman's office would be not be permitted to publish public statements. This function has been repeatedly proposed by the British Government[8] to the Committee of Ministers, Department for the Execution of Judgements of the ECHR, in discharge of the found failings of *McKerr and others*. Indeed, the Police Ombudsman himself, Dr Maguire, has corresponded directly[9] with the Department, in 2014, in respect of budgetary constraints which he faced.

With the disbandment of the HET in September 2014 and the failure to legislate for the HIU and ICIR, per political agreements, this judgment would effectively render a key triumvirate of the Package of Measures, legally incompetent.

[8] https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dadb0
[9] https://rm.coe.int/16804a5dbb

CORONERS INQUESTS

Sir Declan Morgan QC, the Lord Chief Justice of Northern Ireland, has attempted to act as an impartial arbiter and honest broker in the issue. The Lord Chief Justice has provided innovative and stable leadership, in a period of political uncertainty. In the vacuum of not having a Minister for Justice, or indeed a local Justice Committee at Stormont, he has moved forward with pioneering and innovative ways of providing access to justice specifically with regards to the impasse which has afflicted the extant legacy inquests.

On assumption of the Presidency of the Coroners Court in November 2015, the Lord Chief Justice immediately appointed Lord Justice of Appeal Sir Reg Weir QC, to conduct an in depth review of all 55 pending Legacy inquests. This series of publicly heard Case Management reviews was conducted in back to back daily sessions, from Monday 18th January until Friday 29th January 2016, during which the presiding Judge was unambiguous in where he considered the responsibility for the delays and failures to comply with disclosure requests lay.

In an unprecedented and much welcomed and appreciated move, the Lord Chief Justice, along with Lord Justice Weir and Mr Justice Colton, personally met with the families of those affected by the delays in the Inquest system, on Friday 12th February 2016, to present the conclusions of a report prepared by Lord Justice Weir, and the way forward to be proposed to Department of Justice.

He said that the failure to deal with legacy inquests has *"cast a long shadow over the entire justice system"* but that all inquests into controversial killings could be completed within five years if the Government provides enough resources[10].

He went on to say[11]

"It is clear that the existing Coroners Service is not adequately resourced to carry the weight of these cases and so we will need to establish a new, dedicated Legacy Inquest Unit as a matter of urgency. My ambition is to start listing cases from September onwards but this will be predicated on the availability of resource."

Sir Declan added:

"I sincerely believe that if we are now in a position to make meaningful progress on this long-standing issue, and that if we do, it will provide a signal of hope to all victims and survivors that the remaining issues involved in dealing with the past can finally be resolved."

[10] http://www.irishnews.com/news/northernirelandnews/2016/02/12/news/legacy-inquests-could-be-completed-in-five-years-says-lord-chief-justice-416917/
[11] http://www.u.tv/News/2016/02/12/Lord-Chief-Justice-calls-for-legacy-inquest-unit-53977

On 9th March 2016, the Lord Chief Justice outlined his specific plans at a Conference convened by the Commission for Victims and Survivors at the Titanic Centre, in Belfast, wherein he stated:

"I am satisfied that the plan I have developed represents the best way forward for these cases and satisfies the criteria that need to be met in order to discharge the UK Government's Article 2 obligations."

It is a matter of intense regret that the resources required to execute the Lord Chief Justice's plan have not been made available to him. This is the subject of litigation presently before the High Court, the skeleton arguments in respect of which are included in the bundle.

Brigid Hughes' husband was killed at Loughgall in 1987 and as such, the case can come under the scrutiny of the Committee of Ministers, in respect of the supervision of the execution of the judgment of Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328.

Two days after the Lord Chief Justice outlined his plans to the CVS Conference, the sponsoring Minister, the Minister of Justice submitted a draft paper for the Executive Committee on 11th March 2016, in which the Minister sought approval to make a request to the Secretary of State for the funding sought by the LCJ.

On 23rd March 2016, the then First Minister Arlene Foster refused to agree to the Department of Justice paper being put on the agenda for the upcoming Executive Committee meeting.

On 3rd May 2016[12], Mrs Foster was reported as having *"defended her decision not to sign off on a plan to deal with the backlog of inquests into some of the most controversial killings of the Troubles"* on the basis that there were issues concerning "*innocent victims"* and that "*there has been an imbalance in relation to state killings as opposed to paramilitary killings,".* She agreed that the paper had come to OFMDFM but *"I felt that I needed more discussion around it … I will not allow any process to rewrite the past".*

The application for Judicial Review by Mrs Hughes was lodged on 5th October 2016, and on 6th – 8th December, the Council of Europe Committee of Ministers said that it:

"…strongly urged the authorities to take, as a matter of urgency, all necessary measures to ensure both that the legacy inquest system can be properly reformed, resourced and staffed as proposed by the Lord Chief Justice of Northern Ireland and that the Coroners Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded."

Interviewed by the BBC on 15th December 2016, the Lord Chief Justice stated that *"the state is under a legal obligation to act as quickly as possible"* in relation to his request for funding

[12] https://www.belfasttelegraph.co.uk/news/northern-ireland-assembly-election/dup-leader-arlene-foster-why-i-blocked-plans-to-speed-up-troubles-probes-34683461.html

and "if the various agencies who are involved in examining this from a political point of view cannot reach an agreement then the danger is that ***the political process will end up frustrating the rule of law".***

A senior DUP official, Sir Jeffrey Donaldson was quoted as stating that the DUP was not prepared to move forward on legacy issues on a *'partial basis'* where a small number of victims have a *'privileged position'.*

On 9th January 2017, the Deputy First Minister Martin McGuinness resigned, citing the failure to move forward on legacy issues as one of several concerns which meant he could no longer remain in Government.

On 27th January 2017, the Lord Chief Justice said in an address to the Victims and Survivors Forum, that the rate of progress in hearing inquest cases *"falls far short of the pace and intensity of effort that would be required to complete the outstanding cases in a manner that was article 2 compliant"* and that *"in the absence of additional resources we have requested for the creation of a bespoke Legacy Inquest Unit it would be decades before all of the outstanding cases would be completed".* He added *"even if there is a political breakthrough, it will take some time to legislate for and establish the new institutions and it would be artificial –* ***perhaps even bordering on the unconstitutional*** *– to hold back progress on inquests until the wider infrastructure for dealing with the past is in place."*

On 10th March 2017 the Secretary of State for Northern Ireland, James Brokenshire was reported as saying that the government *"will not release money for Troubles inquests until agreement is reached on all legacy issues"* and that *"funds to conduct dozens of inquests are contingent on a comprehensive settlement".*

On 26th June 2017, the Conservative Party and the DUP enter into a confidence and supply agreement. The Agreement explains that the Stormont House Agreement legacy bodies should be established:

"... so as to operate in ways that are fair, balanced and proportionate and which do not unfairly focus on former members of the armed forces or police."

On 5th September 2017, at the opening of the Legal Year, the Lord Chief Justice again expressed 'deep frustration' that he had not received a response to the proposals he had put forward in February 2016. The Council of Europe Committee of Ministers again commented on 20th September 2017 that it:

"...deeply regretted that the necessary resources have not been provided to allow effective legacy inquests to be concluded within a reasonable time; strongly urged the authorities to take, as a matter of urgency all necessary measures to ensure both that the legacy inquest system is properly resourced and reformed in accordance with the Lord Chief Justice for

Northern Ireland's proposals and that the Coroners Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded…"

During the hearing of the judicial review last week, senior counsel for Mrs Hughes, asserted that the DUP leader and First Minister Arlene Foster had acted unlawfully in failing to permit the Minister of Justice application for funding to be processed, and that the funding had been deliberately denied, with no attempt to conceal it, and that the reason that she didn't want them to be heard, was because she considered that they mostly concerned state killings.

Barry Macdonald QC further stated that "***for political reasons she was prepared to prevent a legal process taking place".***

There are 54 inquests pending in relation to 94 deaths, however there are only 3 inquests listed to be heard in 2018.

46 legacy inquests are still to be progressed with no dates set for hearings as the Coroners Service await the outcome of current political talks to implement LCJ five year plan for legacy inquests which he developed two years ago in February 2016.

The capacity issues pertaining to legacy inquests was starkly exposed last Wednesday 31st January 2018, when it was revealed in correspondence from the Judicial Communications Office that the PSNI had been in retention of an intelligence database from the MOD for over ten years, and had not revealed that information to the Coroners Service.

The outworking of this astonishing revelation was that four inquests that had managed to have been complete, may require to be reviewed to ensure that there were no facts concealed that should have been disclosed to the next of kin.

HAGGARTY SENTENCING

A further issue which has contributed to the recent crisis in confidence in the administration of justice has been the conclusion to the sentencing arrangement pertinent to Gary Haggarty.

Gary Haggarty was a UVF Commander, joining the organisation in January 1991. He was a registered informer of RUC Special Branch, (CHIS Covert Human Intelligence Source) from 1993 until 2004. He left Belfast shortly after the publication of the Operation Ballast report by the Police Ombudsman, in January 2007.

Gary Haggarty was originally approached by the HET in 2009 who advised him that they sought to arrest and charge him with the murders of Sean McParland and three other people. Haggarty was known to the HET at that time as having been a Registered Informant, albeit he had been previously stood down by in 2004.

Haggarty agreed to return from Britain to Antrim Serious Crime Suite in August 2009 whereupon he was arrested for the murder of Sean McParland. Unusually he was appointed

an English solicitor to represent him in the after caution PACE interviews, whereon he was interviewed twice, solely about the murder of John Harbinson. He made No Comment interviews and was charged to Belfast Magistrates Court the following day with the murder of John Harbinson. He appeared at court with no solicitor and represented himself, and he was remanded into custody in solitary confinement in Maghaberry prison, where he would stay for the next 3 ½ years.

Thereafter, his English appointed solicitor, negotiated an agreement with a specified prosecutor under the Serious Organised Crime and Police Act, which he signed in January 2010, to in effect, become a supergrass.

From January 2010, he was formally interviewed under the SOCPA agreement and was obliged to disclose details of all criminality undertaken during his membership of the UVF. It was during this process that Haggarty provided details of murders which he had committed, murders he was involved in, and murders which he was aware of, and crucially, had provided advance notice of, to his police handlers.

Haggarty would be taken from Maghaberry prison and flown to undisclosed locations in Britain to be interviewed about his time as an informer working for the RUC whilst moving up the ranks of the UVF.

In January 2011, Haggarty was frustrated with the process to the extent that he changed his solicitor to a Belfast based solicitor. As he had served over two years in prison by this stage, and had only been charged with pre GFA offences, he applied for bail. He was then, perhaps cynically, charged with 8 further offences, which post-dated the GFA, including serious charges such as Directing Terrorism, conspiracy to import arms from the Balkans and conspiracy to murder Laurence Kincaid during a loyalist feud in 2005.

The SOCPA deployments would continue with his new solicitors, however, when they quite reasonably sought access to the transcripts for the previous 750 interviews, this was denied on the spurious ground that it would create prejudice to ongoing police investigations. Haggarty was then granted bail in December 2012, having served 3 years 3 months in custody, the equivalent of a 6 ½ year sentence, and was at liberty, living in the Witness Protection Scheme until his formal arraignment in June 2017 wherein he pled guilty to 5 murders, which led to his remand in custody pending sentencing.

Victims and survivors of Gary Haggarty had invested faith in the SOCPA process, as they were persuaded to believe that the trauma of observing Haggarty receive a vastly reduced sentence, would be offset by the wider ambition of truth recovery, as his evidence would be used to convict many other loyalists and crucially, his police handlers. The protracted process of from August 2009 until January 2018, was emotionally exhausting and traumatic.

In October 2017, the families received the shocking news that Haggarty's evidence would NOT now be used in any other trials, but that he would still receive his significant reduction in

sentence. The legal semantics which the families were asked to believe, was that whereas the director of the Public Prosecution Service, had no reason to consider that Haggarty's evidence was not the truth, from a criminal standard of proof perspective, he could not be taken forward as the sole evidence in the absence of corroborating evidence, to sustain prosecutions alone.

When asked, if the decision not to use Gary Haggarty as a witness in other prosecutions, meant that the PPS did not believe what he had told police, the Director of Public Prosecutions told reporters; *"No it doesn't. What it means is we don't consider … that what he told us is sufficient evidence on its own to prove beyond a reasonable doubt that others were guilty of significant crime".*

Failure to Prosecute

In a letter received by several of our clients in October the rationale for failing to prosecute 11 UVF Loyalist paramilitaries and two retired police officers Gary Haggarty had accused of involvement in murders, the reasoning for the failure to prosecute can be summarised as follows:

1 That one of the Special Branch officers provided a sick line that he was off for four months, which in effect provided an absolute alibi for the allegations.

2 That there doesn't exist any Special Branch records to corroborate Gary Haggarty's account

The letter read in respect of these two excuses:

1. *The particular allegation in this case is that the two officers passed your details to Gary Haggarty on a tacit understanding that you would then be targeted by the UVF. There is independent evidence that is inconsistent with the account of Gary Haggarty in respect of this incident and the records held by police do not record any information to support the allegations and in fact undermine his account.*
2. *Whilst there exists the possibility that Haggarty provided information relating to this matter which was not recorded, the evidence of Haggarty alone falls far short of proving beyond reasonable doubt that the information was in fact provided. The officers concerned have both strongly denied the allegations made against them. A matter of particular significance insofar as the case against the police officers is concerned is that Haggarty made very serious allegations against one of the police officers in relation to events occurring over a period of time when OPONI investigations have identified that the officer was on long term sick leave. In all the circumstances the available evidence against the two police officers falls far short of providing a reasonable prospect of conviction in relation to any of Haggarty's allegations against them and, as indicated above, the Test for Prosecution is not met.*

Corroboration : In relation to the preposterous proposal that a failure by the suspected criminal to maintain notes of his criminality, is a relevant consideration to not prosecute the criminal,

we refer to the published criticisms of then Police Ombudsman Nuala O'Loan in her index report Operation Ballast, wherein she lambasted as a significant obstacle to her investigation *"the generally poor standard of record-keeping within Special Branch over many years, and the failure to document, or to document properly, matters including key pieces of intelligence in relation to murders."* This was the same report found that officers provided '*farcical answers'* which *'indicated either a significant failure to understand the law, or contempt for the law'.* What makes this issue a material consideration by the PPS an even further farce, is the fact that her recommendation arising from that found failing was accepted by the then Chief Constable, with an undertaking to effect a specific IT strategy for intelligence branch and further an assurance that the effectiveness of the new procedures will be monitored to ensure that the highest standards are maintained.

Sick Line: In relation to the **Medical Certificate** submitted by only ONE of the two Special Branch officers for a period of four months during which the contact between Special Branch and Gary Haggarty was alleged by Gary Haggarty, this does not come remotely close to satisfying the requirements of an alibi defence in a criminal court. It is understood that Gary Haggerty had conducted several of the contact briefings by phone and in any event, in his index debriefings with PONI investigators, explicitly referred to the fact that the Special Branch officer in question had been off work for a period with an old rugby injury but that he continued to meet with Gary Haggarty during that period.

The victims and survivors have been deprived the opportunity of having this evidence tested robustly under cross examination and openly in a criminal court, thereby depriving them and indeed the public the opportunity to see justice in action.

The defendants would benefit from

1. bail applications,
2. a right to contest a Mixed Committal,
3. a right to make a No Bill application and
4. a right to make a Galbraith application at the close of the prosecution case, if the evidence was so unconvincing, before being required to give evidence
5. their trial interests would be protected by the legal anomaly which is a Diplock court in our jurisdiction.

The wider concern, was that the entire process had been

- stage managed and directed to ensure that no prosecutions were ever brought,
- the fundamental premise underpinning that guarantee, being the fact that state agents and employees are a species protected from prosecution,

Haggarty's plea and sentence revealed some shocking statistics, which have proven exceptionally difficult for the victims and survivors of Haggarty to tolerate. It was revealed that he was interviewed by police 1015 times, with the transcripts of those interviews

comprising 12,244 pages. He pleaded guilty to over 500 criminal offences, which spanned his time in the UVF, including:

- 5 counts of murder
- 5 counts of attempted murder and 1 count of aiding and abetting murder
- 23 counts of conspiracy to murder
- 21 counts of GBH
- 4 counts of directing terrorism
- 70 firearms offences
- 11 explosives offences

In a letter dated 17th October 2017, the PPS provided a table summarising the assistance that Haggarty had provided in the most serious cases, which indicates that he provided assistance in respect of 31 incidents which comprised 55 murders, as well a further 20 attempted murders and 56 conspiracies to murder.

Gary Haggarty was sentenced last Monday 29th January 2018. The reduction discount was applied to his total sentence in two portions,

- He received a 75% discount for all assistance pre and post SOCPA Agreement (i.e. assistance rendered as a CHIS from 1993 – 2004) and then in accordance with his SOCPA contract with the PPS from 13th January 2010 until sentence.
- The discount from the total sentence was then further discounted by 25%, in acknowledgement of credit for an early plea.

For example, the longest sentence imposed was one of 35 years for murder of Sean McParland a grandfather, reduced by 75% to 8 years 9 months. The 8 year 9 month was then further discounted by 25% to 6 years 6 months. That is his total tariff. He is of course entitled to apply for early release to the Sentence Review Commission, set up as part of the Good Friday Agreement, having served the minimum of 2 years.

In respect of post Good Friday Agreement (1998) offending, the most serious offence was count 13, directing the activities of the UVF from 18th February 2001 to 14th November 2004, for which he received a sentence of 25 years. Applying the discounts explained above, he went to 6 yrs 3 months with 75% discount and then down to 4 yrs 6 months with the 25% discount.

He has served 3 years 10 months in custody having served 1186 days as of the day of sentencing. With remission on a fixed sentence, he was only required to serve 2 years 3 months on the directing terrorism charge.

As such, Gary Haggarty is immediately eligible for release.

CIVIL LITIGATION AND CLOSED MATERIAL PROCEDURES

In the absence of state initiated mechanisms to give effect to the State's obligations under the Convention, many families have sought recourse to civil litigation as a means to access truth recovery and accountability.

John Flynn is a survivor of not one but two murder bids on his life by the UVF, both of which were pleaded guilty to by Gary Haggarty. In civil proceedings brought by him, he has already established an admission from the PSNI that the RUC misused its powers in handling paramilitary agents. The PSNI has taken the unusual step of conceding liability but are denying disclosure which is required to inform the quantum of damages and frustratingly the Chief Constable refuses to abide by orders of the High Court to comply with disclosure orders. With Mr Flynn now being further deprived of the opportunity of a criminal trial, the complicity of the State in two attempts on his life will remain to be a secret, as the Chief Constable has recently made an application that Mr Flynn and his lawyers be excluded during a Closed Material Procedure.

This is an area of grave concern to lawyers concerned with the protection of human rights, is the recent growth of secret courts. Almost all criminal and civil matters are held in open court, which means that the press and public are entitled to be present, and where they might be excluded (for example where it is necessary to protect children) the impugned citizen and their legal representative are present to hear and challenge the evidence presented.

However Part 2 of the Justice and Security Act 2013, which came into effect in July 2013, introduced fundamental changes to British law, in any civil case involving national security by creating an extraordinary alternative to the Public Interest Immunity (PII[13]) procedure.

The 'Closed Material Procedure' (CMP), represents a *'carve out from basic principles of equality of arms and open justice'*[14] by allowing courts to consider any material, the disclosure of which would be "damaging to the interests of national security".

The shifting dynamic behind the legislation was the response to the MI5/MI6 involvement in 'War on Terror' practices such an 'extraordinary rendition' and orders for disclosure in civil

[13] Public-interest immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.
[14] Turning out the lights? The Justice and Security Act 2013 – Tom Hickman. .
http://ukconstitutionallaw.org/2013/06/11/tom-hickman-turning-out-the-lights-the-justice-and-security-act-2013/

cases, arising therefrom, most notably in the case of Binyam Mohamed[15], who was a victim of rendition.

The Justice and Security Green Paper cited the complex and long series of cases[16] concerning Binyam Mohamed[17] as a crucial event in the preservation of sensitive intelligence material. In February 2010, the Court of Appeal (CA) ordered that several paragraphs previously redacted from the Divisional Court judgment in 2008 should be restored and made part of the open hearing. On three separate occasions prior to the CA case the then Foreign Secretary of State, David Miliband signed PII certificates to supress publication of the paragraphs of a Divisional Court reasoning that they contained summarised interrogation techniques used by the CIA against Binyam Mohamed.

The radical significance of CMP's from a rule of law perspective cannot be over-estimated, however infrequently Parliament's intention is, that it be used. Indeed during the final debate in the House of Lords, Lord Brown, himself a retired Law Lord, and former Intelligence Services Commissioner, warned that the legislation involved such a:
"radical departure from the cardinal principle of open justice in civil proceedings, so sensitive an aspect of the court's processes, that everything that can possibly help minimise the number of occasions when the power is used, should be recognised."[18]

The intention of Parliament on review of Hansard was that this repressive anti-terror legislation, was the new world order response to the 'War on Terror'.

However the facts of the matter in practice are somewhat different to the lofty Parliamentary intentions, and as is often the case, repressive measures are often invoked immediately in this jurisdiction to preserve the interests of the State in concealing their involvement in murder and other crimes. It is a fact that in the 5 years since the inception of this legislation, only 41 such applications have been made anywhere in Britain, yet 15 relate to matters in the north, and NONE of them relate to the War on Terror.

FACTS

The facility for an application for Closed Material Procedure came into law in July 2013. On 22nd July 2014 Justice Secretary Chris Grayling submitted the first annual report to Parliament

[15] [2011] QB 218
[16] The case originated in the US in the case of Farhi Saeed Bin Mohammed v Barack Obama (Civil Action No. 05-1347 GK) 2009, where Binyam Mohamed sought disclosure of information necessary to assist his defence before a US Military Commission and in particular to show that the prosecution case consisted of evidence obtained through torture.
[17] R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.1) [2008] EWHC 2048 (Admin) [2009] 1 WLR 2579 and (No.2) [2009] EWHC 152 and 2549 (Admin) [2009] 1 WLR 2653 (Divisional Court) and [2010] EWCA Civ 65 and 158 [2011] QB 218 (Court of Appeal).
[18] House of Lords - 26th March 2013, Col 1032.

on how often closed material procedures (CMPs) had been sought under the Justice and Security Act 2013 (JSA), as he is required to do annually under the Act. Critical analysis by the Laurence McNamara and Daniella Lock, for the Bingham Centre for the Rule of Law in the report *"Closed Material Procedures Under the Justice and Security Act 2013: A Review of the First Report by the Secretary of State"* published in August 2014, noted that the report was lacking in details and was merely a statement of numerical facts. Subsequent reports have provided more details and from review, a startling pattern emerges with specific relevance to the preponderance of applications made in the Belfast High Court.

TOTAL APPLICATIONS MADE		**RELEVANT TO NORTHERN IRELAND**
2013-2014[19]	5 applications made	2[20]
2014-2015[21]	11 applications made	4[22]
2015-2016[23]	12 applications made	5[24]
2016-2017[25]	13 applications made	4[26]

15 out of the 41 applications have been made in relation to the British Government's intelligence interests in relation to their role in the conflict in Ireland, 36%.

Of the 15 CMP applications made in relation to the north (from the UK total of 41) 6 of them have been made by the PSNI Chief Constable, which represents 14.5% of the total and 40% of the northern based applications.

A further point is that *no other* Chief Constable has made a single CMP application, out of the 41 applications i.e. the PSNI Chief Constable is the only Chief Constable out of the 45 British police constabularies and 3 special police forces of the U.K. to have even made a CMP application.

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[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342224/moj-report-closed-material-procedure.pdf

[20] 1. Terence McCafferty (NI SoS). 2. Martin McGartland (Home Secretary)

[21] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468375/closed-material-procedure-report-2015.PDF

[22] 3. Margaret Keeley (MOD). 4. Margaret Keeley (PSNI Chief Con)
5. Michael Gallagher (NI SoS) 6. Simone Higgins (PSNI Chief Con).

[23] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568767/report-on-use-of-closed-_material-procedure-25-june-2015-to-24_june-2016_.pdf

[24] 7. Eilis Morely (MOD) 8. Anthony Lee (PSNI Chief Con)
9. Roddy Logan (PSNI Chief Con) 10.Higgins (linked to 6/8 PSNI Chief Con)
11. Gerard Hodgins (MOD)

[25] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664979/use-of-closed-material-procedure-2016-17-report.pdf

[26] 12. Gabriel Magee (PSNI Chief Con) 13. Ryan Hegarty (Plaintiff)
14. Elizabeth Monaghan (Plaintiff) 15. Mary Heenan (Plainiff)

CONCLUSIONS

In April 2016, we concluded our meeting with the following observations and request:

Starved of resources, bona fides cooperation, openness, transparency and subject to repeated interference with independence, the Legacy infrastructure in the North of Ireland, such as it currently is, has consistently failed to execute the judgments of the European Court in spirit as well as letter.

Violations of treaty obligations at the international level cannot be remedied effectively unless they are effectively remedied at the domestic level. Victims and their families' demands for full truth and accountability cannot remain insulted ad nauseam. Such insults defeat the very purpose of the ECHR itself.

The Commission and the Agencies of the European parliamentary infrastructure are therefore called upon to raise awareness of the serious concerns amongst Member State's with the purpose of encouraging the UK to urgently discharge its obligations under Article 2 of the ECHR, to promote:

a. Public confidence and trust in the Rule of Law,

b. Integrity between Member States regarding the Council of Europe's standards requiring the prompt and effective execution of judgements.

Whereas the above sentiments are as relevant now, as they were two years ago, as outlined above, we are in the midst of an emergency. We would of course, welcome you back to Belfast to observe and engage with key stakeholders in our justice system, including we would respectfully submit, those are denied access to justice before our courts. We further suggest that you might consider some further practical steps.

a. Seek prioritisation of the Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328 before the Committee of Ministers;
b. Ask that the Council of Europe endorse or publicly call for increased damages for consistent breaches of the convention;

Prioritisation of Kelly & Others v. the United Kingdom [2001] ECHR 328.

The system of the Committee of Ministers allows for a decision to be taken to prioritise a case. This procedure is known as the 'enhanced supervision procedure' which in essence enables priority attention to some specific cases. Given the fact that Kelly & Others v. the United Kingdom (application number 30054/96) [2001] ECHR 328 identified systemic failings within the Coronial investigation, yet nearly 17 years on and an effective inquest has not been held requires prioritisation. The failing is incumbent upon the failure to properly resource the Inquest system and has given rise to the victims having to issue fresh domestic proceedings to seek compliance with the Article 2 ECHR procedural obligation.

The criteria for placing a case under the enhanced procedure is that the case requires urgent individual measures, or that the case has revealed important structural or complex problems. We respectfully submit that Kelly is such a case.

If a case is placed in the enhanced supervision procedure, the Secretariat will engage in more intensive and pro-active discussions with the respondent state which can result in expert assistance in the preparation of action plans, seminars to discuss the underlying issues. These cases will ultimately always be included in the Committee's human rights meeting agenda.

The index ECtHR judgment is now some 17 years old, and as such the UK have been allowed to be in perpetual breach continuously throughout that period without any recourse. The collective and corrosive nature of the crises as outlined above, leaves many observers clear in their opinion, that the UK government are simply ignoring the judgment of the Court in the *McKerr* group of cases.

Increased Damages

It is an established fact that the ECtHR does not endorse significant damages (as just satisfaction) save for exceptional cases. However, the Court has on a number of occasions in recent years increased the ceiling where there is evidence of continuous and flagrant breaches.

Given the fact the domestic Court is currently adjudicating on this issue, a statement to this effect from the Commissioner would be of persuasive assistance. Enhanced damages are now necessary to ensure that the respondent UK state retreats from the current position whereby it is comfortable to be in perpetual breach of the Convention with no threat of any substantial or significant award of damages being made against them.

This approach was recognised in the decision in ***Vermeire*** *(12849/87)*, which arose out of a failure to execute the ***Marckx*** judgment and the refusal of the Belgian courts to compensate for the absence of measures by the legislature. In the ***Vermeire*** case, the Court did not understand why the Belgian courts were refusing to enforce a rule about which "*there was nothing imprecise or incomplete."* In an almost identical position, there is nothing unclear about the numerous requests for the UK state to put in place the appropriate prerequisites of an Article 2 compliant inquest system.

"The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979."

This can be directly read across to the current situation in our jurisdiction.

Finally, the Committee of Ministers retain the power under article 8 of the Statute of the Council of Europe to seek the UK's exclusion from the Convention for the flagrant and consistent breaches.