**COUNTERING LEGACY LAWFARE**

**‘No New Evidence’ - a Caveat without Substance?**

**By Jeffrey Dudgeon**

**22 February 2020**

The *New Decade New Approach* dealcommits the Government to introducing legacy legislation into parliament by mid-April. It is not clear whether the promised veterans’ protection law is to be part of a wider Legacy Bill but Sinn Fein will probably be so opposed that there will have to be a separate Ministry of Defence Veterans’ Bill.

The deal’s Annex 1 reads: “As part of the Government’s wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any UK Parliament legislation should have the consent of the NI Assembly.”

The dramatic 100-days timetable for the first reading, at least, of a Legacy Bill was added in secret by the then Secretary of State, Julian Smith, after negotiations with Sinn Fein of which the other parties were unaware.

**Boris Johnson and the NIO position**

There are a number of questions that remain open when discussing the concept of ‘No New Evidence’ on which the Prime Minister relies when asked about veterans’ prosecutions.

Sarah Jones, Labour MP for Croydon Central, in a somewhat garbled question about the deal asked him on 15 January 2020, “The press were briefed last year that the Prime Minister was going to bring an end to all ongoing investigations from the conflict, and he said on Monday that he would not support vexatious claims when there was no new evidence. However, the Stormont agreement includes the Historical Investigations Unit (HIU), and the point of all the ongoing investigations is that the original evidence has never been properly investigated, so will the Prime Minister tell us today, yes or no, whether he now supports the investigation of every single outstanding claim?”

Boris Johnson replied: “I want to reassure the House that nothing in the agreement will stop us going ahead with legislation to ensure that no one who has served in our armed forces suffers vexatious or unfair prosecution for cases that happened many years ago when no new evidence has been provided. We will legislate to ensure that that cannot happen.”

A government spokesman has also said, “The Prime Minister has been clear that we need to end the unfair trials of people who served their country when no new evidence has been produced and when the accusations have already been exhaustively questioned in court.”

The most important question now is what does “No New Evidence” mean and could it hold the line against lawfare?

**Vexatious prosecutions and no new evidence – examining the mantra**

First consider what Boris Johnson’s qualifying words “vexatious or unfair” mean. As the current crop of historic prosecutions in Northern Ireland come through the local Director of Public Prosecutions or the Attorney General, they could never be described as vexatious. Unfair and discriminatory they may be, in the sense that there has been, through the ‘On The Runs’ scheme, something that is not far short of a partial amnesty for terrorists. However to achieve any parity would need a controversial government decision on a statute of limitations, or, better still, a court ruling of discrimination in a veteran prosecution.

The Criminal Justice Act 2003 which was used to justify allowing double jeopardy retrials requires that new evidence has to be reliable, substantial and highly probative, and thus compelling. However the courts in Belfast now regularly accept in judicial reviews, civil suits (e.g. Sir Frank Kitson), and demands for the reopening of inquests, new evidence that is not compelling. The non-statutory allegation of collusion alongside material from recently unearthed archival documents is seen as sufficient justification.

The requirement for 'new evidence' in its simplest form will and can be met in every alleged case of veteran criminality, 'collusion' or historic misconduct. What is happening is that newly released state files are being gone over in depth by state-funded human rights groups. Inevitably, in every case, evidential omissions or contradictions are being found, justifying a judicial review, a prosecution, a conviction challenge, or a reopened inquest and then a prosecution, all amply funded by a bottomless pit of legal aid. No case is ever seen as 'vexatious' and the context of the time is not considered. Indeed, most inquests in the 1970s were necessarily brief as there was little to go on beyond the body of the deceased, other forensic investigations being too dangerous.

However ‘new evidence’ is already defined in Section 9 (6) of the proposed 2018 Legacy Bill. It is something the HIU “Director has reasonable grounds for believing… is capable of leading to the identification” (or prosecution) of a murderer, or to “the initiation of disciplinary proceedings against a person for non-criminal police misconduct relating to the death.” Section 9 (11) helpfully adds evidence is new if not previously known or if the relationship between it and the death was not known.

These are catch-all definitions that have little or no restrictive ability and certainly none if ever tested in the Belfast courts.

**Northern Ireland Court Judgement – ‘The Hooded Men’**

The Northern Ireland judiciary rarely turns down a request for judicial review and increasingly does not take into account legal precedent prior to the 1998 Good Friday Agreement. In effect, the majority has gone over to the politics of the human rights industry.

The plainest and most worrying example is that of the 2019 ‘Hooded Men’ judgement where on the strength of an uncovered Merlyn Rees memo mentioning ‘torture’, two of three Court of Appeal judges even overturned a Strasbourg Court decision. They said its finding over the treatment of several internees, forty eight years earlier, “would if it occurred today properly be characterised as torture, bearing in mind that the European Convention on Human Rights is a living instrument”. The Court had earlier held it to be “inhuman and degrading treatment” and not torture, although still in breach of Article 3.

The Court of Appeal presumed to overturn not just the original Strasbourg Court judgement but its subsequent findings on two further occasions when appeals were lodged by Ireland in 2018. Finally a Court Grand Chamber ruled again that the men had not been “tortured”, thus rejecting the referral back to it of its 1978 finding.

Sir Donnell Deeny in a compelling, dissenting judgement said he was unable to fully agree with the judgment of the Lord Chief Justice and Lord Justice Stephens in respect of two matters. He could not agree that it is appropriate for the Court to make a finding that the treatment is to be re-labelled as torture 48 years after the events. He said the Strasbourg Court, by a majority of six to one, had dismissed the request for revision of its 1978 decision to substitute a finding of torture for one of “inhuman and degrading treatment”. He cited the principle of legal certainty which means there must be an end to litigation and said for the Court to make an actual finding that the “deplorable conduct” constituted torture was inappropriate in four respects:

* It altered a finding of fact by the judge for no good reason;
* It ran counter to the finding of the court with the ultimate responsibility for the vindication of the ECHR which chose not to make that finding applying the appropriate test;
* It contradicts the principle of legal certainty;
* It appeared to be “an unnecessary and otiose” finding and that the conduct in 1971 had a “larger dimension than an ordinary criminal offences and would amount to the negation of the very foundations of the Convention”.

Sir Donnell then proceeded to consider the Convention values test. The principal basis relied upon by the applicants was the Merlyn Rees memo saying that torture had been authorised by Lord Carrington. Sir Donnell dismissed the evidential value of the document and considered that Rees was expressing an opinion about something done by a political opponent in another government department and in the context at the time including Ireland’s claim before the Strasbourg Court.

The Court of Appeal added, “The test had not been met to enable an Article 2 or 3 procedural investigation to take place given the passage of time” and upheld an earlier decision to quash the PSNI’s decision not to take further steps to investigate the question of identifying and, if appropriate, prosecuting those responsible for criminal acts arising from their interrogation. It recognised however that an investigation may be hampered by the antiquity of the events. This left the matter in a state of confusion, as with the recent Supreme Court’s Finucane judgement.

Hooded Men link:

<https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20-%20In%20re%20Francis%20McGuigan%20and%20Mary%20McKenna%20%28The%20Hooded%20Men%29.pdf>

**Scope of any Veteran Protection Law and the proposed HIU**

The scope of the proposed veteran protection law is also critical.

Firstly, will it apply to retired RUC officers? The 2018 draft Bill proposes to introduce the novel concept that the HIU should be given powers to investigate retired (and even deceased) police officers for the non-crime of historic police misconduct. That, if it re-appears in the next draft of the Bill is likely to lead to the wholesale destruction of former officers’ reputations, and indeed of the RUC itself. The argument that it only refers to ‘grave and exceptional’ misconduct falls immediately as ‘collusion’ allegations all refer to murders - which are of course grave.

It is said and widely accepted that the current Police Ombudsman has the powers to investigate such ‘historic police misconduct’. That is not the case. There is no element of this in the legislation since 1998. What has occurred is unchecked mission creep which included the introduction of historical investigations and consequent reports, with allegations of collusion; in effect addressing ‘historic misconduct’ without normal human rights and legal protections, as with the RHI inquiry. The Loughinisland judicial review refers.

Even if this offensive concept of non-criminal historic police misconduct does not re-appear, army veterans and retired police officers will still be subject to the HIU’s unfair investigatory processes.

It will be invested with full police powers. Using those powers it will report to the Public Prosecution Service (PPS) who will then determine whether any prosecution can be launched.

But in cases where there are to be no prosecutions (the vast majority) the HIU will nevertheless issue a ‘Comprehensive Family Report’ to victims’ families. In doing so, the HIU will be acting in the role of adjudicator and as such will be empowered to make unchallengeable findings containing criticism of not just police officers but also of army veterans, civil servants and MI5 personnel.

To ensure proper protection that would be granted in any other public inquiry it will be necessary to curb the power of HIU to issue reports that are unfairly critical of army veterans, retired police officers and others in respect of their service in Northern Ireland. To achieve this, any adjudicatory role must be clearly separated off from HIU’s exercise of its police powers of investigation and reporting to the PPS. It must be noted there is no right to a reputation under the European Convention.

Secondly, will the new law apply to UDR veterans, being “armed forces” only recruited in Northern Ireland?

Thirdly, will the PPS be required to abandon existing cases such as Soldier F and cease investigating those cases already referred to them by the PSNI or the Attorney General but not yet heard in court?

Fourthly, will the proposed legislation apply only to those who served outside the United Kingdom such as in Iraq and Afghanistan?

Without adding all or some of these aspects, the debate will become so rancorous as to jeopardise the new law and with it the Legacy Bill itself.

How any new law will sit with Article 2 (the right to life) of the European Convention on Human Rights (ECHR) and the much quoted need for “compliance with Article 2” in its investigatory aspect is the other great unanswered question, alongside whether the UK will legislate to derogate from the ECHR for future wars. What can be done, as suggested in the magisterial June 2019 Policy Exchange proposals, *Protecting Those Who Serve* (<https://policyexchange.org.uk/wp-content/uploads/2019/06/Protecting-Those-Who-Serve.pdf>) by Richard Ekins, Patrick Hennessey and Julie Marionneau, to limit legacy litigation, is to “amend the Human Rights Act 1998 to specify that it does not apply to any death that takes place before the Act came into force in October 2000”. This is already in line with the most substantive UK jurisprudence.

On answers to these questions much turns. At the same time, the different political demands from veterans, Ulster unionists (now including the DUP leader), and the NIO (including Sinn Fein and Dublin) will make the Prime Minister’s response on legislation difficult. Perhaps he will be decisive and consider the country’s interest first.

The overall SHA aspect yet to be addressed is that the large batch of bodies created by the proposed Bill rather than address legacy, and bring closure, will add to and not replace the limitless court lawfare already in train. The imminent judicial review of the case coming to trial in March relating to veteran Dennis Hutchings may be the first in a line of counter legacy lawfare suits. It remains however up to the new Secretary of State, barrister Brandon Lewis, to square the circle and act on what ‘no new evidence’ should mean.

The line on lawfare needs drawn soon.

Jeffrey Dudgeon was until last May UUP councillor for Balmoral DEA in South Belfast and is the editor of *Legacy: What to do about the Past in Northern Ireland?* <https://amzn.to/2Ef1OgR>

jeffreydudgeon@hotmail.com