SUBMISSIONS TO SECRETARY OF STATE FOR NORTHERN IRELAND ON PROPOSALS TO END JUDICIAL ACTIVITY IN CONFLICT-RELATED CIVIL LITIGATION [10 February 2022]

Patrick Frizzell obo Brian Frizzell (Murdered: 28 March 1991)

KRW LAW LLP (KRW) is one of Ireland's leading providers of legal representation in Conflict-related Legacy litigation offering advice and representation across our community to all those relatives of victims and survivors of the Conflict.

KRW LAW LLP (KRW) is instructed by Patrick Frizzell in relation the murder of his brother Brian Frizzell in a Loyalist sectarian attack on 28 March 1991 in which two other innocent Catholic civilians were also killed. The murder of Brian Frizzell involved collusion between Loyalist paramilitaries and the British Security Forces and was one of a large number of similar attacks against innocent civilians in the Mid-Ulster area.

Brian Frizzell is *Lost Lives* Entry 3188 at page 1232.

Introduction

The family of Brian Frizzell have engaged in good faith with the relevant agencies regarding the murder of their loved one. They have had recourse to litigation to obtain truth, justice and accountability in the absence of the British government's failure to implement the Stormont House Agreement 2014 and in contempt of the spirit and letter of the Good Friday Agreement 1998 and the Package of Measures recommended by the Council of Ministers arising from the *McKerr* judgement of the European Court of Human Rights and in disregard to Article 2 of the Ireland/Northern Ireland Protocol.

KRW has previously corresponded with you regarding the Legacy Proposals set out in Command Paper 498. In addition, we have requested clarification regarding your responses to Parliamentary questions concerning the process of consultation about the Proposals your office is engaged in.

The Proposals and Civil Litigation

At this juncture our client seeks clarification as to how the Proposals regarding civil litigation in Conflict-related actions will be implemented by way of legislation.

The concerns of our client arise from the following:

"38. We are therefore considering a proposed way forward that would end judicial activity in relation to Troubles-related conduct across the spectrum of criminal cases, and current and future civil cases and inquests. We recognise that these are challenging proposals. However, ongoing litigation processes often fail to deliver for families and victims, and their continued presence in a society which is

trying to heal from the wounds of its past risks preventing it being able to move forward.

Of the over 1000 civil claims against the MoD; Northern Ireland Office (NIO) and other State agencies, very few are currently at trial stage and a significant number are yet to progress beyond the initial stage of a court order being issued. ● According to the Crown Solicitor's Office of Northern Ireland the numbers of private claimants in these cases is negligible and the vast majority of cases rely on legal aid. ● These costs are a significant proportion of the approximately £500 million spent on legal aid in Northern Ireland since 2011. ● These cases almost never provide families with the answers or results they seek. ● There are currently around 36 outstanding inquests relating to deaths that occurred before April 1998."

Civil Litigation and The Legacy of the Conflict

We remind you of the position regarding the relationship between civil litigation and the procedural obligations on the UK following a breach or violation of Article 2 ECHR.

In *McKerr v UK* (Application No. 28883/95) 4 April 2000, the ECtHR set out the position thus in its admissibility judgment:

"The Government submit that the applicant's complaints concerning the death of his father are inadmissible for failure to exhaust domestic remedies, since he has not pursued to a conclusion the civil action which has been commenced against the relevant authorities alleging unlawful killing. They point out that the determination of applicant's central complaint - whether or not Gervaise McKerr was killed in circumstances falling outside the exceptions to the right to life in the second paragraph of Article 2 - will depend on an assessment of all the facts of the case and these circumstances, in particular the necessity and proportionality of the use of force, are also at the heart of the civil proceedings launched by the applicant. If the allegations in those proceedings are well-founded, domestic law will provide the applicant with an effective and adequate remedy - a judgment dealing with the facts of the case and the liability of the authorities and damages, if appropriate.

The applicant argues that civil proceedings taken at the initiative of relatives are plainly inadequate to remedy his complaint under the procedural aspect of Article 2, which, he submits, places the responsibility on the State to furnish an effective investigation into the killing of his father. They are also inadequate and ineffective in respect of his substantive complaints under Article 2. He submits that the purpose of civil proceedings is to obtain damages for the family of the deceased and that this is not an adequate remedy for a violation of the right to life. The death of his father was also not an isolated occurrence but part of an administrative practice of the use of lethal force by the security forces which is condoned and encouraged by the respondent Government."

The ECtHR concluded that: "The Government cannot rely on civil proceedings either, as this depends on the initiative of the deceased's family."

In its substantive judgment in *McKerr v UK* (Application no. 28883/95) 4 August 2001 the ECtHR noted:

"121. Conversely, as regards the Government's argument that the availability of civil proceedings provided the applicant with a remedy which he has yet to exhaust as regards Article 35 § 1 of the Convention and, therefore, that no further examination of the case is required under Article 2, the Court recalls that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages (see, for example, *Kaya*, cited above, p. 329, § 105, and *Yaşa*, cited above, p. 2431, § 74). The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible. The Court therefore examines below whether there has been compliance with this procedural aspect of Article 2 of the Convention.

156. As found above (see paragraph 118), civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. *It is, however, a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.*" (our emphasis)

It is therefore clear that civil litigation cannot be taken into account in the assessment of the UK's compliance with its procedural obligations under Article 2 of the ECHR. Therefore, any attempt to legislate so as to end judicial activity by way of Conflict-related civil litigation would be out-with any current procedural obligations imposed on the UK by the ECHR and of no effect. The attempt would be unlawful and offend the letter and spirit of the *McKerr* judgments. The attempt would seek to ouster/fetter judicial activism in this area and therefore be an attack on the constitutional principle of the separation of powers. It would also be an affront Common Law principles regarding access to justice as a mechanism in upholding the Rule of Law.

The Protocol on Ireland/Northern Ireland

We draw your attention to the following:

"Article 2 Rights of individuals 1. The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms. 2. The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards."

It is clear that these Proposals offend Article 2 of the Protocol on Ireland/Northern Ireland. Article 2 is drafted as a prescriptive measure in which the UK *shall* implement this paragraph through dedicated mechanisms.

Further, we remind you that Northern Ireland is a jurisdiction in its own right, separate to that of England and Wales and to Scotland. It is a jurisdiction with its 'particular circumstances' reflecting its own tradition of judicial activism, not least around the ECHR. Further, Northern Ireland is a devolved administration. The statutory implementation of these Proposals may offend aspects of the devolved powers in addition to the ECHR and the Protocol on Ireland/Northern Ireland. The offence would be specifically regarding limiting access to justice (both private and public) where, for example, the rules on judicial review (which is already subject to scrutiny by administration at Westminster) are specific to the jurisdiction.

Criticism of the Proposals regarding Civil Litigation

On this Proposal and the accompanying 'evidence', the Model Bill Team (QUB and CAJ) provide the following analysis:

"In the absence of a set of wider truth recovery mechanisms (such as those proposed under the SHA), families and survivors affected by the conflict have availed of civil proceedings in their pursuit of information and truth recovery and justice. Through this judicial process, defendants such as the PSNI, MOD and NIO have been directed to provide substantial discovery of relevant documentation to the legal representatives of families and survivors. This includes information previously denied to next of kin, including through statutory processes such as Police Ombudsman investigations where the PSNI has failed to comply with its disclosure obligations. Sensitive material such as that subject to Public Interest Immunity and Closed Material Procedures are routinely withheld from the public component of such civil actions on national security grounds. Nonetheless, even the provision of non-sensitive material can provide substantial information about the death of a loved one or unlawful treatment that was previously withheld from families and survivors." (The Model Bill Team's Response to the NIO Proposals September 2021 page 64)

Regarding Closed Material Procedures, we refer you to our evidence to the Statutory Review of the "Closed Material Procedure" provisions in the Justice and Security Act 2013:

"Under Section 6 of the Justice and Security Act 2013 the Secretary of State must produce a report on the use of CMPs. These annual reports reveal a continued trend of disproportionate use of CMPs in relation to cases concerning the legacy of the Northern Ireland conflict, despite the region constituting only 2% of the UK population. Such cases generally concern the actions of informants or agents of the state within paramilitary groups. The statistics for the three years 2015 – 2018 confirm 13 applications made in Northern Ireland, with all other applications totalling 24."

We maintained that:

"From the Northern Ireland perspective CMP has been used in historic Conflict-related Legacy litigation to frustrate the truth-recovery process which is a central plank to the outworkings of the Legacy of the Conflict."

Lord Mance in *R (on the application of Haralambous) (Appellant) v Crown Court at St Albans and another (Respondents)* [2018] UKSC 1 (Lord Mance) noted:

"61. As a matter of principle, open justice should prevail to the maximum extent possible. Any closed material procedure "should only ever be contemplated or permitted by a court if satisfied, after inspection and full consideration of the relevant material as well as after hearing the submissions of the special advocate, that it is essential in the particular case": *Tariq v Home Office*, para 67; and should, of course, be restricted as far as possible."

The Model Bill Team conclude with an important reminder:

"(A)ny process that is designed to support information recovery and reconciliation as well as respond to the needs of victims and survivors and society as a whole must 'comply fully with international human rights obligations'. As we also note above, the Stormont House Agreement had adherence to the rule of law as one of its key underpinning principles." (page 68)

Regarding the 'evidence' relied upon in the Command Paper we direct you to the analysis offered by prominent victims' support groups Relatives for Justice:

- The vast majority of victims do not qualify for or receive legal aid.
- Despite continued failings by the State to properly investigate the killings of their loved ones, families, NGO's and lawyers have been involved in extensive research, discovered documents and evidence themselves, and personally paid for and issued writs through their lawyers.
- Many law firms have also provided *pro bono* advice and representations.
- It is hypocritical for NIO to falsify and conflate the legal aid budget on legacy whilst the NIO, PSNI, MoD and MI5 have spent decades fighting families tooth and nail in the courts to prevent the discovery and disclosure of documents and evidence about killings, bombings and shootings.
- Indeed, these same agencies have all resorted to using secrets courts, and so-called "national security" gagging orders to hide the truth.
- In doing so they've spent tens of millions of pounds from the public purse to cover up their illegal actions.
- The majority of settlements in these cases also involve costs being awarded and so legal aid is not a factor. (Lewis' Legal Aid Claims are False and Misleading | Relatives for Justice (last accessed 8 February 2022))

Burns and McCready

We note the following comment of Colton J *In the Matter of an Application by Patricia Burns and Daniel McCready for Leave to apply for Judicial Review* (25 November 2021)

"[8] Should these proposals become law they would obviously have a detrimental impact on the ongoing investigations and legal proceedings relating to the deaths of Thomas Burns and James McCann. Apart from the impact on these applicants it is trite to say that the proposals have been greeted with wide ranging opposition

from elected representatives, victims' groups and various organisations including CAJ, the Pat Finucane Centre, Relatives for Justice and Amnesty International. The court has received short written submissions from each of the latter four groups."

The challenge in *Burns and McCready* was as follows:

"[10] Having identified the impugned decisions the application seeks a number of declarations. The first is a declaration that any legislative provision which purports to introduce an amnesty protecting all those suspected of an offence during the Troubles from criminal investigation and prosecution would be:

(i) So fundamentally unconstitutional that it could not lawfully be enacted by Parliament or given affect by the courts.

(ii) Incompatible with important rights protected by the European Convention on Human Rights including Articles 2 and 3 which permit no derogation in peace time.

(iii) Incompatible with Article 2 of the Ireland/Northern Ireland Protocol which has primacy over any such legislative provision thereby rendering of no force and effect.

[11] The applicant seeks similar declarations in relation to the introduction of a statutory bar to terminate all investigations into offences on the same grounds as set out above and similarly a declaration that any legislative provision which purports to prohibit further civil claims or inquests or any other court proceedings would also be unlawful on the basis of the three grounds that I have set out already.

[12] There is also a challenge seeking a declaration that the refusal of the proposed respondent to agree or otherwise confirm his position in the meantime on propositions of law identified in pre-action correspondence as irrational."

As you are aware leave was refused in that application but we state the grounds of the challenge as they succinctly describe the constitutional objections to the Proposals.

Definition of a Command Paper

"White papers are policy documents produced by the Government that set out their proposals for future legislation. White Papers are often published as Command Papers and may include a draft version of a Bill that is being planned. This provides a basis for further consultation and discussion with interested or affected groups and allows final changes to be made before a Bill is formally presented to Parliament." (White Papers - UK Parliament (last accessed 8 February 2022)

To date no Bill has been published from the Command Paper.

Access to Justice, the Common law and Human Rights (1)

Many Common Law principles of fairness might more properly be framed as protection for the right of access to justice, including, for example, the following rights: to be heard (*Ridge v Baldwin* [1964] AC 40); to have notice of the case against you (*R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531); to have a hearing free from bias (*Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759); and to open justice (*Scott v Scott* [1913] AC 417). Many of these concepts are reflected in the fair trial rights protected by ECHR Article 6 and in other international treaty protections. Regarding open justice we refer you to the comments above regarding the roll-out of CMP in civil actions relating to the Conflict in Northern Ireland.

The Common Law expressly recognises a fundamental right of access to justice and to the courts.

In *R v Secretary of State for the Home Department ex p Leech (No 2)* [1994] QB 198, Steyn LJ held at 210A that: "It is a principle of our law that every citizen has a right of unimpeded access to a court."

In *R v Lord Chancellor exp Witham* [1998] QB 575, Laws J held that the Common Law affords special protection to the right of access to a court as a constitutional right. He referred to De Smith's Judicial Review of Administrative Action (5th edition paragraph 5-017:

"22. We were referred also to certain passages in de Smith Woolf and Jowell on "Judicial Review of Administrative Action", which is of course the recently published 5th edition of Professor de Smith's distinguished book, edited and to a considerable extent re-written by Lord Woolf and Professor Jowell; though it certainly retains the qualities of de Smith's original work. The authors say at paragraph 5-017:

'It is a common law presumption of legislative intent that access to the Queen's courts in respect of justiciable issues is not to be denied save by clear words in a statute.'"

Laws J concluded:

"24. It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. A statute may give the permission expressly; in that case it would provide in terms that in defined circumstances the citizen may not enter the court door. In *Leech* the Court of Appeal accepted, as in its view the *ratio* of their Lordships' decision in *Raymond* vouchsafed, that it could also be done by necessary implication. However, for my part I find great difficulty in conceiving a form of words capable

of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members."

Access to Justice, the Common law and Human Rights (2)

Following Laws J *dicta* that the Common Law affords special protection to the right of access to a court as a constitutional right or order, it is necessary to direct you to the use of ouster clauses which may be necessary to implement the Proposals regarding judicial activism in the area of Conflict-related Legacy litigation. The Parliamentary use of the ouster clause exposes a series of tensions within the constitutional settlement or order.

In short, the contentious issue of ouster clauses within legislation, strikes at the separation of powers between legislature and judiciary. Further, the ouster clause evokes the paradox of Parliamentary sovereignty over judicial scrutiny most recently exercised in the Article 50 *Re Miller* [2019] UKSC 41 litigation. Further, the ouster clause strikes at the heart of the Rule of Law in which access to justice (as further protected by Article 6 ECHR, primarily regarding trial rights, but which can be extended to right to take civil action with judicial permission) is a main stay against overarching and oppressive Executive and Legislative authority.

Laws LJ (as he became) extrapolated the point in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 at paragraph 36 and 38:

"The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. There are of course cases where a decision-making body is the last judge of the law it has to apply. But such bodies are always courts. The prime example is the High Court, which is also the paradigm of such an authoritative source of statutory interpretation. (36)

If the meaning of statutory text is not controlled by such a judicial authority, it would at length be degraded to nothing more than a matter of opinion. Its scope and content would become muddied and unclear. Public bodies would not, by means of the judicial review jurisdiction, be kept within the confines of their powers prescribed by statute. The very effectiveness of statute law, Parliament's law, requires that none of these things happen. Accordingly, as it seems to me, the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective; that is another." (38)

Ipso facto provisions that render judicial processes inaccessible prevent the judiciary from performing not only its function of enforcing the law, but also its equally axiomatic, and logically prior, function of determining and interpreting what the law means.

Sales LJ was alive to the Rule of Law implications of effective ouster clauses, observing that "a provision which isolates a tribunal from any prospect of appeal through to this court and the Supreme Court on points of law which may be controversial and important … involves a substantial inroad upon usual rule of law standards in this jurisdiction". (*Re Privacy International* [2017] EWCA Civ 1868 at para 2). Lord Reed's judgment in *Re Unison [2017] UKSC 51* is more explicit:

"[t]he constitutional right of access to the courts is inherent in the rule of law" (64) that the administration of justice is not "merely a public service like any other"; (65) that "at the heart of the concept of the rule of law is the idea that society is governed by law"; (66) that the rule of law requires "that the executive branch of government carries out its functions in accordance with the law"; (67) and that this necessitates a "constitutional right of unimpeded access to the courts". (68)

Returning to Laws LJ on this point. In *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 Laws LJ was of the opinion that: "It is elementary that any attempt to oust altogether the High Court's supervisory jurisdiction over public authorities is repugnant to the constitution." And in *R (Cart) v Upper Tribunal [2009] EWHC 3025 (Admin)*, Laws LJ went on to say that the susceptibility of statutory text to judicial interpretation is non-negotiable, while suggesting that this "is not a denial of legislative sovereignty, but an affirmation of it". This followed because legislation "would become muddied and unclear" unless its meaning continued to be curated by independent courts, the role of such courts thus being imperative to the effectiveness of legislation (paragraph 38). To deny courts their interpretive role would thus be to deny Parliament its capacity to enact effective legislation. Laws LJ's contention that the constitutional non-negotiability of the judiciary's interpretive role is a facet of, rather than a challenge to, parliamentary sovereignty.

Following Laws LJ's analysis judicial engagement with ouster clauses ultimately takes place on terrain that is other than interpretive in nature. Indeed, on this view, such engagement amounts to an exercise in discerning the limits of parliamentary authority — whether or not such limits imply a challenge to parliamentary sovereignty — rather than an attempt merely to ascertain the meaning of parliamentary enactments. He concludes that ouster ouster, at least in some circumstances, may be beyond Parliament's legislative reach.

Lord Steyn is of the opinion that: the "classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom", and that "[i]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, [judges] … may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish". (*R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at paragraph 102).

Lord Hope, also in *Jackson,* noted: ""[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based" and that "the courts have a part to play in defining the limits of Parliament's legislative sovereignty". (at paragraph 107).

Professor Mark Elliott asks whether these *dicta* are "nothing more than judicial noises off". He dismisses this contention in favour of the following analysis:

"Instead, they are best understood as a form of contestable judicial claim about the limits of curial power. Indeed, the same might be said of ouster clauses themselves. In enacting such provisions and in threatening defiance of them, legislators and judges are each operating at (and arguably beyond) the edge of their constitutional authority, meaning that legislative and curial interventions along these lines can amount to no more than debateable claims as to the reach of such authority. When, therefore, a judge raises the prospect of disobedience to an ouster clause, she is neither making an empty threat nor stating a settled legal proposition. Rather, she is contributing to a form of constitutional discourse the conduct of which involves the testing and determination of the respective boundaries of judicial and legislative power." (Chapter on access to courts and interpretation 4 (SSRN version) (last accessed 10 February 2022) at page 19).

Elliott cites Lord Phillips in his evidence to the House of Commons Political and Constitutional Reform Committee Constitutional Role of the Judiciary if there were a Written Constitution (HC 2013–14, 802) at 16–17:

"One would be considering a constitutional crisis before you could envisage the courts purporting to strike down primary legislation. Before you got that, the courts would say, "Parliament couldn't possibly have meant that because—" and therefore would have given an interpretation to the legislation that it, faced with it, couldn't bear it, but would have chucked the gauntlet back to Parliament, saying, "We have pulled you back from the brink. Are you really going to persist with this?" That is what the House of Lords did as the Privy Council in Anisminic. They threw down the gauntlet and it was not taken up. Judges do have ways of finessing the intention of Parliament from time to time" Q208 [Lord Phillips] Back (House of Commons - Constitutional role of the judiciary if there were a codified constitution - Political and Constitutional Reform (parliament.uk) (last accessed 10 February 2022)) (Elliott page 19).

Conclusion

On behalf of our client, we request that you clarify and explain how you intend to implement the Proposals regarding ending judicial activity in relation to Conflict-related conduct across the spectrum of current and future civil cases in a way that would be constitutional, lawful, rational and compatible with Article 2 ECHR and Article 2 of the Ireland/Northern Ireland Protocol and the Good Friday Agreement 1998 and in compliance with the Common Law right to access to justice as a mainstay of the Rule of Law.

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Yours faithfully

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