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AN RÚNAÍOCHT ANGLA-ÉIREANNACH

BÉAL FEIRSTE

ANGLO-IRISH SECRETARIAT

BELFAST

CONFIDENTIAL

31 December 1986

Mr. E. O Tuathail
Assistant Secretary
Anglo-Irish Division
Department of Foreign Affairs

Dear Eamonn

I attach copies of two papers given to me today by the British side entitled

- RUC Questioning of Suspects in Garda Custody
- Use of Extraterritorial Legislation

(My telex 1156C of today refers.)

I would be glad if Niall Burgess would arrange for circulation to members of the Working Group as soon as possible.

Yours sincerely

NR

N. Ryan

cc Taoiseach
Minister
Minister for Justice
Attorney General
Secretary
Mr Daly
Memb. of W.G.
Amb. London
A-I Section

CONFIDENTIAL

RUC QUESTIONING OF SUSPECTS IN GARDA CUSTODY

Introduction

1. The British side attach great importance to enabling the RUC in certain circumstances to question suspects in Garda custody. The professional experience of police forces throughout the world is that the officer best placed to derive the maximum advantage from interviewing a suspect is the one who is in charge of the case, has the most intimate knowledge of it, and has the greatest incentive to bring it to a successful conclusion.

2. The British side do not seek a blanket power for the RUC to question anyone who might be in Garda custody. The RUC are interested primarily in those persons against whom a certain amount of evidence that they have committed offences in Northern Ireland already exists, which might, as a result of questioning, be supplemented to the point where a charge could be brought. The object of questioning would therefore be to determine whether an extra-territorial prosecution should be brought or whether a warrant should be sent to the Republic for the return of the suspect to the North. It is envisaged that the RUC would keep the Garda supplied with an up-to-date list of names of those who fall into the above category.

3. A second category of suspect whom it is important for the RUC to be able to question consists of those who may be picked up by the Garda immediately following an incident close to the border in the North. The more detailed knowledge of the RUC of the nature and circumstances of the incident make it desirable for them to be able to question suspects direct.

4. It seems unnecessary to state that any questioning by the RUC would be in the presence of Gardai and subject to any practices and procedures that the Garda might prescribe.

Obstacles

5. As the British side understand it, the Irish side see two principal obstacles in the way of the RUC being able to question suspects in the Republic:

i. powers: the powers available to the Garda to detain and question suspects may not be such as to permit the Garda to hold - and the RUC to question - persons suspected of having committed offences in the North;

ii. purposes: since an arrest must be for Garda purposes, it may be that questioning by anyone other than the Garda may not be permissible.

Powers

6. The Irish side have explained that the Garda have only limited powers to detain and question. In terrorist cases these powers are confined to persons arrested under section 30 of the Offences Against the State Act 1939 under which a person may be detained for up to 24 hours if he is suspected of having committed one of the terrorist-type offences scheduled to the Act. This period of detention may be extended for a further 24 hours under section 52.

7. Under the Criminal Law (Jurisdiction) Act 1976, the commission in Northern Ireland of terrorist-type offences scheduled to the Act is, by virtue of section 2, an offence in the Republic. And there is a power of arrest in respect of that offence under section 19. However, that power of arrest is not accompanied by any power to detain; and since the section 2 offence does not fall within the scope of the schedule to the 1939 Act, the detention power in that Act cannot be applied. Therefore, a person arrested under the 1976 Act must be taken before a court and charged as soon as practicable.

thus ruling out any opportunity for the RUC to be able to question the arrested person.

8. The British side note these difficulties. To overcome them, they suggest that the offence created by section 2 of the 1976 Act should be added by order to the schedule to the 1939 Act. This would, it is suggested, have the effect of empowering the Garda to detain for questioning any person suspected of having committed in Northern Ireland any of the terrorist-type offences scheduled to the 1976 Act.

Purposes

9. The British side have noted the Irish concern that questioning by anybody but the Garda could be ruled by the courts not to be permissible, since the arrest - and therefore any subsequent questioning - must be for Garda purposes. The British side are not aware of the origin of the phrase "for Garda purposes". However, they would question the grounds for the Irish concern.

10. They would suggest that where a suspect is arrested and detained by the Garda under section 30 of the 1939 Act, and is questioned by the Garda and the RUC about offences that constitute offences in both the Republic and Northern Ireland by virtue of section 2 of the 1976 Act, with a view to deciding whether an extra-territorial prosecution should be pursued by the Garda or whether a warrant for the suspect's return to Northern Ireland should be sent by the RUC for backing by the Garda, then the whole process should be viewed as lawful and constitutional in the Republic.

11. However, if the Irish continue to believe that questioning by the RUC would be open to legal challenge, there would appear to be two alternatives:

i. amend the law expressly to empower police forces from the country in which an extraditable offence is suspected to

have been committed to be involved in the questioning of suspects with the purpose of establishing what action is to be taken to bring offenders to justice;

ii. make no amendment to the law but allow the RUC to be involved in questioning in the Republic and, if it were challenged in the courts, await their verdict, by which the British side would obviously abide.

Conclusion

12. The British side seek early and positive discussion of these proposals. It is a subject on which progress needs to be made if the two sides are, in the words of the preamble to the Anglo-Irish Agreement, to demonstrate "their determination to work together to ensure that those who adapt or support such [violent] methods do not succeed". Against that background the British side believe that it is indefensible that the situation with regard to the questioning by the RUC of suspects in Garda custody is more restrictive than that which obtains throughout most of the rest of Europe as shown by recent Interpol research.

USE OF THE EXTRATERRITORIAL LEGISLATION - PAPER BY BRITISH SIDE

Introduction

1. The UK Criminal Jurisdiction Act 1975, together with the Irish Criminal Law Jurisdiction Act 1976 enables persons charged with the commission of certain serious crimes in Northern Ireland to be tried in the Republic, and vice versa. This paper is intended simply to form a basis for discussion of the obstacles to making more use of the legislation. The British side notes that the Irish have also undertaken to prepare a paper.

2. The concept of trying terrorist crimes extra-territorially stems from the Report of the 1974 Law Enforcement Commission whose Irish members put it forward as an alternative to backing of warrants. The UK members of the Commission (who included the present Lord Chief Justice for Northern Ireland) strongly favoured backing of warrants but recommended the extra-territorial method if it were not available. To date five cases have been mounted in Ireland for crimes allegedly committed in the UK; nine persons have been convicted and three acquitted. Five people have been prosecuted in Belfast for crimes committed in Ireland; of these four were convicted.

3. The British side continues to believe that backing of warrants is the means most likely to be effective in bringing terrorists to justice. It is right in principle that wherever possible fugitive offenders should be brought to justice in the jurisdiction where their crimes are committed. But that is not to say that we should not be looking at ways of making the extra-territorial route more effective. This paper looks at some of the obstacles to making greater use of the legislation and where possible suggests ways round ther.

The Obstacles

4. On a preliminary view, and without prejudice, these are as follows:-

(i) There is a lack of control over the proceedings on the part of the UK authorities. The RUC are responsible for preparing the case file containing the evidence and charges directed by the DPP(NI); it is then sent to the Garda Commissioner who in turn places it before the Irish DPP. He must then decide whether the evidence is sufficient and direct what the charges should be. This is probably an inevitable consequence of the system but it does illustrate why the backing of warrants arrangements are the best means of dealing with fugitive offenders.

(ii) Offences before June 1976 are time-barred. There is nothing we can do about this, but since 1976 was ten years ago the restriction should not be too crippling.

5. These are proolems for which there may be no practicable solution but some movement should be possible in the following.

6. The difficulty in using the extraterritorial legislation is mainly due to the fact that the RUC cannot question suspects in custody in the Republic; this can lead to serious problems in the assembly of the evidence and can mean that it is impossible to establish a prima facie case in the Irish courts, a requirement which does not exist in the backing of warrants arrangements. This is being addressed separately.

7. Different rules on admissibility of confession evidence. The 1964 Judges Rules in Northern Ireland are regarded as more flexible than the 1918 Rules under which Ireland operates, particularly as regards the admissibility of confession evidence. Under the 1918 Rules the duty to caution a person arose "whenever a police officer had made up his mind to charge a person with a crime", and it was generally held that a person in police custody should not be questioned on the subject of the crime for which he was in custody, except for the purpose of

clearing up ambiguities. Under the 1964 Rules the duty to caution now arises at a much earlier stage, namely "as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence". Questioning may however continue up until a second caution has been given, at the stage "when a person is charged or informed that he may be charged", thus enabling questioning to continue beyond the point at which formerly it would in many cases have had to stop.

8. The McCormack judgement in May 1986 brought out this point that confessions made by an accused person while in police custody in Northern Ireland may not be admissible in Irish Law. Among other things, Mr Justice Barr said:

> "Furthermore, in particular circumstances the Director might find himself being used as a vehicle to enable an accused person to avoid trial for serious crime in either jurisdiction in Ireland even though the offence in question is common to both. The following example illustrates what I have in mind. The laws of evidence relating to admissibility of confessions of having committed crime made by arrested persons while in police custody differ substantially in the respective Irish jursdictions. Confessions made by an accused person while in police custody in Northern Ireland may be prima facie admissible under the law of that jurisdiction, but may not be admissible in Irish law. Accordingly, it does not follow tthat because there appears to be sufficient evidence to justify bringing an accused to trial in Northern Ireland that the same evidence is sufficient to warrant a prosecution here. In every case, therefore, the Director is obliged to make an independent assessment as to whether a particular person should be prosecuted in this jurisdiction or not. He has no obligation to state his reasons for any such decision and, indeed, it would appear to be contrary to public policy that he should be compelled to do so".

9. Section 8 of the EPA goes even further than the Judges Rules and allows evidence to be heard in cases involving terrorist offenders in Northern Ireland that would certainly be ruled in-admissible in the Republic. The current limitation in the Irish power therefore makes it less likely that admissible confession evidence can be obtained for an extra-territorial prosecution. We recognise the difficulty the Irish would face in changing their laws in this field, but the absense of any such change means that the backing of warrants route will remain by far the most effective means of dealing with fugitive offenders.

10. Reluctance of civilian witnesses to travel to the other jurisdiction. The Law Enforcement Commission recognised this and there is a provision (in Schedule 4 of the Criminal Jurisdiction Act) for evidence to heard in the witnesses' own jurisdiction. There has never yet been a need for witnesses to travel to the Republic from Northern Ireland but there may be scope for examining the provision with a view to making it more effective.

Conclusion

11. The system is basically sound at present and if some of the difficulties mentioned above could be removed more use might be made of it. While it is a valuable tool in our mutual struggle against terrorism the backing of warrants procedure must remain the preferred means of dealing with fugitive offenders.

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