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SECRETARY OF STATE
FOR
NORTHERN IRELAND

Tanaiste
Brian Lenihan Esq, TD
Minister for Foreign Affairs
Department of Foreign Affairs
DUBLIN 2

2 December 1988

Dear Tanaiste

I am sure that you and Gerry Collins will have been seeing reports from the Working Group of officials which has been discussing the working of extradition and extra-territorial proceedings. As you know, British officials had notified the Irish side that they would wish to make certain suggestions for consideration in the context of the report on the working of Part III of the Extradition Act 1965 as amended, to which your Government is committed under the Extradition (Amendment) Act 1987.

I am therefore writing to you now to send you and Gerry Collins the attached paper which contains a number of specific suggestions for ways in which the operation of the extradition arrangements between the two jurisdictions might be improved. Some of these points have already been put by Sir Patrick Mayhew to Mr Murray in their discussion on 18 July.

Yours sincerely

Stephen Leach

TK

Approved by the Secretary of State and signed in his absence

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IRISH REVIEW OF EXTRADITION ARRANGEMENTS

PAPER BY BRITISH SIDE

Introduction

At a meeting of Working Group II on 5 October, it was agreed that the British side would put forward suggestions for consideration in the context of the report on the working of Part III of the Extradition Act 1965, as amended, to which the Irish Government are committed under section 6 of the Extradition (Amendment) Act 1987. This paper fulfils that purpose.

2. It is in the interests of both governments to ensure that effective arrangements are in place for dealing with fugitive offenders. Extradition is a vital (although not the only) factor in this. It is therefore necessary to ensure that the process works smoothly and effectively. The British side appreciates the changes ~~thoughts~~ which have been made recently - and the better understanding of our respective positions - and we note that as some problems have arisen they have been overcome. However, and while bearing in mind the sensitivity of the subject in the Republic, we still feel that there are useful changes that are necessary if the system is to work effectively. The following is a summary of suggestions from the British side. Some of them have been discussed before, particularly between the two Attorneys General.

Jurisdiction for extradition cases

3. There is a history of difficulties arising from consideration of cases by District Courts in the Republic, particularly those

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involving terrorist offences. Such cases are often highly controversial. Even before McVeigh there were a number of other cases including Glenholmes, Flanagan, McDonald and McClafferty where the decision of the District Justice surprised the authorities. The British side notes that following the Minister for Justice's statement to the Dail on the McVeigh case some Deputies expressed the view that jurisdiction over extradition should be removed from the District Courts, and that the Irish Government undertook to consider the possibility.

4. Against this background, the British side again suggests that there would be merit in changing the arrangements whereby extradition cases are heard in the local District Court. Extradition could be regarded as a special category of judicial work to be dealt with in the first instance in the High Court. Alternatively cases could be reserved for the Dublin District Court (or a single other designated District Court) which could develop expertise and experience in considering such cases.

5. A similar arrangement exists in the United Kingdom for extradition requests from countries outside the commonwealth under the Extradition Act 1870 (shortly to be amended by the Criminal Justice Act 1988). Many of these cases are complex and involve the application of bilateral treaties and consideration of whether conduct abroad gives rise to extradition offences. For this reason, such cases are referred to the Chief Magistrate or one of the stipendiary magistrates in the Bow Street Magistrates' Court in London where considerable expertise has been built up by the Bench and the court officers. The arrangement works well.

Provision for detention pending appeal

6. The absence of a full appeal procedure for the State and provision to detain a fugitive offender pending such an appeal has long been seen by many as a deficiency in the backing of warrants

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legislation, in both the UK and the Republic. It tilts the scales in favour of the fugitive, since he only has to have a legal decision in his favour once for him to go free (and, of course, many of those whose return is sought can be expected to disappear from view if by any chance they are released). It also maximises the damage done by a decision which may be open to question.

7. Legislation to remedy this now exists in the UK, although it is not yet in force. Part II of schedule 1 to the Criminal Justice Act provides for appeals by the requesting State (through the Chief Officer of Police) by way of the case stated procedure. The result will be to give the magistrate the power to detain or release on bail when immediate notice of intention to appeal has been given to the court. Thus, the State will be enabled to appeal against adverse decisions of magistrates, and, in serious cases or those in which it is possible that the person sought will abscond, the fugitive will be detained in custody pending the outcome of the appeal.

8. So far as the Republic is concerned, it is understood that the Irish state can appeal against an adverse decision of the District Court by way of case stated as in the case of McVeigh. However, it is also understood that there is no power to detain in custody (or release on bail) pending the outcome of such an appeal. It will be recalled that following the decision of the District Justice in the McVeigh case he was immediately released from custody. Further embarrassment was caused when he was briefly rearrested by the Garda on 7 October. If detention powers had been available, it seems likely that McVeigh would have been subject to a detention order, bearing in mind his previous conviction in the Republic for firearms offences. This would have enabled the decision of the District Justice to be challenged in a higher court, as desired by the Irish Attorney General, without releasing from custody a fugitive wanted for serious terrorist offences in Great Britain.

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9. Having regard to the powers which will soon be available in the UK to facilitate the consideration of cases in which fugitives are sought by the Irish State, it is hoped that consideration can be given to introducing similar provisions in Irish legislation.

Evidential provisions

10. It seems to the British side that section 7 of the Backing of Warrants (Republic of Ireland) Act 1965 gives effect to what must have been the intention of the backing of warrants procedure, that once there is a warrant apparently good on its face, the court of the requested State must accept it and not seek to go behind it. On the other hand, the corresponding provision of the Irish Extradition Act 1965 (section 55(1)) enables the court to admit documents without further evidence if certain requirements are satisfied, but with the qualification "unless the court sees good reason to the contrary." In the view of the British side, this gives the court an opportunity to require supplementary evidence, which may not be easily produced and not be strictly relevant to the merits of the case. In the light of the difficulties which have been experienced, notably (but not only) in the McDonald case, the Irish Government may wish to consider whether there would be merit in seeking to amend the provisions of section 55 by bringing them more closely into line with the Backing of Warrants (Republic of Ireland) Act 1965. This would establish full reciprocity in an important element of the backing of warrants procedure.

11. The British side also notes that in Part II of the Irish Extradition Act (Section 25(a) and 37) a warrant or other document shall, if duly certified, be taken as having been duly issued. This is also the approach taken in the UK Criminal Justice Act 1988 which will deal with foreign extradition. It seems odd therefore that the provision in section 55(1) of the Irish Act allows the courts more latitude to question documentation.

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Removal of specified point of departure

12. Section 47(1) of the Irish Extradition Act 1965 provides that the District Court shall, subject to certain provisions, make an order for the fugitive's delivery "at some convenient point of departure from the State." There is no such requirement for extraditions under Part II of the Act. Irish courts have subsequently held that this means that the place of handover must be named on the order. To date the place in Northern Ireland cases specified has been Killeen/Carrickarnon. But there seems no obvious reason why this should be the only interpretation: the point of departure could be left unspecified or an alternative given.

13. Both Governments recognise that the present system affords a major propaganda opportunity to the critics of extradition. It does not help the public perception of the process. There is also a serious risk to the security forces on both sides who are tasked with protecting the handover. And Gardai and RUC personnel need to be taken off other important duties in considerable numbers. Both Governments should therefore do all in their power to reduce these disadvantages to a minimum. Ideally the British side would prefer the extradition order not to have to specify the handover point at all. Although the equivalent provision in the Backing of Warrants (Republic of Ireland) Act 1965 specifies that the fugitive be delivered to a police officer from the requesting State at some convenient point of departure, courts in the UK have never interpreted it as meaning that a place has to be specified in the Order.

14. If this is not possible an interim solution would be for the extradition order to specify an airfield from which the fugitive could be flown to Northern Ireland. There can be no objection in principle to this since this is already what happens in respect of transfers to the mainland. Failing this, the police on both sides should get together to determine which crossing points bring the fewest difficulties, thus minimising the risks associated with the

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Killeen route which is particularly unsuitable for the security forces in Northern Ireland.

Extension of provisional arrest period

15. At present a provisional warrant under section 49 of the 1965 Act is valid only for 3 days. A workable mechanism for provisional arrest is an essential feature of extradition arrangements. Although it is the aim of the UK authorities to have final warrants in the Republic in respect of each and every fugitive who might be there, there must always be a possibility that an unexpected case will arise. It is the view of the British side that in this eventuality 3 days is not a sufficient period for the documentation to be prepared and the final warrants backed, all the more so now that the procedures in the Extradition (Amendment) Act 1987 have to be complied with.

16. The international norm for a provisional arrest warrant to be valid can vary from 14-60 days but is very rarely as short as 3 days. The British side would therefore hope that the period should be extended to considerably nearer the norm. The British side would also wish to be assured that section 49 of the 1965 Act does work in practice, and that if not it can be amended; there have been occasions when provisional warrants have not been sought by the Irish authorities following UK requests.

Other points

17. The British side recognise that all the suggestions made above (save for that in paragraph 14) would require legislation. But there is, it seems to us, scope for certain other improvements in the following areas:

(i) a more formal system - including regular review meetings if necessary - of reporting developments in cases in the Republic might lead to a better 'feel' for the process. Contacts between the respective legal authorities are good at present but any improvement could only be beneficial. A more formal system would also facilitate consideration of the read-across of individual judgments etc to other cases;

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(ii) completion of the backing of warrants checklist would set the seal on our improved knowledge of the requirements of the Irish courts.

The 1987 Amendment Act

18. The British side continues to regard section 2 of the 1987 Amendment Act as unnecesary and an impediment to the smooth flow of cases. The difficulties are of course exacerbated in cases where it takes a long time to decide whether to allow a warrant to be backed. It is wrong in principle for the prosecuting authorities in the requesting jurisdiction to have their work done again by those in the requested State. The burdens of operating the new provisions have led to a reduction in the number of non-terrorist requests and necessitate a heavy commitment of resources. A very large number of hours has been spent by staff of the prosecuting authorities in preparing detailed summaries of facts and law and answering further detailed questions from the Irish Attorney General's Office. The demands on staff in the Attorney General's Office in London, coordinating this work, have also been extremely heavy. And despite the requirement in section 2(2) of the 1987 Act, it is still possible that the sufficiency of evidence might be tested in court. Given the fact that requests are never made without sufficient evidence for a prosecution, and given the degree of mutual trust on this point which now exists between us, the British side feels strongly that section 2 should be repealed.

Conclusion

19. These suggestions are intended to be helpful and are made in a constructive spirit. The British side welcomes the progress made in 1988 and would be grateful for the opportunity of discussing how it might be built on to the benefit of both Governments and our common fight against terrorism. We have a common interest in putting fugitive offenders behind bars, whether by means of extradition or the extraterritorial route. We wish both routes to work with maximum efficiency.

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