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22 December 1987

John Murray, Esq., SC,  
Attorney General,  
Attorney General's Office,  
DUBLIN 2,  
Republic of Ireland.

*Dear John:*

Thank you for your letter of 21 December.

You will recall from our discussion in London on 12 and 16 November my reluctance to provide you with a statutory confirmatory note. Whilst I was happy to offer the informal assistance represented by the non-statutory scheme that had been offered a year ago, I was, however, unwilling to expose any confirmatory note given by me to challenge in the Irish courts. I was determined to avoid the risk that the Irish courts would go behind the confirmatory note and examine the evidence on which the warrants are based. I understood you at that time to sympathise with my concern on that score and in your letter of 17 November you said "... I remain of the same opinion as I expressed to you yesterday, namely, that legislation incorporating the proposed procedure can be drafted in such a way as will not result in the Irish courts requiring evidence from the appropriate authority or to the bona fides, reasonableness, vires or the like, of the authority in issuing the certificate."

Your legislation, of course, goes far further than envisaged when we met in November. You have been good enough to recognise that the wording of the Act is not what I would have wished. My fears as to the risk of the Irish courts going

behind the warrant to examine the evidence on which it is based have been increased by the formulation of the new Act and the added opportunity for the courts to review the manner in which you exercise your discretion. It was made clear to your Government before your Bill was presented to the Dail that whilst I might be persuaded reluctantly to provide you with a confirmatory note in these new circumstances, I would certainly be unwilling to transmit any material bearing upon the evidence, for reasons which have been fully explained and which doubtless led the Taoiseach to give the assurance to the British Ambassador that nothing more than the confirmatory note would be required.

In a spirit of co-operation, I have agreed reluctantly to provide you with a confirmatory note, although I will, of course, have to review the matter, should that note be challenged in your courts. In the light of the urgent representations contained in your letter, I am also prepared to provide you with an indication of the law which is relevant to the charges in the warrant. I am afraid, however, that I am quite unable to accede to your request that I should provide you with any material relating to the evidence forming the basis for the prosecuting authority's intention to prosecute.

I have therefore arranged for my confirmatory note, and an indication of the relevant law in relation to the charges against Phillip John James Kelly, to be transmitted urgently to you via the diplomatic channel.

*With all good wishes,  
Yours sincerely,  
Folish*

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OIFIG AN ARD AIGHNE  
(Attorney General's Office)  
BAILE ÁTHA CLIATH  
(Dublin 2)

21 December, 1987.

Sir Patrick Mayhew, Q.C., M.P.,  
Attorney General,  
Royal Courts of Justice,  
London WC2A 2LL

*Dear Patrick,*

As you may have heard, the first warrants since the coming into force of the Extradition (Amendment) Act, 1987 have arrived. They relate to a Philip John James Kelly, alias Kim Neilson. He is apparently a native of Scotland and is wanted on two drugs charges; one appears to be a comparatively minor charge of possessing drugs with a street value of some £60, I am told, the other appears to be a more serious one of possessing an amount of cocaine for supply. Unfortunately, the warrants were sent to the Gardai only last week although the Crown Prosecution Service had written to the police force concerned as far back as last May requesting that the warrants be sent to the Gardai immediately. Kelly is due to be released from Limerick Prison, where he has been serving a sentence, on Christmas Day.

We would, needless to say, be anxious to return this man to the West Mercia Constabulary. As you know, under the new Act I am required to form an opinion as to two matters: (a) that there is a clear intention to prosecute for the two offences concerned; and (b) that that intention is founded on the existence of sufficient evidence.

As to the former of these two matters, if you were prepared to give a confirmatory note on the general lines of the draft which your people passed over to mine last February, I would be prepared to accept it as satisfying my obligation in regard to that matter (and I believe that any Court, if it ever had to form a view on the question, would hold that I had acted entirely correctly in so doing). The exact wording of the note could be agreed between our Offices.

As to the second of the two matters, it seems to me to be clear that different considerations are imposed by our Act. While an intention to prosecute is a state of mind, whose existence can be evidenced by an assurance from an appropriate source, the sufficiency of the evidence upon which that intention is based is a question of fact. In my opinion the effect of the Act is to impose upon me the burden of forming an opinion on the existence of that sufficiency.

I do not see this function as one of assuming the role of the prosecuting authority; there are considerations which are proper to a prosecuting authority (relating to the public interest, for example) which are no concern of mine. However, I do need to have sufficient information as to what the evidence is.

Accordingly, I should like to have an indication of the law which is relevant to the charges in the warrant and a summary or synopsis of the evidence which is available to the prosecution. Whether this were contained in a single document, in two parts, or in two separate documents, and whether such document or documents were separate from, or part of, the confirmatory note which I have referred to above, are questions of convenience rather than of principle, I think. Owing to the urgency of this case perhaps a Fax message might be used if that be thought necessary.

I do hope that, in the spirit of co-operation which exists between our two Offices, you will find it possible to supply me with this material. I am well aware that the wording of the Act is not what you would have wished, but I also believe that what is at stake - the smooth operation of arrangements for the transfer of wanted persons from one jurisdiction to the other - is so important to both our countries that we should make every effort to make the Act

work whatever difficulties might be thought to exist.

I cannot see, and I hope you agree, that the provision of a synopsis of the evidence concerned and a statement on the relevant law is in any way an onerous task. It seems to me that if a summary or synopsis of the evidence does not already exist on the relevant file its preparation would be a very straightforward one.

I have already had occasion to refer to the high level of co-operation between our respective Offices and instanced the onerous task undertaken by my Office in recently scrutinising some 850 extradition documents in one operation at the request and for the benefit of your Office. It is in this spirit that I have every hope that your Office will take the administrative steps necessary to provide the kind of information which I now need for the purposes of the new Act. Further, it would be a pity if the high level of co-operation which exists in the area of security were not to be mirrored in the legal field, particularly since the co-operation which has existed to date between our two Offices has, I am sure you will agree, produced extremely satisfactory results.

For my part I will be quite flexible as to the form and manner in which the information which I seek will be transmitted by you and your Office. Our mutual objective must, I feel, be to take positive steps to ensure that the extradition arrangements work effectively. As previously indicated

I would be quite happy for one of my officials to go to London at any time for a discussion with yours concerning any aspect of this matter if this will assist.

*With best wishes,*

*Yours sincerely,*

*John*

15th December, 1987

**Sir Patrick Mayhew Q.C., M.P.,**  
Attorney General,  
Royal Courts of Justice,  
London WC2AA 2LL.

*Dear Patrick,*

Thank you for your letter of the 18th November.

I have not been able to reply to you until now because, inter alia, I have been very occupied with the preparation of the new Bill and its progress through the Houses of the Oireachtas.

At the time of your letter events had rather overtaken the proposal which we had discussed, since, as you point out, other suggestions were then being put forward by my Government for the consideration of the Secretary of State, Tom King.

I must, however, correct your understanding as outlined in the fourth paragraph of your letter. I made it clear at both meetings that if I was only required by statute to be satisfied as to the receipt of a confirmatory note or certificate from you the exercise of that function could only be reviewed on the basis as to whether I had in fact so received it, without going into the "merits" of the note or certificate itself. You, in turn, indicated that you would find it unacceptable

if even one set of proceedings were launched challenging that view. I agree that I did not suggest that one could guarantee that such or any set of proceedings would not be commenced, since this is always a matter for the individual litigant, but at no stage did I accept that such proceedings would, with an appropriately drafted provision, have any realistic prospect of success. Similarly, one could not say that a non-statutory scheme could not be made the subject of proceedings, although it is academic at this stage to consider whether an informal non-statutory scheme would be more or less open to review than a statutory one in which the basis on which the statutory function would be exercised was specified and delineated.

The question was, however, would such a challenge be likely to succeed? On that question my opinion was, and remains, that it would not, and that you would not have been held to be answerable to our Courts.

As you know the Extradition (Amendment) Bill, 1987 has been passed by both Houses of the Oireachtas, and yesterday it was signed by the President.

Obviously, the main burden of making the new arrangements

work satisfactorily will fall upon you and me. I know I can look forward to your co-operation in this regard, and you may be assured that you will have mine.

I fully appreciate the concerns that you have previously expressed concerning the interposing of any kind of additional procedural step in the existing backing of warrants system. I think it is only fair to point out that my Office has, particularly in recent times, made a substantial contribution to the administration of this system by interposing procedures for examining warrants and supporting documentation even before they are formally transmitted from the United Kingdom for endorsement by the Garda Commissioner. For example, I understand that recently the drafts of over 850 extradition documents were scrutinised here in one operation at your Office's request. This has involved a significant use of my limited resources so as to ensure that the extradition arrangements are as effective as possible. In addition, of course, there has been a major input by my Office in the drawing up of a extensive checklist document so that legal technicalities which have arisen with regard to such warrants in the past can be avoided as far as possible.

It is my intention that this high level of co-operation should continue side by side with the new functions

which the Oireachtas has conferred upon me, including, of course, the day to day contact between our Offices when required.

Equally, it is my intention that the new procedures should operate as efficiently and effectively as possible. Obviously I will need sufficient information to enable me to form an opinion as to the matters referred to in the new Bill and I trust that I can rely on your co-operation in that regard. With such co-operation I believe that the new arrangements can work satisfactorily but as you know it is intended to review the operation of the legislation after twelve months.

I suggest that it would be useful if one of my officers were to go across to talk to yours with a view to devising whatever procedural arrangements will be necessary to make the system work smoothly.

*I would like to extend every good wish for Christmas and the New Year. Although policy differences have surfaced between the two sides in this matter there is the fundamental common concern that the extradition arrangements are effective and I hope we can both work together to that end.*

*Yours sincerely*  
*Jal*