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cc PS/S of S (L&B)
PS/PUS (L&B)
PS/Sir Ewart Bell
Mr Bourn
Mr Angel
Mr Reeve
Mr Coulson

① Sir Ewart 9/2
② PS/ 23/6

Mr Boys Smith

EUROPEAN COMMISSION ON HUMAN RIGHTS: FARRELL v UK

I understand that you are familiar with this case about which the Secretary of State for Defence has minuted Mr Prior.

It is yet another example of the folly of a system which tests the validity of our domestic law against wording as imprecise as that in the European Convention. For my own part, I do not understand the views attributed to the European Commission in paragraph 3 of Mr Heseltine's minute. I can see that it is a less stringent test to require that the force be "reasonable" than to require it to be "absolutely necessary" but it is unclear to me why the Commission categorise the one test as "subjective" and the other as "objective". There is nothing objective about a test of absolute necessity. Heaven knows how the courts would interpret it if we were obliged to adopt it in our domestic law but, like the test of reasonableness, it would surely require subjective interpretation in the circumstances of each particular case. I had the opportunity of a word with Mr Hammond about this last night, and gathered that he was equally puzzled.

However that may be, I should think that we might be well advised to settle the Farrell case on the lines which MOD

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propose. It probably would not kill the issue indefinitely but would leave us the option, if we eventually have to fight it in the European Court, of doing so on more confortable ground. It will be well to keep closely in touch with the Home Office with a view to concerting a line with them.

A J E BRENNAN

21 June 1983