



Foreign and Commonwealth Office

London SW1A 2AH

11 August 1986

Sir Robert Andrew KCB
Northern Ireland Office

PUS/ 756

12 AUG 1986

H.L.O. LONDON

Dear Robert,

NORTHERN IRELAND: NEXT STEPS

1. Many thanks for your letter of 7 August enclosing Lord Lowry's letter to you of 4 August, which I was extremely interested to see.
2. It is depressing that Lord Lowry seems to have set his face as firmly against three-man courts as, at an earlier stage in the game (and, it seems to me, much more understandably) he did against mixed or joint courts. What I find particularly disappointing about his letter is his failure to acknowledge any of the background history on the Irish side. In referring to the Irish Government's pressure for three-man courts as "a point which has recently been their sole court concern", he seems to overlook the fact that the need to make some visible change in the Northern Ireland courts has been a central element in the Irish case since the negotiations for the Anglo-Irish Agreement began back in 1983 (and of course has figured in Garrett Fitzgerald's own thinking for very much longer). As you know, it was because of the importance of this point for the Irish that we very reluctantly agreed to include the reference to the "possibility" of mixed courts in both jurisdictions in Article 8 of the Agreement; and it is only because of the consistency with which we have made it clear to them that we remain opposed to this possibility (not least because of Lord Lowry's own views on the subject) that the Irish have been brought to lower their sights and press us instead for three-man courts in which all three judges would be from the Northern Ireland judiciary.
3. Lord Lowry's letter also overlooks the references in the 15 November Hillsborough communique to the understanding between the two governments that the Intergovernmental Conference should give early consideration to "measures which would give substantial expression to the aim of underlining the importance of public confidence in the administration of justice". I think you will agree that the Irish made it quite clear at the time that in agreeing to that formulation they were looking for changes in the composition of the courts, and that this was the essential piece of "background" against which the communique went on to record the Taoiseach's intention to accede to the European Convention on the Suppression of Terrorism.

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4. Against this negotiating background, the implication in Lord Lowry's letter that the Irish Government's difficulties over extradition legislation in the absence of a British move on courts are contrived rings a bit hollow. He also makes rather a meal of what has been written about three-man courts in the press. Given the history, it is hardly surprising that well informed journalists should be speculating about the introduction of three-man courts as a possible British response to Irish pressure for measures which will demonstrate to the nationalist community that the Agreement is bringing them tangible benefits. Of course it is regrettable that journalists should do this in a way which is calculated to raise unionist hackles; but the Agreement was after all intended inter alia to redress the balance in Northern Ireland where it was perceived as being tipped too far against the minority.

5. The fact of the matter is that, rightly or wrongly (and it is difficult to argue that they are wholly in the wrong) the Irish see us as owing them (and the SDLP) something in the general area of the administration of justice; and the Taoiseach genuinely believes that, in the absence of such a move, it will be very difficult for him to get the necessary legislation on the European Convention through the Dail. I was interested to see that all this came out very clearly in his conversation with the Secretary of State for Northern Ireland in Dublin on 6 August. The Taoiseach also believes that, without some British move on the courts, nationalist disillusionment with the Agreement will gather damaging momentum. Although this latter proposition may be more questionable, I think we would both agree that it is not a wholly unreasonable view.

6. No doubt you made these points to Lord Lowry in your conversation with him, but the more persistently they can be brought home to him the better. The Prime Minister has, as we know, made it clear to the Taoiseach that she is not prepared to make changes in the courts in Northern Ireland which do not have the backing of the Northern Ireland judiciary. Lord Lowry's letter seems designed to make it equally clear that the judiciary are not prepared to contemplate any changes in the courts which could be presented as intended to meet nationalist concerns. Despite the hopes expressed by Mr King in one of his recent conversations with Sir Goffrey Howe at which we were both present that Lord Lowry might come up with some helpful ideas, there is not a single constructive suggestion in his letter - despite his profession that he is "trying to help, not hinder". Is it too much to hope that, if the political and negotiating background to the problem were explained to him again, he might be ready to turn his mind to possible ways of going some way at least to meet Irish concerns?

7. I shall, as you suggest, be discussing this with Tony Brennan at lunch; meanwhile I thought you might find it useful to have my immediate reactions.

SECRET & PERSONAL



7. Copies of this letter go to Tony Brennan and also to Robert Armstrong and Christopher Mallaby.

Yours ever

David

A D S Goodall

cc:- A J E Brennan Esq CB (NIO)
Sir R Armstrong GCB CVO (Cabinet Office)
C L G Mallaby Esq CMG (Cabinet Office)

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N.I.O. LONDON

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4th August, 1986

Dear P H S,

Having regard to our talk last Monday, I am concerned lest, despite the views of the Lord Chancellor and the Law Officers and the vigorous attitude of the Secretary of State at the inter-governmental Conference in May (of which he was good enough to tell me), officials might still be prepared to entertain the idea of 3-judge Diplock courts.

I shall not rehearse arguments with which you are familiar: see the Diplock Report paragraph 39, Gardiner Report paragraphs 30-33, Baker Report paragraphs 109-121 and my own notes "One judge or three" dated 23rd May, 1973 and "One judge or two" dated 15th November, 1983. See also the Attorney-General's letter to me dated 31st October, 1983, containing this paragraph:

"Both Patrick and I are in complete agreement with you that there is no place for 'lay assessors', magistrates or a plurality of judges in the trial of scheduled offences, and we welcome your assurance that the judges, who bear the burden and heat of the day in these matters, do not seek any change."

(We still do not seek any change.)

I assume that 3-judge courts are not in reality thought likely to promote, on the part of nationalists, increased confidence in the Diplock process, if that is lacking, and that the question among officials is whether it might be expedient to give the Fine Gael Government a symbolic political victory on a point which has recently been their sole court concern. An inducement to make this concession may lie (1) in the probability that concessions about the R.U.C. and U.D.R. would arouse greater reaction and (2) in the fact that Mr. Paisley voted with Labour for 3 judges in 1973. The first point is no doubt right but the second does not, I believe, now hold good: to concede Irish Government demands would be seen as giving in to Barry and Mallon over the heads of the Lord Chancellor, the Attorney-General and the L.C.J.

A look at recent statements in the Press confirms this reading of the situation. The "Irish Times" of 13th June contained a piece by Conor O'Clery which ended thus:

"The reform of the Diplock courts in Northern Ireland will dominate to-day's meeting between Mr. Scott and Mr. Dukes."

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It is understood that the Northern Secretary, Mr. King is not dogmatically opposed to the Irish argument for increasing the number of judges in Diplock courts from one to three. This reform (sic) is being strongly resisted by the legal establishment in the North, led by the Lord Chief Justice, Lord Lowry, who has the strong backing of the Lord Chancellor, Lord Hailsham. According to sources in London, the key to this problem lies with Mrs. Thatcher who will have to be persuaded that it is in British interests to face down Lord Hailsham." (my emphasis.)

I refer also to Mary Holland in "The Observer" of 20th July, starting with the headline "Diplock Courts to be axed", and continuing:

"The controversial Diplock courts in Northern Ireland are to be replaced this autumn by three-judge courts to try terrorist crimes.

"The new courts, agreed in a reform package by British and Irish government officials, will replace the present system in which a judge sits alone without a jury. The news comes in the wake of the collapse last week of the latest supergrass trial."

After listing other proposed changes, the article continued:

"The news of the reform package, which will please the Catholic community and anger Protestants, comes at a time when officials in London and Dublin are trying to repair the damage done to The Anglo-Irish agreement by the decision to allow Orange marches to pass through Catholic areas of Portadown last weekend."

And Conor O'Clery wrote in the Irish Times last Friday (1st August):

"The prospect of an 'autumn package' of reforms from the Anglo-Irish Intergovernmental Conference has distinctly improved since the Minister for Foreign Affairs, Mr. Barry, and the Northern Ireland Secretary, Mr. Tom King, met in London on Tuesday evening.

"Mr. King, who seemed anxious before the July 12th marching season to dismiss the significance of the Anglo-Irish Agreement, is now more enthusiastic that it should work to the advantage of both sides, according to sources in London.

"Despite reports to the contrary in the British press, some of the key issues between the two Governments are still open for continued negotiation. These include the Diplock courts, which at present have only one judge, sitting without a jury. The Irish Government has argued that three judges would make the courts more acceptable.

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"The Lord Chancellor, Lord Hailsham, has been opposed to such a reform, but it was learned yesterday that he is still involved in exchanges about the judicial system and that the door has not been closed on such a development, though it will involve a major concession on his part." (My emphasis.)
(The rest of the article deals with marches.)

These mixtures of fact and fiction (as I believe them to be), which seem to be inspired by "hand-outs", are alarming to me and evoke a strong judicial reaction of concern here.

If you are pursuing political extradition as a desired consequence of Ireland's signing the European agreement, you may on past form expect them to seek 3-judge courts as the "only hope" of getting the legislation through. I would advise you to approach such a proposition with very great reserve, determined not to mistake the shadow for the substance. You will also recall that the Supreme Court, when extraditing Shannon (accused of murdering Sir Norman Stronge), rejected the argument against extradition which was based on the likelihood of "unfair trial".

I know that you and your colleagues are searching for the right answer and, in my turn, I am trying to help, not hinder. But I earnestly beg you not to be tempted by the misguided plan of trying to persuade Ministers to reject the advice about the make-up of the courts which has been consistently tendered to them since 1972.

I am convinced that, quite apart from the cogent judicial and administrative considerations, the political effect of introducing 3 judges would be very damaging indeed to the Bench and to criminal justice here and therefore could not be responsibly recommended.

In view of our serious and helpful discussion and your great courtesy to me, I think it only right to send my letter to you, but I feel confident that you will take an early opportunity of showing it to the Secretary of State, as I would wish.

With kind regards,

Yours sincerely,

Robert L. J. Long

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