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The Under Secretary of State
Nationality and Treaty Department
Foreign and Commonwealth Office
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LONDON

30 January 1986

Sir

I am directed by Mr Secretary King to forward for consideration by Secretary Sir Geoffrey Howe the enclosed documents in support for an application for the extradition from the Netherlands of Brendan Joseph McFarlane and Gerard Kelly.

2. Kelly

On 15 November 1973 Kelly was convicted at Winchester Crown Court of offences under the Explosive Substances Act 1983 and sentenced to life imprisonment on the third count. Details can be found at paragraph 4 of the enclosed Statement of Facts. He was subsequently convicted in March 1983 of two attempts to escape from imprisonment.

On 25 September 1983 Kelly and others broke out of the Maze Prison, where he was serving his sentences of imprisonment. As a consequence of the events on that day, warrants have been issued for his arrest for a number of serious offences, including murder and attempted murder.

3. McFarlane

McFarlane was convicted in Belfast on 24 May 1976 of murder, explosive offences and membership of the IRA. On the murder counts, he was sentenced to life imprisonment with a recommended minimum of 25 years imprisonment, to 14 years and 7 years on the explosives counts and to 2 years on the IRA count. Details of his offences are at paragraph 5 - 6 of the Statement of Facts.

He subsequently attempted to escape from prison and was sentenced to imprisonment for 6 months for that offence.

McFarlane was among those who escaped from the Maze Prison on 25 September 1983 and he too is the subject of warrants of arrest issued in respect of the offences of murder etc. allegedly committed on that occasion.

7/Extradition

Extradition Proceedings

4. Kelly and McFarlane were arrested in the Netherlands by the Dutch police on 16 January at the request of the Royal Ulster Constabulary (Article X of the Extradition Treaty with the Netherlands (enclosed) provides for provisional arrest pending a formal requisition). Kelly and McFarlane are at present in custody.

5. In the case of Kelly it is not clear whether extradition will be available in respect of the 1973 explosives convictions. Explosives offences did not become extraditable in English law until 1978 (Suppression of Terrorism Act 1978, 5.3(1)); we do not know what the position was in Dutch law in 1973, and in any event if the Netherlands insists on strict reciprocity, our own inability to extradite for a conviction obtained in 1973 would govern (see Article XIII of the Treaty on this). It is recommended that extradition be sought in respect of these convictions but that urgent advice should be obtained as to the position with regard to Article XIII in the light of Dutch law.

6. Kelly's extradition is not sought in respect of his convictions in March 1983 for attempted escape. Such offences are not extraditable.

7. However, the offences connected with the Maze breakout of September 1983 are certainly extraditable (with the exception of riotous assembly, the hijacking of vehicles and escape from custody). The offences in question are specified in the warrants at pages 21 - 40 inclusive of the bundle of documents. In connection with some of these offences Kelly would in fact be an accessory, although liable to be charged as a principal.

8. In the case of McFarlane, his extradition is sought in the first place in respect of his 5 convictions for murder. The remarks above as to the extraditable character of convictions for explosives offences obtained before 1978 apply in his case also, (his convictions for attempted escape likewise). He is charged with the same offences as Kelly in respect of the September 1983 Maze breakout, as specified in the warrants at pages 1 - 20 in the bundle of documents and his extradition is sought in respect of these offences also. Like Kelly, McFarlane is in connection with some of these offences an accessory liable to be charged as a principal.

Conclusion

9. It is accordingly requested that, if the Foreign Secretary sees no objection, a formal requisition be made to the Government of the Netherlands, under the terms of the Treaty of 1898, in respect of Kelly's conviction of explosives offences in 1973, and his alleged offences (with the exceptions mentioned in paragraph 7 above) on the occasion of the Maze breakout in September 1983; and in respect of McFarlane's 5 convictions for murder and his alleged offences on the occasion of the Maze breakout.

10. The attention of the Dutch Authorities should be drawn to the fresh warrants issued by the Resident Magistrate in Northern Ireland on 26 January. They are identical to those on which the provisional arrests of McParlane and Kelly are founded.

11. It is also requested that all material seized by the Dutch authorities from the fugitives be returned under Article XV of the Treaty.

12. The enclosed documents which have been certified and authenticated as required for applications to the Netherlands include a copy of the Certificate of Conviction, Warrant of Arrest, sworn depositions, copies of exhibits and a statement of the facts of the offences for which extradition is requested.

13. It would be appreciated if in the event of return being ordered, the Secretary of State for Northern Ireland could be informed as soon as possible so that the necessary arrangements can be made for escort to Northern Ireland.

S A MARSH
SIL Division