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TO TELELETTER FCO

TELELETTER NFR

OF 101513Z JUNE 87

INFO. FC
AND
POL. AFFAIRS / 227
15 JUN 1987
REFER TO:



① cc PS/Sir K. Bowfield
② AI 8
Anspsence
Mitterwitt
Mitterwitt
McConnell

& return please

15/6
15/6

FOLLOWING FOR: T J B GEORGE ESQ, RND, FCO
COPIED TO: P N BELL ESQ, SIL, NIO(L)
✓M ELLIOTT ESQ, NIO(B)
FROM: H M A DUBLIN

MCGIMPSEY

1. THANK YOU FOR COPYING TO ME YOUR LETTER OF 5 JUNE TO PETER BELL ABOUT DR MCGIMPSEY'S CHALLENGE IN THE IRISH COURTS TO THE CONSTITUTIONALITY OF THE ANGLO-IRISH AGREEMENT. WE ALSO HAVE DAVID BARRIE'S LETTER OF 28 MAY TO MARK DICKINSON.
2. I MADE MY COURTESY CALL ON THE NEW ATTORNEY GENERAL ON 9 JUNE. HE WAS PROPERLY CAUTIOUS BUT RECOGNISED OUR LEGITIMATE INTEREST IN THE CASE AND AGREED THAT WE MIGHT KEEP IN TOUCH INFORMALLY AND CONFIDENTIALLY AS THE CASE DEVELOPS. THE FOLLOWING WERE THE MAIN POINTS TO EMERGE ON THE MCGIMPSEY CASE. RECORD ON OTHER SUBJECTS FOLLOWS BY BAG.

3. MR MURRAY SAID THAT THE WRIT CITED EACH MEMBER OF THE IRISH CABINET BY NAME TOGETHER WITH THE ATTORNEY GENERAL HIMSELF. IN SUCH CASES IT WAS NORMAL FOR THE WRIT TO CITE "IRELAND" BUT THIS WORD HAD BEEN SCRATCHED OUT IN INK. PRESUMABLY MCGIMPSEY COULD NOT BRING HIMSELF TO INCLUDE IT

4. H H O'FLAHERTY WAS AN EXPERIENCED CONSTITUTIONAL LAWYER AND COULD PROVE A FORMIDABLE ANTAGONIST.

5. TIME WOULD DEPEND PARTLY ON HOW RAPIDLY THE CASE WAS PURSUED. IT MIGHT COME BEFORE THE HIGH COURT "BEFORE THE END OF THIS YEAR" WITH APPEAL TO THE SUPREME COURT "IN THE FIRST THREE MONTHS OF 1988".

6. THE WRIT DID NOT SPELL OUT THE GROUNDS FOR MCGIMPSEY'S CHALLENGE. MR MURRAY ASSUMED THAT HE WOULD ARGUE THAT ARTICLE 1 OF THE AGREEMENT WAS INCOMPATIBLE WITH ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION. HE MIGHT MAKE SOME PLAY WITH THE POLITICAL POINT THAT THE PEOPLE OF NORTHERN IRELAND HAVE NOT BEEN CONSULTED BUT HE DID NOT THINK THE COURT WOULD TAKE THAT SERIOUSLY. MCGIMPSEY WOULD CERTAINLY MAKE AS MUCH AS HE COULD OF THE SUPREME COURT'S RULING ON THE SINGLE EUROPEAN ACT, PARTICULARLY THE CONSTRAINTS WHICH THE JUDGEMENT SEEMS TO HAVE CREATED ON THE IRISH GOVERNMENT COMMITTING THEMSELVES TO CONDUCTING THEIR FOREIGN POLICY THROUGH A PARTICULAR FRAMEWORK.

7. MR MURRAY SPECULATED THAT MCGIMPSEY'S CHALLENGE MIGHT BE REJECTED BY THE COURT ON THE GROUND THAT, WHATEVER THE CONSTITUTIONALITY OF THE AGREEMENT IN THE REPUBLIC, MCGIMPSEY HIMSELF WAS NOT A VICTIM OF THAT UNCONSTITUTIONALITY SINCE HE WAS A PROTAGONIST OF THE UNION OF THE SIX COUNTIES UNDER THE BRITISH CROWN: PLAINLY MCGIMPSEY DOES NOT SUPPORT ARTICLES 2 AND 3 OF THE CONSTITUTION OVER ARTICLE 1 OF THE AGREEMENT. MR MURRAY SEEMED TO HAVE IN MIND THE WAY IN WHICH THE HIGH COURT INITIALLY DUCKED THE ISSUE OF THE SINGLE EUROPEAN ACT ON THE GROUND THAT MR CROTTY WAS NOT A VICTIM OF IT.

8. THE IRISH GOVERNMENT WOULD "OF COURSE" RESIST. THE TAOISEACH HAD SPELLED OUT THE FIANNA FAIL GOVERNMENT'S ATTITUDE TO THE AGREEMENT. WHATEVER THEIR OWN PRIVATE RESERVATIONS ON ITS CONSTITUTIONALITY, THE GOVERNMENT WAS COMMITTED TO IT AND WOULD DEFEND IT.

9. MR MURRAY WOULD NOT HAZARD A FORECAST ON THE OUTCOME. BUT HE CLEARLY DID NOT EXCLUDE THE POSSIBILITY THAT MCGIMPSEY WOULD WIN. DERMOT NALLY TOLD ROBERT STIMSON PRIVATELY AT A PARTY ON 9 JUNE THAT THE GOVERNMENT WAS VERY WORRIED ABOUT THE WAY THE SUPREME COURT MIGHT JUMP: THE LEARNED JUDGES WERE QUITE UNPREDICTABLE UNPREDICTABLE. THE GOVERNMENT DIDN'T WANT YET ANOTHER REFERENDUM AND NALLY WAS ANYWAY UNSURE ON WHAT GROUND MR HAUGHEY COULD CREDIBLY DEFEND AN ADVERSE LEGAL DECISION TO THE ELECTORATE.

10. IN SEPARATE DISCUSSION OF THE SINGLE EUROPEAN ACT, MR MURRAY MADE IT CLEAR THAT THE GOVERNMENT WOULD MAKE HASTE SLOWLY IN CONSIDERING THE RESIDUAL PROBLEMS DERIVING FROM THE SUPREME COURT'S RULING. IT SEEMED TO HIM UNLIKELY THAT THE MCGIMPSEY CASE WOULD BE OVERTAKEN BY ANY GENERAL REVIEW OF THE CONSTITUTION.

11. ON ONE POINT, MR MURRAY WAS CATEGORICAL. IF THE BRITISH GOVERNMENT WANTED TO BE HELPFUL THEY SHOULD STAY OUT OF IT. HE COULD THINK OF NO LEGAL WAY IN WHICH HMG COULD BE CALLED UPON TO PRESENT ANY EVIDENCE TO THE COURT, AND ANY PUBLIC POSITION WE MIGHT TAKE WOULD PROBABLY BE COUNTER PRODUCTIVE.

COMMENT

12. I HOPE YOU WILL TAKE THIS LAST COMMENT AS OUR RESPONSE TO YOUR TELEPHONED INSTRUCTIONS TO ROBERT STIMSON ON 5 JUNE: OUR EMBASSY LEGAL ADVISER IS NOT THE RIGHT LAWYER FOR CONSTITUTIONAL QUESTIONS AND IF WE WERE TO TAKE THE VIEW OF THE COUNSEL THE FACT THAT WE HAD DONE SO WOULD ALMOST CERTAINLY BECOME KNOWN TO THE IRISH GOVERNMENT. THE ATTORNEY GENERAL'S VIEW WAS CATEGORICAL, AND I THINK IT ANSWERS THE QUESTION.

13. MR MURRAY'S VIEW ALSO SUGGESTS THAT OUR CONTINGENCY PRESSLINE OUGHT PERHAPS TO BE EVEN MORE RESTRICTIVE THAN THAT IN YOUR NON-DRAFT SUBMISSION, PERHAPS BEING CONFINED TO:

ON THE RECORD (UNDERLINED): THIS IS A MATTER FOR THE IRISH COURTS ON WHICH I CANNOT COMMENT.

UNATTRIBUTABLE (UNDERLINED): THE IRISH GOVERNMENT WOULD HARDLY HAVE ENTERED INTO THE AGREEMENT IF THEY HAD THOUGHT IT UNCONSTITUTIONAL.

14. MR MURRAY WAS UNEASY IN DISCUSSING THIS WITH ME. HIS AGREEMENT TO KEEP IN TOUCH PROVIDES US WITH AN OPENING WHICH WE SHOULD USE SPARINGLY. MATT RUSSELL WAS PRESENT, AND WE SHALL TRY TO BUILD AN INFORMAL CHANNEL OF COMMUNICATION THROUGH HIM.

YOURS EVER

NICK FENN

FENN

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RE: CONSTITUTIONALITY, THE GOVERNMENT WAS COMMITTED TO IT AND
WOULD NOT VETO IT.