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Mc Gimpsey Judgment
Speaking Points

1. We believe that the controversy over the Mc Gimpsey judgment and Articles 2 and 3 is very much a manufactured one. What is most important from our joint points of view is that the decision of the Court successfully sees off a threat which was designed to bring the Agreement to an end. And, as the Taoiseach said in his Ard Fheis speech, the Constitution can never 'be invoked by anyone to justify the use of force to achieve the purposes of Articles 2 and 3'. He added that 'we trenchantly reject any idea of achieving unity by force or imposing the jurisdiction of this State' on the North. It is perhaps significant that the Unionists have chosen to ignore these most helpful remarks as well as similar sentiments in the Supreme Court judgment.

2. I think you know our view about possible changes to Articles 2 and 3 of the Constitution. We do not believe that these should be changed except in some entirely new circumstances and in the context of new political arrangements on this island which may emerge at some stage in the future; indeed it could well be counterproductive to attempt to do otherwise.

3. I am a little disturbed that the Mc Gimpsey judgment continues to be projected as something on which a difference exists or should exist between the two Governments. Our position, and your position if I understand it correctly in particular from Dr Mawhinney's statement in the adjournment debate in the House of Commons in March, is that the decision of the Supreme Court does not affect the position regarding Article I of the Agreement. Indeed Dr Mawhinney indicated that the judgment was not a 'surprise'. Both Governments therefore remain committed to this Article of the Agreement as well as to all its other Articles. We have said this clearly in the Review document last May. It is my view that we should leave it at that and not allow

ourselves to be unduly affected by those who seem intent on using manufactured issues of this kind.

Note; If the British press for a reiteration of Article I of the Agreement in the context of the Mc Gimpsey judgment the Minister might say;

- We do not believe that it would be proper to single out one particular Article of a binding Agreement for particular attention or emphasis. We both signed and lodged the Agreement with the UN. This is the most positive possible reflection of its status and binding nature. Let us leave it at that.

Anglo Irish Division
18 April I990

MCGIMPSEY CASE

Background Note

Christopher and Michael McGimpsey sought a declaration from the courts that the Anglo-Irish Agreement was unconstitutional principally on the ground that Article 1 of the Agreement was incompatible with Articles 2 and 3 of the Constitution. They failed in both the High Court and the Supreme Court. The essence of the Supreme Court's judgment was that;

[1] Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right;

[2] Article 3 prohibits, pending the reintegration of the national territory, the enactment of laws applicable to Northern Ireland;

[3] The Anglo-Irish Agreement is not inconsistent with the Constitution and in particular Articles 2, 3 and 29 [devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality; and peaceful settlement of disputes;]

[4] The Agreement was not concluded in disregard of the interests of the Unionist Community in Northern Ireland.

In replying to a PQ in the Dail on 13 March 1990 on the judgment of the Supreme Court, the Taoiseach referred to §5.7 of the Forum report; "The particular structure of political unity which the Forum would wish to see established in a unitary State, achieved by agreement and consent, embracing the whole island of Ireland and providing irrevocable guarantees for the protection and preservation of both the Nationalist and Unionist identities." The Taoiseach went on to say that the requirements for achieving this objective would include "a total cessation of violence...; a constructive dialogue with Unionists in Northern Ireland; an accommodation of the two traditions, their aspirations and their loyalties; and an all round constitutional conference to formulate new structures." In the course of replies to supplementary questions, the Taoiseach said that the Government had no plan to amend Articles 2 and 3 of the Constitution.

The Government successfully opposed an Independent members' motion in the Seanad on 13 and 21 March calling for the amendment of these Articles of the Constitution.

In the course of his reply to an adjournment debate on the House of Commons on this judgment, Mr Mawhinny said that both Governments had spelt out in the Agreement that the status of Northern Ireland cannot be changed save by the freely given consent of the people of the Province. The fact that Articles 2 and 3 constituted a legal claim was something the Unionists have always known and they did not need the Supreme Court judgment to spell this out. Mr Mawhinny also said that it was the Irish Government's duty to explain their claim in light of the Helsinki Final Act. [Note: a preliminary reading of the terms of the relevant provisions of the Final Act would appear to show that our interpretation of Articles 2 and 3 is consistent with the Final Act.]

Anglo-Irish Section
April 1990

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

III. *Inviolability of frontiers*

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV. *Territorial integrity of States*

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.

V. *Peaceful settlement of disputes*

The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.

They will endeavour in good faith and a spirit of co-operation to reach a rapid and equitable solution on the basis of international law.

For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.

In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.

House of Commons Parliamentary Debates (Hansard)
15/3/90

[Mr. Ken Maginnis]

appearance's sake, perhaps they can at least accept that it is meaningless. When I was first sent to this House in 1983, the honest to God decent people who sent me here thought that this was a place where they would get justice. Enoch Powell always insisted that this Parliament was the final arbiter, but Harold McCusker died believing otherwise. On behalf of the people of Northern Ireland I ask the Minister to tell us who is right. Are we to continue to be sold out for political expediency or will the Government now recognise, in the light of the McGimpsey judgment, their obligation to justice and the people I represent?

1.10 am

Mr. Ivor Stanbrook (Orpington): With the leave of my hon. Friends the Member for Fermanagh and South Tyrone (Mr. Maginnis) and the Minister I wish to say a few words about the subject of this debate.

The constitution of the Irish Republic suffers from all the defects of written constitutions in that it embodies national ideals, vague aspirations and noble objectives, but has to respect certain major legislation which it inherited from this country. It also comes within the common law tradition. As a result, when its Supreme Court interprets the constitution, it provides many opportunities for obscurity and tendentious interpretation to cover almost any decision that the court may see fit to take, even those which are purely politically motivated. That is the crux of the problem that we have faced in ecent years in relation to the actions of the courts in the Republic.

The McGimpsey case illustrates the ambiguity. The court treated the Single European Act as law within the terms of article 40 of the constitution. It was treated as law because the court accepted that a derogation of the sovereignty of the Irish Republic was all right because it was properly done and was, after all, a treaty. However, the Anglo-Irish agreement, which is also supposed to be an internationally binding treaty and must be respected by all sovereign states party to it, is not law for this purpose. Why? After studying the constitution, the court concluded that provision for the Anglo-Irish agreement came out of the section of the constitution that allowed for the mere ordering of peaceful international relations. That was the basis of authority for the Irish Government to conclude that that agreement with the United Kingdom was an international treaty, but it did not reach the status of law for the purpose of the constitution. That ambiguity is reflected in the constitution in articles 2 and 3. It is difficult to construe the meanings of those two articles, but the message is repeated in article 1 of the Anglo-Irish agreement, which states that there will be

"no change in the status of Northern Ireland."

My right hon. and hon. Friends, the leaders of the Government, assigned that agreement with those very words and have paraded it as if, at last, the Irish Republic has accepted that Northern Ireland is a part of the United Kingdom. It has done nothing of the sort. The phrase that there will be

"no change in the status of Northern Ireland"

makes one ask, what is its status? Under Irish law, the status of Northern Ireland is that it is a part of Ireland, not the United Kingdom. Under British law its status is that it is a part of the United Kingdom. That ambiguity has never been resolved and, politically, the British Government have asked us to accept that the meaning should be that attributed to it by British courts, whereas we all know that the meaning attributed to it by Irish courts, such as in this case, is quite different.

Due to that ambiguity and the many times that we have allowed Irish courts to get away with—and forgiven them for—the errors which, according to our jurisprudence, they continually make, we have enabled them to block off all possibility in law of the extradition of terrorists from the Irish Republic. Under the most recent judgment, a finding of fact was made which will be instanced in future to show the impossibility of extraditing anyone to the United Kingdom because they may be beaten up when they arrive in United Kingdom jurisdiction.

Previously there was a finding, allowed and confirmed by the courts, by the Attorney-General to say that in the case of Father Ryan no extradition could take place because there was no chance of his getting a fair trial. That ambiguity is at the heart of the Anglo-Irish Agreement. It is a tragic mistake that has been confirmed by the recent experience that we have had to endure.

1.15 am

The Parliamentary Under-Secretary of State for Northern Ireland (Dr. Brian Mawhinney): I do not have too much time to respond to this interesting debate. I congratulate the hon. Member for Fermanagh and South Tyrone (Mr. Maginnis) on obtaining such an early Adjournment debate on this important subject. I also congratulate him on his speech. He asked me to place a copy of the Supreme Court judgment in the Library, and I shall see that this is done.

The hon. Gentleman indicated his belief that the recent judgment of the Irish Supreme Court in some sense substantially changed Northern Ireland's position and that, perhaps, Unionists had never before understood article 2 of the Irish constitution to be a legal claim on the north.

I cannot accept that argument. I fully understand the sense of dismay felt by many, including Unionists, at the clear affirmation in the judgment that articles 2 and 3 constitute a legal claim to Northern Ireland. But Unionists have always known that the claim was legal and territorial. They did not need the Irish Supreme Court to spell it out. When the hon. Gentleman and I were growing up in the Province, Unionists were not referring to article 2 as some sort of political aspiration. If they had believed that, they would have been much less agitated. It was precisely because they believed that the article did lay legal claim to the Province that Unionists were so upset and offended —as, indeed, were others in the United Kingdom. In fact, the hon. Gentleman may remember the report from an all-party committee of the Dail, chaired by George Colley, a Fianna Fail deputy if I remember correctly, which reported in 1967 and which proposed a number of Irish constitutional amendments, including the desirability of converting articles 2 and 3 into a political aspiration using the words:

"The Irish nation hereby proclaims its firm will"

—and so on.

After all, a constitutional document, almost by definition, has to be seen and understood in a legal sense. Most people accepted this. While it may come as a shock to many that this understanding should have been confirmed in such stark terms in 1990, it cannot be said to be a surprise.

The hon. Gentleman postulated that the judgment changed something fundamental in our relationship with the Irish Republic in general and rendered meaningless article I of the Anglo-Irish Agreement in particular. I shall deal with each claim in turn.

It is not my responsibility to defend the Irish constitution. It is for Irish Ministers to consider and if they feel it necessary to explain this territorial claim in light of that country's signature of the Helsinki Final Act. Our two countries have differing historical perceptions and constitutional frameworks, and as we are entitled to ours, so they are to theirs. It is also for Irish Ministers to relate article 2 of their constitution to their signing of the Anglo-Irish Agreement.

Rev. Ian Paisley (Antrim, North) *rose*——

Dr. Mawhinney: I cannot give way, as I have little time left.

That notwithstanding, both Governments value the Anglo-Irish Agreement, its aims and its modus operandi. Whatever the constitutional facts, in practice it has proved to be an important treaty.

I cannot accept that the hon. Gentleman is seriously asking the House to believe that the Supreme Court judgment actually makes any difference in reality to the United Kingdom's unwritten constitution or Northern Ireland's safe inclusion within it. As far as we are concerned, Northern Ireland is part of the United Kingdom and is clearly so in international law. He said that it does not matter what the Government believe, but in the United Kingdom—that includes Northern Ireland —what Parliament and the Government believe is all important.

Article I of the Anglo-Irish Agreement, which is an internationally binding treaty, is not and cannot be affected by a judgment of the Irish court. In signing the Agreement, the Irish and British Governments recognised the reality of Northern Ireland's position within the United Kingdom, whatever the the different de jure positions.

I say that because the nub of article I is not a definition of the status of Northern Ireland but says that that status cannot be changed save by the freely given consent of the people of the Province. Willingness to contemplate change carries with it de facto recognition of the position from which change might occur. I hasten to add that the British Government's view is that there will be no majority for change in the foreseeable future. In other words, the declaration on status in the Anglo-Irish agreement is simply aligned with reality. The reality is that the status of Northern Ireland is British.

Lest the hon. Member thinks that I theorise, let me point out to him that we are having this debate in the House of Commons, not the Dail. It is in this forum that decisions affecting Northern Ireland are taken—as is affirmed by article 2b of the Anglo-Irish Agreement. And the court judgment makes no difference to that reality either. I accept that the Irish Government have not abandoned any aspiration to unity. They have accepted, however, that this aspiration can only be realised on the basis of the consent of the people of Northern Ireland. This position holds, irrespective of the Irish constitution and the Supreme Court's interpretation of it.

Let me summarise. The people of Northern Ireland and the United Kingdom have lived with this territorial claim for over 50 years. The United Kingdom Government have never accepted it, do not accept it and have said so, as I do again tonight. We regard it as having no validity in international law. It has never had any practical effect on Northern Ireland's position as part of the United Kingdom.

Nor do I lend credence to the view that the court judgment will serve to sustain the Provisional IRA in its campaign of violence. PIRA does not recognise the legitimacy of the Government, institutions or constitution of the Republic. It cannot therefore be argued that it will be influenced by some legal interpretation of a part of that constitution.

I wish to make one final point. In light of what I have said, the Government believe that it would be wrong to suggest that this judgment should in any way affect prospects for political progress in Northern Ireland. As the talks offered are without precondition, Unionists may legitimately——

The motion having been made after Ten o'clock and the debate having continued for half an hour, MADAM DEPUTY SPEAKER *adjourned the House without Question put, pursuant to the Standing Order.*

Adjourned at twenty-two minutes past One o'clock.

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