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AN ROINN GNÓTHAÍ EACHTRACHA
Department of Foreign Affairs

BAILE ÁTHA CLIATH 2
Dublin 2

NOTE

8 June, 1990.

H. E. Andrew O' Rourke,
Ambassador,
London.

Dear Ambassador,

Thank you for your letter of 4th June about the proposed Embassy draft submission to the Sir John May enquiry.

We have given detailed consideration to the amendments to the text you have suggested and have incorporated a number of them into the submission. We are very grateful for the helpful input from the Embassy into the draft. The revised draft submission is attached.

As regards your two queries on the paper from the Director of the Forensic Science Laboratory, we have consulted (through Mr. Brosnan of the Department of Justice) Dr. Donovan and can confirm that he does not wish to amend his paper at this stage.

I believe it is now important that the submission should be sent to the Enquiry as soon as possible. We might have a word about the timing of this when we meet on Monday evening.

Yours sincerely,

Dermot Gallagher,
Assistant Secretary.

cc: PSM; AG; Mr. Nally; PSS; Mr. Mathews; Mr. Brosnan

GUILDFORD AND WOOLWICH INQUIRY

The Irish Embassy appreciates the invitation from Sir John May to the Ambassador to submit views on the Guildford/Woolwich and Maguire cases and on matters arising from these cases. In this paper the Embassy is responding to that invitation in respect of a number of the topics listed in the Annex to Sir John's letter of 13 December 1989. We assume that the Inquiry will be interested in learning of the practice in Ireland on these matters.

The Embassy may in the course of the Inquiry submit further material for the Inquiry's consideration.

Introduction

The law governing much, if not all, of the procedures used by the police in the Guildford/Woolwich, Maguire and Birmingham Six cases has, of course, since been amended. The Police and Criminal Evidence (PACE) Act 1984 contains provisions which set out suspects' rights when in custody, backed up by extensive Codes of Practice. For instance, the right of a suspect to have a person informed of his arrest and access to legal advice, issues which specifically arose in the context of the Guildford, Woolwich and Birmingham cases, are now provided for in a way which did not exist at the time of these cases. These are important changes in the law to safeguard a person's rights. It is of the utmost importance that all suspects regardless of their nationality or alleged crimes benefit fully from these changes.

Pre-trial investigation

One of the issues which the Inquiry proposes to examine is the adequacy of the existing system of safeguards with particular reference to tape recording, Codes of Practice, access to solicitors and custody records.

There are a number of aspects of the present regime of safeguards to which the Irish Embassy wishes to refer. Given the nature of the cases which are the subject of the Inquiry, it believes that

a particularly important feature of the present law and one which we note that the Inquiry intends to address is the distinction between terrorist and non-terrorist crime in the investigation of crime. We have noted that important differences exist particularly with regard to:

- the length of the period of detention
- the exercise of rights such as the right to legal advice
- tape recording of interviews.

Length of period of detention

S 14 of the Prevention of Terrorism Act 1989 authorises detention for a maximum of 7 days. Following the judgment of the European Court of Human Rights in the Brogan case [which held that a detention of 4 days and 6 hours was in breach of the requirement in Article 5.3 of the Convention on Human Rights to bring a person promptly before a judge or other officer authorised by law to exercise judicial power], the British Government announced that the United Kingdom would derogate from the provisions of Article 5.3 in respect of Northern Ireland terrorism. Lord Colville said in his annual report on the operation in 1989 of the PTA: "It cannot be felicitous for the UK to have to derogate."

Under the provisions of Part IV of the Police and Criminal Evidence Act 1984, the maximum period a person may be detained in relation to a non-terrorist crime is 96 hours. These provisions are used against persons who commit serious crimes such as murder, arson, kidnapping, extortion etc., all of which are crimes which can be and have been committed by terrorist offenders.

In Ireland, s 30 of the Offences Against the State Act 1939 authorises a maximum period of detention in respect of an offence under the Act or a scheduled offence of 48 hours. This period may not be extended under any circumstance, nor may the suspect be immediately re-arrested upon release after 48 hours.

A comparison of the British and Irish measures shows that in the UK a distinction is drawn between terrorist and non-terrorist related offences in the matter of the maximum periods of detention and in both cases the maximum periods of detention exceed the maximum period of detention under Irish law. Furthermore, the quarterly statistics produced by the Home Office concerning the exercise of certain of the powers under the PTA show that the majority of persons detained are held for three days or less. The statistics also show that only 12% of persons detained in the course of 1989 were charged with an offence. The Inquiry may wish to consider whether it is necessary to retain the PTA power of detention for up to 7 days and whether the maximum period any suspect could be detained should be in line with international norms and the decision of the European Court of Human Rights in the Brogan case. In this context, it is noted that the maximum period of detention prior to charge under the PACE Act is 96 hours.

Access to Legal Advice

The Irish Embassy would invite the attention of the Inquiry to the provisions of section 58 of the Police and Criminal Evidence Act, 1984, and in particular to the possibility under that section for the police to delay access to legal advice for up to 48 hours and to the absence of a statutory requirement for a detained person to be informed of his right to consult a solicitor. In this regard it might be noted that Irish law requires the member in charge of a station (the equivalent in Irish law of the custody officer) to inform a detained person or cause him to be informed without delay of his entitlement to consult a solicitor and, on request, to cause a solicitor to be notified of a request as soon as practicable (cf. sections 5 and 9 of the Irish Criminal Justice Act 1984). Furthermore, the Irish Supreme Court has held that access to a lawyer was a fundamental right and that the "only thing which could justify the postponement of informing the detained person of the arrival of the solicitor or of immediately complying with the request of a detained person, when so informed, for access to him would be reasons which, objectively viewed from the point of view of the

interest or welfare of the detained person, would be viewed by a Court as being valid".

It will be seen that, in contrast to the British legislation, Irish law requires a detained person to be informed of his entitlement to consult a solicitor and, furthermore, does not permit the police to delay notification of a solicitor whose attendance has been requested.

Similarly, in regard to the right of a detained person to have another person informed of his detention, Irish law, in contrast to the position under the Police and Criminal Evidence Act, requires the person in custody to be informed of this right and does not permit the police to delay giving effect to such a request (cf sections 5 and 9 of the Irish Criminal Justice Act 1984 and section 56 of the Police and Criminal Evidence Act 1984).

The Inquiry will be aware that in the Guildford/Woolwich case the suspects were kept incommunicado and therefore unable to arrange rapidly for the best possible evidence which could have led to an early realisation of their innocence. The Inquiry may wish to consider whether delaying access to legal advice or denying information about a person's arrest, whether to a friend or to a legal adviser, is in the long term in the best interests of justice.

In the more limited context of the operation of the existing provisions of the Police and Criminal Evidence Act 1984, the Inquiry might consider police practices in this regard. Statistics issued by the Northern Ireland Office show that, in the case of a person arrested under the Northern Ireland (Emergency Provisions) Act 1987, denial of access to legal advice is more a matter of course than the exception. The Irish Embassy has seen no evidence to suggest that the contrary is the case in Britain when a person is arrested under the terrorism provisions.

A study commissioned by the Lord Chancellor's Office ("Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme", November 1989) shows that, where access to legal advice may not be delayed, the police use what are termed "ploys" to discourage suspects from requesting legal advice (pages 56 to 64). The Inquiry may wish to address this finding and consider how best to ensure compliance with the provisions of the 1984 Act and the associated Codes of Practices.

Tape-recording of police interviews

The provisions in Code E of the PACE Codes of Practice regulate the tape-recording of police interviews. However, this Code does not apply to interviews of persons arrested under the PTA [or the emergency provisions in Northern Ireland]. The cases under examination by the Inquiry come within the ambit of the PTA. It is clear that, had the police interviews been tape-recorded, the Guildford Four could not have been convicted on the basis of the false confessions which were presented to the Courts. The Home Secretary has announced a two-year experiment for the London Metropolitan Police and the Merseyside Police whereby interviews of persons detained under the terrorism provisions will be summarised on tape by a police officer with the suspect or his legal adviser being given the opportunity to record his comment on the summary. It is to be hoped that this experiment will point the way towards a generally satisfactory solution.

Custody Records

The Guildford/Woolwich case demonstrated that the police either did not maintain custody records or that the records which were established were not accurate [see transcript of the cross-examination of police witnesses at the trial in Belfast of Paul Hill for the murder of Shaw]. The absence of custody records was also an important feature of the Birmingham case and, together with the much-disputed "Reade schedule" [for which no satisfactory explanation was found], brings the interrogation evidence into serious question. The Inquiry may wish to address

the extent to which police custody records, required by §2.1 of Code C of the PACE Codes of Practice, represent an adequate record of the suspect's treatment.

Location of a trial

This is not an issue which arose in the cases under review. However, the Embassy notes that among the wider issues which the Inquiry proposes to examine are matters relating to the fairness of trial procedures (no. 3 of issues to be considered). In this connection, the Inquiry may wish to consider the location of trials. For many understandable reasons, terrorism-related crimes arouse a considerable degree of emotion, particularly in the area in which they were committed or alleged to have been committed. Consideration might therefore be given as to whether it would be in the best interests of justice that proceedings of this kind be moved to a "neutral" venue such as the Old Bailey.

Security measures in court

While fully recognising that security measures are necessary when persons accused of terrorism-related offences are brought to trial, the possibility that those measures may themselves influence the outcome of a trial by virtue of their impact on jurors should be borne in mind. The intensive security arrangements for the Guildford/Woolwich and other trials suggested that the defendants were highly dangerous. This may well have influenced the jury. There is concern that these measures can prejudice the chances of a fair trial especially when combined with widespread media coverage. Against that background, the Inquiry may wish to consider how the interests of justice and legitimate security needs can best be balanced.

The Conduct of the Media

The Inquiry might also wish to consider the question of the extent to which a jury can operate impartially, as it should, in cases where there has been heavy advance press coverage. While such material may not conflict with the Contempt of Court Act

1981, it would be difficult to accept that a person who had read the more forcefully expressed articles and who subsequently became a member of a jury sitting in the case could be regarded as a person whose knowledge of the case was limited to the presentation in court; or that a jury which included such persons could be regarded as genuinely impartial. The problem is all the greater if such articles appear in large circulation newspapers. The issue is particularly relevant in cases deriving from major terrorist activities. Guidelines to editors in such cases could be of assistance and the Inquiry may wish to consider what sort of guidelines could be provided; or in the alternative, it might wish to consider how best to enforce the provisions of the Contempt of Court Act, 1981. In this context, the Inquiry may wish to consider in particular whether guidelines could cover the period of extended detention, for example under the Prevention of Terrorism Act 1989, prior to charge.

The Right to Silence

It is noted that the Right to Silence Working Party has produced its report in which it favourably recommended the proposal of the Criminal Law Revision Committee's 11th report that the right of silence would be restricted by empowering the jury or the court to draw whatever inferences are reasonable from the failure of the accused, when being interviewed or on being charged, to mention a fact which he later relied on in his defence. The Working Party also proposed safeguards in favour of the accused with regard to the implementation of this proposal. The right to silence has already been modified in Northern Ireland by the Criminal Evidence [Northern Ireland] Order 1987. The changes in the law in Northern Ireland were more extensive than those proposed by the Working Party. At the time the Order was introduced, the Irish Government expressed their concern about the implications of the new legislation. They are monitoring the application of the new rules on the right to silence in Northern Ireland. [Note: in Ireland, under the Criminal Justice Act 1984, s 18 and s 19, the Court may draw such inferences as appear proper from a failure or refusal to account for a mark or substance on one's clothing or to account for one's presence in a

particular place; such failure or refusal may amount to corroboration of any other evidence; but no person shall be convicted solely on an inference drawn from such a failure or refusal. These provisions have not been tested in the courts.]

It has been shown that the right to silence is, even under the present law in Britain, availed of in a minority of cases. The Inquiry may therefore wish to consider the advisability of taking any steps to alter the present right to silence rule in Britain in light of the facts of the Guildford/Woolwich cases and the concerns that exist in relation to the Birmingham Six case and having regard to the powers of the police under the Police and Criminal Evidence Act.

Confession Evidence

In the Guildford/Woolwich case, the confession evidence was not corroborated by any other evidence and indeed was patently implausible when compared with other available evidence, for example the minimum time which it would be likely that Carole Richardson would have taken to travel from the Horse and Groom in Guildford to the South Bank Polytechnic. Untested confessional evidence was also a feature of the Birmingham case. The Inquiry may wish to consider whether it should be required of the prosecution to demonstrate or to attest that the terms of the confession presented in court have been confirmed by "field test" to be credible.

In November 1989, the Irish Government appointed a committee under the chairmanship of Judge Frank Martin to examine this aspect of the law and make recommendations. In its report, the committee recommended a number of additional safeguards, including audio-visual recording of interviews, to ensure that uncorroborated inculpatory admissions are properly obtained and recorded and it proposed that the views of the Chief Justice and other judges should be sought as to the necessity for trial judges to give juries a warning in cases where the guilt of the accused depended wholly or substantially on an inculpatory admission. The Irish Government have decided to have the report

examined as a matter of urgency with a view to bringing forward appropriate proposals in due course. A copy of the report is attached.

Conspiracy

The Irish Embassy would like to draw the Inquiry's attention to a prosecuting practice in which a person may be accused of both a substantive offence and of conspiracy to commit the substantive offence. Under the latter charge, the courts have wider discretion to admit evidence. In the Birmingham case, this procedure was followed. At the conclusion of the trial the conspiracy charges were withdrawn from the jury, but by that stage a considerable amount of circumstantial evidence under those charges had been introduced. A solution might be to require such charges to be tried in separate trials as a rule rather than as a matter for the discretion of the bench.

Technical and Scientific Evidence

The Inquiry will be aware of the central role which forensic evidence played in the convictions of the Maguire family. It is noted that the Inquiry has commissioned a fresh scientific study of this evidence. The Inquiry will find attached a study carried out by the Director of the Irish Forensic Science Laboratory in which, on the basis of the information available to him, he offers his considered views as a professional working in this field in Ireland on the forensic evidence in the Maguire case. This study, bearing on the nature of the test for explosives used in the case and the credence to be attached to it, is submitted in the belief that the Inquiry might find it useful as an additum to the material which it has already to hand or which it has commissioned. The study includes references to the Home Office note of January 1987 prepared in connection with the decision of the then Home Secretary not to refer the case to the Court of Appeal. It will be recalled that the forensic evidence was also important in the Birmingham Six case and was much disputed.

Retention of records

It has come to light in the context of another investigation currently in progress into the work and practices of the West Midlands Serious Crimes Squad that police records were destroyed after two years. It would appear that the practice varies from Constabulary to Constabulary; for example in the case of the London Metropolitan Police it is understood that records are kept indefinitely. The Inquiry may wish to consider the desirability of a general guideline to all Constabularies on this matter, including a minimum period for the retention of records.

Pre-trial disclosures

A feature of the Guildford/Woolwich and Maguire cases was the existence of written material which could have been of assistance to the defence but which was not made available to them. Written notes concerning interrogations were in existence and these conflicted with the testimony of the police witnesses at the trial. The question of the "Bryant and Dickson list" has already been referred to by the Counsel to the Inquiry.

It is noted that there have been developments in English practice since this trial, notably the issuing by the British Attorney General in December 1981 of guidelines for the disclosure of "unused material" to the defence in cases to be tried on indictment [see (1982) All ER 734, Archbold 43rd edition §4.178]. The rule is now that unused material [subject to certain exceptions] should be made available to the defence if it has some bearing on the case. This rule, however, leaves to the prosecution the decision whether material is relevant. If such a rule had been applied to the Birmingham case, for example, it is by no means certain that the "Reade Schedule" (which came to light only in the context of the investigation into the case by the Devon and Cornwall Police) would have been disclosed as it was the Crown's contention subsequently that this document had no bearing on the case. Furthermore, without knowledge of what defence is to be presented, it is difficult to see how the prosecution can always form a correct judgment on whether unused material may be relevant. The Inquiry may wish to consider

whether there is a case for power of inspection by the defence of unused material, subject only to the right to withhold material in specified cases.

The Inquiry may also wish to consider whether the decision not to release material should be one for a Court of law rather than the prosecution in the same way that in a civil action the decision on whether documents are privileged and need not be discovered is ultimately for the Court and not the party invoking privilege.

Additionally, the Inquiry may wish to consider whether the list of cases in which there is a discretion not to make a disclosure is not cast too widely; for example, the discretion not to disclose statements which may be of use to the prosecution in cross-examination appears difficult to reconcile with the view that the defence should have equal access to relevant evidence.

Procedures for review of alleged miscarriages of justice

The Martin Committee, referred to earlier, also recommended that alleged miscarriages of justice should be investigated by a statutory inquiry body to be appointed by the Irish Government following consideration by the Attorney General of information supplied by the aggrieved party. The action taken by the Government on receipt of the report of the inquiry would include, where appropriate, advising the President to grant a pardon.