



An Chartlann Náisiúnta **National Archives**

Reference Code: 2021/45/64

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CONFIDENTIAL

Use of lethal Force by the Security Forces
Background Note

Introduction:

1. In the aftermath of the killing of Fergal Caragher and the wounding of his brother, Michael, by members of a British army patrol in Cullyhanna on 30 December 1990, the Minister raised this issue at the January Conference and again at the most recent Conference meetings of 9 and 26 April. In raising the issue, the Minister laid stress on the following points:

- (1) It should be axiomatic that security force personnel involved in such incidents should be suspended automatically.
- (2) There should be an independent element in the investigation of such incidents - for instance drawn from a police force in Britain.
- (3) The investigation should be as thorough and speedy as possible and not drag on like the Stalker/Sampson investigation.
- (4) That a thorough investigation be carried out into the whole area of the use of lethal force by members of the security forces, including the investigative processes and the adequacy of the existing law to meet the clear needs of the situation.

2. While the Secretary of State initially appeared to indicate some level of sympathy, notably in respect of (1) and (3) above, this sympathy appears to have evaporated over the succeeding months. There are no indications at present of any change in relation British policies or practices in respect of such incidents. However, this issue is likely to continue to be controversial in the short to medium term.

Recent Developments:

3. In respect of the Caragher killing, the RUC investigation is now complete and the file was sent on 3 June to the

Director of Public Prosecutions who has yet to decide whether to initiate prosecutions in relation to the killing. (The Chief Constable indicated at the last Conference on 26 April that prosecutions were unlikely owing to the lack of effective co-operation by witnesses with the RUC investigation.)

4. A private Inquiry was recently held in Cullyhanna organised by the Caraher family, in association with the Irish National Congress (a new organisation based in the South and involving a number of people like Robert Ballagh, Kevin Boland etc). The Inquiry was chaired by Michael Mansfield Q.C. and was apparently conducted in an impressive manner and was quite successful in focusing renewed attention on the circumstances of the Caraher killing. The four Jurists involved in the inquiry will issue separate reports in a few months time.

5. There has also been controversy in relation to access by the Caraher family to the full postmortem report and for an independent forensic examination of the car. The decision of the Armagh Coroner to provide only a summary, and not the full postmortem report, has caused considerable surprise, particularly in view of the fact that the Belfast Coroner follows the practice of providing the full report to the next of kin immediately it comes available. (The matter has been raised in the Secretariat and we have been told that it is entirely a matter for the individual Coroner's discretion.)

6. A further development has been the killing of 3 IRA men in Coagh by an undercover army unit on 3 June. While the men were apparently armed and there has been no great public outcry about this particular killing, nonetheless it adds further to the numbers killed by the security forces in circumstances where questions could reasonably be asked as to whether it might have been possible to avoid the use of lethal force.

7. Suggested Lines of Approach:

- To again flag this issue as a very important one in terms of public confidence. (Any perception that members of the security forces are not effectively subject to the law has the most corrosive effect on confidence and provides ammunition for the IRA propaganda machine);
- In that regard, reference could again be made to our view that the introduction of an independent element in the investigation of controversial killings by the security forces would help to promote public confidence;
- that the legal framework applying in such cases requires examination;
- to enquire as to when the DPP is likely to make a decision in relation to the Caraher case;

Background:

8. Because of the relatively high incidence in recent times of controversial shootings by the security forces, renewed attention has been focused on shortcomings in terms of

- (a) the investigation of such incidents;
- (b) the legal framework which applies to such incidents.

Investigation:

9. In the case of controversial killings by the RUC, ready-made options exist to build an independent element into the investigation either

- (a) by having the investigation supervised by the Independent Commission for Police Complaints - as in the case of the investigation into the killing of Seamus Duffy in August 1989;
- (b) by bringing in an investigating team from an outside police force - as in the case of the Stalker/Sampson

investigation or the Stevens Inquiry.

10. However, most recent controversial shootings have been carried out by the British army and not the RUC. In the case of killings by the army, the investigation takes the form of a normal criminal investigation by the RUC and there appear to be no ready-made precedents immediately available to build an independent element into such investigations. [However, a possible avenue may exist in the Police Act (NI) 1970 which provides that an officer from another UK police force can be provided for the purpose of enabling the RUC to meet a special demand on its resources. It is presumably this provision which Seamus Mallon had in mind when he called for an independent person to be appointed to lead the investigation into the Caragher killing.]

Legal Framework:

11. The law governing the use of force by the security forces is laid down in Section 3 of the Criminal Law Act (NI) 1967 which provides that "a person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large".

12. The practical effect of this provision revolves around the interpretation of what force "is reasonable in the circumstances".

13. The House of Lords provided a very liberal interpretation in the McElhone case. [McElhone, who was clearly unarmed, was shot in the back by a soldier while running away.] The House of Lords in their judgement found that the soldier had reasonable grounds for fearing imminent danger to himself or to other members of the patrol if the suspect were allowed to escape in so far as "if he got away, he was likely sooner or

later to participate in acts of violence". In the same judgement, the House of Lords held that where a member of the security forces used lethal force unreasonably, a charge of murder (which carries a mandatory life sentence) is the only appropriate charge.

14. Section 3 of the Criminal Law Act as interpreted by the House of Lords has the effect that if a member of the security forces uses lethal force, the only charge which it is practical to make is one of murder. At the same time, the interpretation by the House of Lords of the amount of force reasonable in the circumstances makes the chances of such a charge succeeding almost negligible in practical terms. [Essentially, the only case where a soldier has been convicted of murder while on duty was that of Private Thain. He was subsequently released after serving only two years of his life sentence and readmitted to the army.]

Legal Reform:

15. Suggestions for the reform of the existing law have been made by Lord Colville who, in his review of the emergency legislation, recommended the introduction of a new manslaughter offence involving the excessive use of force in self-defence; - a reform also recommended for England and Wales by the Criminal Law Revision Committee and by the House of Lords Select Committee on Murder and Life Imprisonment, chaired by Lord Windlesham. Most recently, the same reform has been recommended by the Standing Advisory Commission on Human Rights (SACHR) who additionally suggested that a code of practice be introduced to control the circumstances in which lethal force could be used - a breach of the code would be a criminal offence punishable by 2 years imprisonment.

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9 July 1991.