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(Secretary of State(L)

cc PS/Secretary of State(B) - M
PS/Ministers (L&B) - M
PS/PUS (L&B) - M 10/6
1. PS/Sir K Bloomfield - M ✓
Mr Burns
Mr Chesterton
Mr Elliott - M
Mr Spence - M ✓
Mr Hewitt - M
Mr Kirk
Mr J McConnell - M
Mr Wood - M
Ms Jackson
Mr George, RID



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THE AGREEMENT AND THE IRISH CONSTITUTION: THE MCGIMPSEY CHALLENGE

1. The McGimpsey brothers are challenging the compatibility of the Anglo-Irish agreement with the Irish Constitution in the Irish High Court. This submission, the thrust of which has been agreed with the FCO, considers how we should react to enquiries; and whether and if so, how we should seek to influence the Irish handling of the case.

Background

2. Dr Christopher McGimpsey and his brother Michael have now opened proceedings against the Irish Government. They have retained as Counsel Mr O'Flaherty, who acted in the Single European Act (SEA) case earlier this year. The case could be heard quite soon, but more likely in the Autumn. It would first come before the High Court. But whatever the outcome, an appeal is likely to the Supreme Court, which would not be heard until the New Year.

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3. We have now been given, by Mr Lillis, the opening documents from the McGimpseys. They suggest that the chief arguments will revolve around two issues. The first is whether Articles 1 and 2 (b) of the Agreement is compatible with Articles 2 and 3 of the Irish Constitution. The relevant texts are attached. Such a challenge would test the affirmation in the Agreement that change in the status of Northern Ireland would only come about with the consent of a majority against the (somewhat obscurely expressed) claim in the Irish Constitution to sovereignty over Northern Ireland.

4. The second issue will be the same as that in the case against the Single European Act, namely the competence of the Irish Government by treaty to restrict its freedom of action in foreign relations. The documents passed to us also suggest that McGimpseys will argue that the Agreement is unconstitutional because it endorses direct rule in Northern Ireland, which is alleged to be undemocratic.

5. The compatibility of the Agreement with the Constitution was considered during the negotiations. The Irish Government then assured us that their best legal advice indicated that the proposed agreement was constitutional. However, the matter was one of very careful wording (such that a change from "would" to "could" in Article 1 (a) of the Agreement might render it unconstitutional). Mr Nally, Secretary to the Irish Government, also considered that a Court would rule very swiftly in favour of the Agreement. Article 2 (b) states "there is no derogation from the sovereignty of either the UK Government or the Irish Government, and each retains responsibility for the decisions and administration of government in its own jurisdiction".

Analysis

6. Partly because the grounds of challenge may be different from when the matter was considered in 1985, it is difficult to be so

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• categorical about the outcome now, and the Irish Government are concerned - not least following their defeat in the SEA case, where the majority decision of the Irish Supreme Court implied a considerable limitation to the Executive's freedom to enter into treaties.

7. As in the case of the SEA, the Irish Government will be called upon to make their position plain. This will present political difficulties for Mr Haughey who has said that he has reservations about the constitutionality of the Anglo/Irish Agreement, although he has agreed that he is bound by it as an international agreement. Nevertheless the Irish Attorney-General has told the Ambassador in Dublin that his Government will 'of course' resist the McGimpsey case. They may well wish to argue in favour of the Government's freedom to conduct foreign policy as most observers understood it to be before the SEA verdict changed matters. But Mr Haughey will clearly find it difficult to say in terms that Article 1 of the Agreement is compatible with Article 2 and 3 of the Constitution, or explicitly to abjure his (political rather than legal) belief in Irish unity. But Mr Haughey will is likely to want to avoid a crisis in Anglo-Irish relations whilst still battling with the economy. Further, there is strong support in the Dail for the Agreement (including within his own party).

What can HMG do?

8. The Irish are likely to remain wary of discussing the case with us: it goes, after all, to the heart of their constitutional sensitivities, and the *raison d'être* of their state. But it does not, therefore, follow that we should do nothing: the Agreement is a bilateral one; and it is the Irish executive who will be fighting the case (in effect on our behalf as well as their own). There is, in fact, a strong case for keep keeping discreet pressure on the Irish to defend the Agreement in a way that causes both of us the least political damage, and reminding them of our common interest in the smooth handling of NI in Anglo-Irish relations. But a high profile would be counterproductive, and our points need to be made informally rather than by formal demarche if charges of heavy handed interference are to be avoided. But we can none the less ensure that the Irish are left in no doubt that any unhelpful statements about eg sovereignty or consent which they make in or out of court will be pounced on by unionists and other opponents of the Anglo-Irish process, and as well as making life difficult for both Governments generally, could damage our burgeoning dialogue with the Unionists. Both the Secretariat and our Embassy are ready to make these points, and will continue to keep us in touch with developments in the case.

What should HMG say, or do in public

9. On similar grounds, we should certainly not seek to intervene, or overtly influence the court case. As the Irish Attorney General explained to our Ambassador: "if the British Government wanted to be helpful, they should stay out of it". His remark rings true. It is not for us to interpret Irish law and anything we did that could be misconstrued as seeking to influence the Irish legal process would understandably put back up in the Republic.

10. Indeed, in public announcements we need to be very guarded in what we say about the Agreement from now on, especially about Article 1. In the past, we have sometimes spoken of it as "confirming the position of NI within the UK". This is what we believe the effect to be, but any such statement is likely to be seized on unhelpfully by the McGimpsey and embarrass the Irish Government in preparing their case. Rather we should speak of it as a reassurance to Unionists (as it was meant to be) and by citing the exact text.

If the McGimpsey's win?

11. The implications of the Irish Government losing the case are potentially serious. But it is worth recalling that finding that the Agreement was "unconstitutional" by no means implies the invalidity of the Agreement in international law, or that the Irish Government would automatically cease to be bound by it. Correcting an adverse verdict by referendum, as happened with the SEA, might prove very difficult. But it is too early to speculate in detail about such matters: so much would depend on the exact terms of any judgement and our tactics would be influenced by the wider political climate prevailing in the autumn. For the time being, therefore, we can only proceed with the Agreement on a "business as usual" basis.

Recommendation

12. The Secretary of State is invited to note the unwelcome difficulties this case may inject into the Anglo-Irish process (with possible spillage into what we hope will be our dialogue with Unionist politicians); and the analysis sketched above. However, our ability to influence the outcome of proceedings is comparatively limited, and I accordingly recommend that:

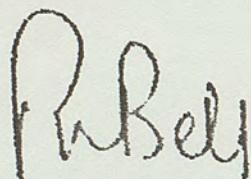
- (a) we should confine ourselves to informally, and discretely encouraging the Irish Government in their defence of the Agreement (though avoiding formal

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demarches; but reminding them that Unionists and others will seek every opportunity to use the terms of their defence against us. Nor should we seek to intervene in any way, in the action ourselves; and

- (b) in answering queries, we should make clear that this is a matter for the Irish courts on which we cannot comment. We could add, unattributably, that the Irish Government would hardly have entered into the Agreement had they thought it unconstitutional; and that both sides have recognised it as a binding international agreement. We should refuse to answer hypothetical questions about the outcome of the challenge, or the consequences of its succeeding.

13. I shall keep Ministers abreast of developments, and will be offering separate advice on how the Secretary of State might handle this subject in the context of the Conference..



P N BELL

10 July 1987

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PS: You may now have seen the Irish Press article of 9 July summarising the McGimpsey case. The open season may now have begun.