

Mr Chesterton

cc PS/PUS (L&B) 17/7
1. PS/Sir K Bloomfield
Mr Burns
Mr Elliott
Mr Kirk
Mr S Hewitt
Mr J McConnell
Mr Wood
Ms Jackson
Mr George, RID, FCO

2. ~~17/7~~ 4/11

McGIMPSEY CASE: FIRST STEPS

I attach for your information a note from Mr Elliott, covering the McGimpseys' first formal statement of their case against the Agreement.

The statement of claim

Paragraphs 6-10 of the statement of claim set out the McGimpseys' arguments:-

para 6:

the Agreement
unconstitutionally restrains
the State's freedom of action
in the foreign relations
field. This is based on the
judgements on the Single
European Act case.

para 7:

Article 1 and 2(b) of the Agreement acknowledge UK sovereignty in Northern Ireland, contrary to Articles 2 and 3 of the Constitution.

para 8:

direct rule in Northern Ireland is undemocratic; the State has a duty to ensure as best it can that government in Northern Ireland is democratic; adherence to the Agreement is in breach of this duty.

para 9:

the Irish government, by becoming involved under the Agreement in devolution initiatives and legislative proposals in Northern Ireland, is confirming the status quo, contrary to Articles 2 and 3.

para 10:

(this is consequential on the previous arguments). The Dail resolution approving the Agreement was unconstitutional; so, accordingly, is the appropriation of funds to the Conference and Secretariat.

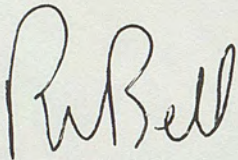
The McGimpseys seek a declaration that the "Agreement is contrary to the provisions of the Constitution"; and the cutting off of public funds for the Conference and Secretariat.

The first two arguments in the statement were expected. The third is ingenious, but surely unlikely to succeed: the alleged duty is difficult to infer from the Constitution, and the judges would not relish pronouncing on what constitutes a democracy. The fourth argument could be taken as significantly restricting the rights of the Irish government to dabble in Northern Ireland affairs: a restriction even more contentious than that imposed by the SEA judgment. The fifth argument will not be made out unless one of the others is.

We are now slightly better placed now than before to pronounce on the action's chances of success. The least desirable outcome, from our point of view, would be a finding of incompatibility between Articles 2 and 3, and Article 1 of the Agreement. The best - not beyond hoping for - is a finding of compatibility, based on a minimalist interpretation of Articles 2 and 3. A middle course is perhaps more likely than either, and has dangers. The McGimpseys might be deemed not to have a sufficient interest to sue - which may leave the argument hanging for another day. Or the Agreement may be found constitutional, but on the basis of a minimalist interpretation of it by the court; which would lead Irish governments to tread very warily in the future, and might lose us all hope of persuading Unionists Article 1 had something in it for them. Indeed, if the Irish government - as must be tempting for them - argue for such an interpretation, that might itself be damaging (which is another reason why the Irish need reminding of the dangers of merely 'defending' the Agreement. There are ways and ways of doing this. It is not for us to seek to dictate to the Irish the conduct of their case. But we can (and in my view should) remind them of the consequences of saying things, even in defence, on which critics can pounce and which could prejudice our dialogue with the Unionists).

Action

I am putting up today a submission bringing Ministers up to date on the case (and which happily can benefit from yesterday's discussion in PUS' AI Steering Group), without (I hope) too much troubling them with arcane constitutional points, and suggesting a public line to take. We should become clearer, as we see further papers, what all the likely outcomes are. We shall then have to make more detailed plans about our response. In the meantime I am very grateful for the help and attention both the Secretariat and Embassy are giving to this issue.



P N BELL

SIL

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