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PS/Secretary of State (L)

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Mr Burns
Mr Stephens - M
Mr Chesterton
Mr Innes - M
Mr Steel - M
Mr Blackwell - M
Mr Coston - M
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Mr Nelson, Crown Sol - M
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Mr George, RID, FCO
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Mr. Maxwell

US EXTRADITION CASE: JOSEPH PATRICK DOHERTY

Introduction

This submission reports on the visit (forecast in my earlier note of 19 June) which the Crown Solicitor, a Home Office Legal Adviser and I made to Washington recently in order to ensure that we could file an extradition request as soon as necessary. It also gives the latest state of play; and seeks the Secretary of State's confirmation to seeking, if necessary, the extradition of Doherty this time round in respect of only his most serious convictions for crimes committed in 1980.

The INS Appeal

2. The US Department of Justice do not expect their Attorney General to decide to uphold or reject the appeal of the Immigration and Nationality Service (INS) against the Board of Immigration Appeals (BIA) judgement for at least two months.

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If he upholds the BIA decision that Doherty should be deported to the Irish Republic, then the Justice Department would seek Doherty's arrest on foot of a provisional arrest request which we have already given them. As soon as Doherty had been arrested under this procedure, we would then have 60 days to submit the full set of extradition papers.

3. If the Attorney General overturns the BIA decision, thereby accepting the INS view that Doherty should be deported to the UK, Doherty will appeal almost certainly. Given the salience of this case for US Immigration law as well as for its wider extradition connotations, the case could reach the US Supreme Court. For us, deportation to the United Kingdom, eliminating the need for extradition proceedings, would be the ideal outcome. It is, therefore, in our interest to allow the INS case to proceed. However, if it appears that these proceedings are going to drag on indefinitely, we could at any stage seek Doherty's extradition. Equally, if at the end of this track it was held, (eg by the Supreme Court), that Doherty should not be deported to the UK, then once again we should be back on the extradition track.

On What Grounds should we seek to extradite Doherty?

4. Whatever the Attorney General determines, we may thus end up by having to seek Doherty's extradition. And, should the INS appeal fail, we may have to initiate that process in, say, two months from now. We must, however, first resolve the following:

- (a) should we seek Doherty's extradition in respect of both his convictions for crimes committed in 1980 and his alleged 1981 offences, or just in respect of the former? and
- (b) if for just the former, in respect of which convictions in particular?

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Convictions and/or Offences?

5. Neither Justice nor we are in any doubt but that Doherty should be sought in respect of (at least some of) the crimes which he committed in 1980 and for which he was convicted in 1981. But, as my earlier submission explained, the validity of the 1983 warrants in respect of the 1981 offences he is alleged to have committed during his escape (for which extradition was last sought) is questionable. They have accordingly been withdrawn. We could, of course, secure new, valid warrants. But we could not explain why we had taken this unusual step without drawing the court's attention to the defects of those earlier warrants.

6. Our American lawyers believe that it would be foolish now to proceed in respect of the alleged 1981 offences: First, we do not need to extradite Doherty for these offences: he has already been sentenced to 30 years imprisonment for murder. Second, seeking extradition for them would inevitably lead to complex legal arguments, including the bearing of the US Statute of Limitations on Mr Doherty's offences, in the course of which we could not help exposing the weaknesses of the 1983 warrants. And, third and most important, those defects were such that, if they became the subject of argument in court, they would materially assist Doherty's lawyers in resisting extradition under the terms of the "humanitarian safeguard" incorporated in Article 3 of the Supplementary Treaty which allows a US court to deny extradition if they believe that the request has been made with a view to try and punish someone on account of "his race, religion, nationality or political opinions".

7. We therefore concur with the American lawyers that it would be counterproductive, on both pragmatic and policy grounds, to seek to extradite Doherty in respect of the offences he is alleged to have committed when escaping from custody in Belfast in 1981.

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Out Extradition for which Convictions?

8. All agree that we should seek to extradite Doherty in respect of his convictions for murder, and attempted murder; but not for membership of a proscribed organisation, which is clearly non-extraditable. The difficulty concerns his conviction for possession of firearms and ammunition with intent to endanger life etc, and for which, among others, his extradition was sought in 1983.

9. The US side favoured the omission of this conviction although we argued then for its inclusion on the grounds that it was a serious offence (for which Doherty received 20 years concurrent), and that it was worth establishing that the Supplementary Treaty extended to possession offences where the facts showed actual use. Further reflection, however, shows that there is a stronger case for following the advice of the Justice Department. Our legal advice is now that:

- (a) murder and attempted murder are clearly extradition crimes, being listed in the schedule to the 1972 Extradition Treaty. They are also listed by name in the 1986 Supplementary Treaty among the crimes in respect of which the political offence exception cannot be claimed. If an extradition request cannot succeed in respect of these, it is unlikely to succeed at all;
- (b) given the relaxed attitude of US law to firearms, it is doubtful whether we could persuade a US court that possession with intent is, in fact, an extraditable offence; and
- (c) even if a US court could be so persuaded, there are grounds for believing that, even under the terms of the Supplementary Treaty, Doherty would still be able to run the political offence exception on the firearms request. (This is because the Treaty rules out the political offence exception in offences

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involving the use but not, explicitly, the possession of a firearm.)

10. The legal arguments are complex. But there is plainly scope for Doherty's lawyers to argue that extradition should be refused for the firearms conviction. While we might get a satisfactory result, and a useful precedent, we could also get a ruling on either the main or the Supplementary Treaties which would seriously restrict their usefulness in future cases (eg an armed robbery). Doherty's lawyers might choose to appeal these matters right through the system. The delay and expense would be considerable, as would the burden on the US legal team (and the UK). In these circumstances, there is a strong case for only requesting Doherty's extradition for the conviction for murder and attempted murder, but not for his firearms conviction. If need be, we can tell the US court that we are confining our request to murder and attempted murder because these are absolutely straightforward, and will mean a saving of judicial and administrative time, and that Doherty's sentences on those convictions are quite adequate for public safety etc. We would certainly not concede that he was not returnable (or entitled to the benefit of the political offence exception) for the firearms conviction. But we do not see any point, in this case, in litigating over that, given his other convictions.

Other Action

11. We have other action in hand to ensure that extradition proceedings can move ahead as soon as the button is pressed:

- (a) the Crown Solicitor is checking the adequacy of the legal documentation, notably the Certificate of Conviction, and the Statement of the Facts which will be submitted in support of the extradition request (which we shall prepare in the light of your decision in response to this submission);

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- (b) I have invited the US Attorney who will be representing us in New York to visit the UK, including Northern Ireland, as soon as extradition proceedings have started in order to familiarise herself with the problems; and
- (c) begun contingency planning to deal with the "worst case" outcome: namely if Doherty is deported to the Republic. (At present our favoured option would be to secure his conviction, as has happened with six other 1981 escapers, under the Republic's extraterritorial legislation and then seek extradition in respect of the original conviction.)

13. In addition, a great deal of supplementary briefing will be required on all aspects of law enforcement in Northern Ireland; and, on the precedent of a parallel extradition case (McMullen), in response to extensive requests for additional information by the defendant's lawyers.

Conclusion

14. Our visit successfully established a cordial working relationship with our American lawyers; we have resolved, subject to the Secretary of State's views, the major problem of the grounds on which Doherty's extradition should be sought; we have identified, and again subject to the Secretary of State's agreement resolved a difficulty about his convictions; we are, in general, much clearer now about the way ahead.

15. But we are under no illusions about the difficulties of this case. Doherty is ably represented (so ably, that news of our visit to Washington had reached his Attorney in New York) and we will have a very hard fight on our hands which could well end up before the US Supreme Court.

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Recommendation

16. Against this background, therefore, I recommend that, if Doherty is not deported to the UK and it is necessary to seek his extradition, then we should seek his extradition only in respect of his convictions for the 1980 offences of murder and manslaughter. Meanwhile officials will press on with the related tasks summarised in paragraph 11 above.

17. The Home and Foreign and Commonwealth Offices are content with this recommendation.

PN Bell

P N BELL

9 July 1987

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