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FROM: Q J THOMAS - AUS(L)
19 MAY 1989

1. Mr Gilmore *QJ*
2. Mr Allen McVeigh
- Pl. file

c.c. PS/PUS (L&B) - B
Mr A W Stephens - B
Mr Burns - B
Mr Steele - B
Mr A P Wilson - B
Mr Bentley HO
Mr MacCabe *CM 22/5* - B
Mr Blackwell
Mr Bell - B
Mr Daniell - B
Mr Masefield - B
Mr Nelson, CSO

1. PS/MINISTER OF STATE (L&B) - B
2. PS/SECRETARY OF STATE (L&B) - B

EXTRADITION: CRUMLIN ROAD ESCAPERS

1. Mr Skenson *QJ 28/5*
2. Miss McGowan *ofr.*
3. Mr J Stephens *G 22/5*

Five individuals are at present serving sentences in the Republic of Ireland for offences committed in the course of escape from HMP Belfast in 1981. They are due for release at varying dates from July onwards. This submission invites the Secretary of State to decide whether warrants should be forwarded to the Republic seeking their return to Northern Ireland on release to serve the unexpired portions of their sentences; and if so, whether account should be taken of time spent in prison in the Republic in calculating the unexpired portion of those sentences. It is agreed with Prison Department.

Background

2. The five individuals are: R G Campbell, A Fusco, P P Magee, M A McKee, and Anthony Sloan. All escaped from Belfast Prison in 1981, whilst serving long fixed-term sentences. In addition, Campbell, Fusco and Magee were subject to life sentences, running concurrently. All five fled to the Republic, but were arrested and tried extraterritorially there for the escape and connected offences. They were sentenced to ten years' imprisonment in the

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Republic, subject to remission. Details of the sentences and likely release dates are at Annex A. (A sixth case exists, that of Gerard Sloan, a Crumlin Road escaper sentenced to five years imprisonment in the Republic on 20 April. But in his case a warrant has already been sent to the Irish, on a contingency basis.)

3. Under Section 72 of the Criminal Justice Act 1967, a magistrate can issue a warrant for the return of an escaped fugitive to prison in Northern Ireland. A Section 72 warrant is subject to broadly the same procedures as any other warrant for the arrest of a fugitive offender, save that the Irish Attorney General is not obliged to exercise his powers to consider the sufficiency of the evidence or the intention to prosecute under the 1987 Extradition Act.

Should warrants be forwarded to the Irish?

4. It is possible that the Irish courts regard the ten-year sentence imposed in 1981 as full and adequate retribution both for the escape and for the previous offences of the five. They may therefore resist the idea of returning them to Northern Ireland to serve longer in custody. It could be argued that if we intended to exact our "pound of flesh" we should have extradited the five in the first place. On the other hand, the five were all originally convicted of serious terrorist crimes. It would be very difficult to defend a refusal to use an existing mechanism for their return to Northern Ireland. The Attorney General and Solicitor General both believe it to be in the public interest that warrants be forwarded. I so recommend.

How should the remaining sentences be treated?

5. Should the periods of custody served in the Republic be taken into account in determining the length of time that the five should serve, if returned to Northern Ireland? This is one of the questions which the Irish courts would ask in considering our Section 72 warrant, and may determine their approach to it.

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Discussion

6. The legal position is that under Section 38 of the Prison Act (NI) 1953, any time spent "unlawfully at large" shall not count towards a prison sentence unless the Secretary of State otherwise directs. Our legal advice is that, under Northern Ireland law, the five have been "unlawfully at large" since 1981 (although actually imprisoned in the Republic). Unless the Secretary of State directs otherwise, therefore, no account will be taken of the period they have served in the Republic in determining their sentences. The key issue is whether the Secretary of State should issue a direction under Section 38, and if so, in what terms.

7. The following policy considerations are relevant:

- (a) It might be considered inequitable to ignore the sentences in the South, given both the comparison with similar escape cases in the UK (see (b) below) and the apparent harshness of treating the prisoners as being unlawfully at large when they were in fact in prison in the South as a result of proceedings we helped to instigate. (Although our legal advice is that the prisoners are in law 'unlawfully at large', in another sense they are plainly not.)
- (b) comparison with similar escape cases in the UK. Any time an escaper spends serving a sentence after his escape in any prison in the UK counts towards the original sentence - unless the new sentence was imposed to run consecutively. The Republic's court was not, in these cases, in a position to order that the sentence be served consecutively. The general, but not invariable, practice of the UK (and Irish) courts has been that sentences for escape have been made consecutive to other fixed-term sentences. On the

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other hand, a court in the UK cannot make any sentence consecutive to a life sentence; and three of the five have life sentences. Further, the Irish court probably did not envisage return to Northern Ireland at the conclusion of their sentences in the Republic;

- (c) the difference in sentencing practice between Northern Ireland and the Republic. The five were sentenced to ten years for escape, subject usually to 25% remission. The maximum sentence for "breach of prison" in Northern Ireland is seven years, subject (at the time) to 50% remission. The net effect of these differences is that, unless account is taken of time served in the Republic, the five will serve longer sentences than the harshest likely treatment they would have received if tried in the UK. (Annex B sets out in detail the effect of the differences);
- (d) the effect on extradition relations with the Irish. If we decide not to take the Irish sentences into account, we do not intend to seek the views of the Irish in advance. But our expectation is that they would see that refusal as unjustifiably harsh. Their courts may be correspondingly unwilling to uphold the warrants. They might also be less willing to impose heavy sentences on escapers in future. The possibility of a row with the Irish need not, of itself, lead us to adopt a more lenient approach. It would seem sensible however to maximise our chances of success - not least because we may wish to use the Section 72 route for Maze escapers again in the future;
- (e) the effect on domestic opinion. These five were convicted of serious terrorist crimes. It is possible that if the Secretary of State were to exercise his discretion to remit part of the sentences (in itself an

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unusual act) he might be criticised for allowing terrorists to "go free". I believe, however, that this can be defended by referring to the harsher treatment for escape in the Republic of Ireland;

- (f) the effect on extradition of cases other than in the Republic of Ireland. If the Secretary of State exercises his discretion in these cases it is possible that fugitives in other jurisdictions might claim that, if convicted criminals have had their sentences remitted in part, unconvicted fugitives are an even clearer case for the exercise of his discretion. It is possible that fugitives in other jurisdictions such as Doherty (also a Crumlin Road escaper and detained in the US pending deportation) might claim it as a precedent. However, this argument - if it surfaces - can be rebutted by pointing out that in an arrangement unique to the Republic, the five were tried extraterritorially and convicted in the Republic at least in part at our instigation;
- (g) the precedent which we would set. Given the difficulties associated with the use of the extraterritorial legislation in escape cases, it is less likely that we will seek to use this route for escapers in the future. However, at least one case (G M Sloan, see paragraph 2) already exists, and the treatment of the five will set a precedent in his case at least.

Options

8. Ministers have the following options:

Option A: To do nothing, in which case no account will be taken of time served in the Republic. All the escapers would serve between three and half and seven years longer in

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custody than they would have done under the harshest likely treatment if they had been tried in the UK (see Annex B). It is particularly harsh in the case of the three life sentence prisoners because it would make their life sentences consecutive to the sentences for the escape: a practice which could not be followed if they had been tried in the UK. There would be an increased risk of the Irish courts rejecting the warrants.

Option B: To direct that account be taken of time served in the Republic in respect of the life sentences, but not in respect of the fixed terms. This could be justified on the ground that under UK law sentences cannot be made consecutive to a life sentence, but can be made consecutive to another fixed term. But this would only make a difference to the three lifers; the two escapers with fixed sentences only would serve at least three and half years longer than the harshest likely sentence in the UK. Although attractive as a compromise, appearing to treat some of the escapers differently from others might mean that this option gives greater cause for protest and for challenge to the decision. It would also draw attention to the Secretary of State's discretionary power and accordingly to his failure to use it in the two fixed term cases.

Option C: To direct that full account of time in the Republic be taken in respect of both life and fixed terms. This option ensures that all escapers are treated either the same or, in the case of those serving fixed terms only, more leniently by some three and a half years than the harshest likely treatment if tried in the UK. (In the case of McKee, it would result in him having just two years left to serve on return to Northern Ireland.) This option runs the least likelihood of creating

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political difficulties with the Republic, or of causing the warrants to be rejected by the courts there. But is open to charges of leniency; in particular it means that the two fixed term prisoners will not serve extra time as a result of their escape although the three life sentence prisoners may well do so.

Conclusion

8. The considerations are complex and there is no "right" answer. On balance, officials would prefer not to draw a distinction between fixed-term and life sentences, and therefore reject Option B. Whilst the choice between options A and C is not easy, we believe that the key considerations are keeping broad parity with sentences imposed in the UK; and the desirability of encouraging the Irish courts to continue to impose heavy sentences in future extraterritorial cases. Both point towards option C as the correct decision. That this may avoid friction with the Republic, or at least ensure that in any row our ground is defensible, is an incidental advantage. The precedent this will set will be relevant only to future cases of extraterritorial prosecution for escape; and we believe one moral of this is that we shall, generally speaking, stick to extradition in future escape cases.

Summary of recommendations

9. I recommend that:

- (i) the Secretary of State should agree to the preparation and despatch to the Republic of warrants for the return of the five escapers under Section 72;
- (ii) the Secretary of State should decide now that, should the five be returned, he will direct that full account be taken of the time spent in prison in the Republic in

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determining the period still to be served in Northern Ireland; and that his decision to do so be made known to the Irish as soon as it is appropriate to do so. (We would propose to brief the Irish through the Secretariat before the warrants are despatched.)

10. If the Secretary of State agrees with (ii) above, he may wish to write to the Home and Scottish Secretaries informing them of his decision, which may set a precedent in GB cases. I will provide a suitable draft in the light of the Secretary of State's decision.

(signed:)

Q J THOMAS

AUS (L)

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REPUBLIC OF IRELAND SENTENCES AND RELEASE DATES

	SENTENCE FOR ESCAPE IN ROI	ESTIMATED RELEASE DATE
R J CAMPBELL	10 years	3.7.89
A FUSCO	10 years	16.12.91
P P MAGEE	10 years	25.8.89
M A MCKEE	10 years	5.9.89
A G SLOAN	10 years	25.8.89

Note: Although the sentences are identical the release dates are different, because of differing periods spent on remand in custody and differing dates of arrest.

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EFFECT OF SENTENCING OPTIONS AND COMPARISON WITH UK

YEARS TO SERVE ON RETURN TO NORTHERN IRELAND¹.

ESCAPER/DOMINANT SENTENCE	OPTION A	OPTION B	OPTION C	HARSHEST LIKELY IN UK ³ .
R J CAMPBELL ² . (Life sentence & 20 years fixed term)	19	12	12	12
A FUSCO ² . (Life sentence & 20 years fixed term)	19	12	12	12
P P MAGEE ² . (Life sentence & 20 years fixed term)	19	12	12	12
M A MCKEE (20 years)	9	9	2	5½
A G SLOAN (20 years & 5 years consecutive)	11½	11½	4½	8

Notes

1. Assumes that each escaper will have served 7 years in custody in the Republic. The precise figures for each could only determined by consultation with the Republic's authorities.
2. Assumes that life = 20 years.
3. Assumes that maximum sentence of 7 years, consecutive to fixed terms, would be imposed. Actual treatment might well be more lenient.

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