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Legal Position in Respect of Overflights by British
Military Aircraft

1. By virtue of the Air Navigation (Foreign Military Aircraft) Order 1952, the power to permit overflights is vested in the Minister for Foreign Affairs. The operative Articles of the Order are as follows:

"No foreign military aircraft shall fly over or land in the State save on the express invitation or with the express permission of the Minister.

Every foreign military aircraft flying over or landing in the State on the express invitation or with the express permission of the Minister shall comply with such stipulations as the Minister may make in relation to such aircraft."

The full text of the Order is annexed.

2. Successive Legal Advisers have agreed with the view that "express permission" must be interpreted as excluding retrospective consent. A former Legal Adviser (Mr. M. Hayes) has stated

"From the wording of the Order (in particular the use of the word 'express') and the fact that an offence is involved it is my firm view that the appropriate invitation or permission may not be given retrospectively".

3. Legal advice has also been sought on the question of the administrative arrangements that might be necessary in granting permission for overflights in order to ensure that the terms of the Order are complied with. The following is the view of the Legal Adviser (Miss Skinner):

"The problem in my view relates to the interpretation of the term "express permission" and whether this means that times, place, purpose, number of flights, type of aircraft, altitude and flight paths must be specified. There are three main elements - the area in question, the nationality of the military aircraft and whether it may only overfly or may also land - which must be dealt with in the permission given by the Minister. In relation to the area it does appear that a general reference would suffice. Neither does it appear to be necessary to specify by date or time, though a general indication such as during daylight hours might be included if there is any intention to limit the time during which flights may take place.

In relation to the conditions which the Minister may wish to impose if compliance with them would incur sanctions then these must also be included in any permission granted".

The Legal Adviser concluded that specifying the flights by purpose, indication of the general area and listing of the conditions would not infringe the requirement that "express permission" must be given.

4. Specifically in relation to the question of the granting of permission for a quota of overflights the Legal Adviser is of the opinion that a limited quota of overflights could also be provided for without specifying the exact location but in that case some general area within which the permission would operate would need to be specified. The same would apply in relation to the precise timing and a period within which flights could take place should be specified.

Department of Foreign Affairs
September 1979

S. I. No. 74 of 1952.

AIR NAVIGATION (FOREIGN MILITARY AIRCRAFT) ORDER,
1952.

I, SEÁN F. LEMASS, Minister for Industry and Commerce, in exercise of the powers conferred on me by the Air Navigation and Transport Act, 1946 (No. 23 of 1946), hereby order as follows:—

1. This Order may be cited as the Air Navigation (Foreign Military Aircraft) Order, 1952.

2. In this Order—

the expression "military aircraft" means aircraft used in military service;

the expression "aircraft used in military service" includes naval, military and air force aircraft, and every aircraft commanded by a person in naval, military or air force service detailed for the purpose shall be deemed to be an aircraft used in military service;

the expression "the Minister" means the Minister for External Affairs.

3. No foreign military aircraft shall fly over or land in the State save on the express invitation or with the express permission of the Minister.

4. Every foreign military aircraft flying over or landing in the State on the express invitation or with the express permission of the Minister shall comply with such stipulations as the Minister may make in relation to such aircraft.

5. Articles 3 and 4 of this Order shall not apply to foreign military aircraft engaged in searching for an aircraft in distress or in rescuing survivors of an aircraft accident but—

(a) no such foreign military aircraft shall enter any area appointed as a prohibited area under or by virtue of an order made under Part II of the Air Navigation and Transport Act, 1946 (No. 23 of 1946), and

(b) any such foreign military aircraft shall comply with such stipulations as the Minister may make in relation to it.

6. Article 75 of the Air Navigation (General) Regulations, 1930, is hereby revoked.

GIVEN under my Official Seal this 27th day of March, 1952.

L.S.

(Signed) SEÁN F. LEMASS,
Minister for Industry and Commerce.

The version of this Statutory Instrument in the Irish language, officially prepared, is printed on the opposite page.

Ministerial meeting in London (early October)

Gals?

1. Since the meeting between the Taoiseach and the British Prime Minister on 5 September representatives of the Departments of the Taoiseach, Foreign Affairs and Justice have met twice, on 10 and 14 September, 1979. They have considered in particular the suggestions put forward in the British Embassy's Aide-Mémoire of 7 September (Annex I) which correspond approximately to those made by Mrs. Thatcher in London two days before. The Department of Justice has obtained the views of the Garda Commissioner and has produced a document based inter alia on his assessment. The Garda Síochána have profound reservations about many aspects of the British proposals.
2. At Downing Street on 5 September the Taoiseach, the Tánaiste and the Minister did not conceal the difficulties which would arise from attempting to implement the British proposals, but none was rejected out of hand. In general the line taken was that in the context of really serious or emergency incidents certain steps could be looked at (e.g. communications from British Army direct, block permission for overflights). Other proposals would be examined, due reservations having been expressed (e.g. R.U.C. participation in interrogation, special Garda units and patrols, exchange of police liaison officers. In these cases joint police assessment was recommended by the Taoiseach).
3. The British reaction to these responses was marked by a degree of satisfaction at the time of the meeting. In the course of the discussions both the Taoiseach and the Prime Minister had made emphatic statements about their determination to stamp out terrorism which was a threat to democracy. This determination is reflected in the agreed communiqué (Annex II). Mrs. Thatcher expressed the view at the talks that the two Governments could not declare terrorism to be a threat and then do nothing.
4. It is clear from the evidence of British attitudes at the meeting in London that they expect that we will be able to extend cooperation in at least some of the ways which they have suggested.

Conversely it can be predicted that if the meeting between the Minister and Mr. Atkins does not produce that result, there would be an adverse reaction which may be publicly expressed but which would certainly be "fed" to the British media by the British Government. A renewal of the campaign of criticism against the Government's approach to security would inevitably follow. At inter-Governmental level, there might be a request for a new meeting between the Taoiseach and the Prime Minister. In the foreseeable context of further terrorist outrages, possibly within our jurisdiction or close to the border, and in the current atmosphere of heightened tension between the two parts of the community in Northern Ireland, an over-negative or unenterprising approach on the part of the Government to security cooperation would make us an easy target for media criticism. The part of prejudice and manipulation in the popular British press's recent attitude to our authorities is of course recognised, and these are factors which cannot be countered by press and information work, however dedicated and well directed.

5. It appears accordingly that both in regard to the British Government's approach to us and the attitude of the British public, our response if it is to be adequate must include substantial steps in the security sphere. The consideration of what these steps might be is a matter for political decision in which the questions of security cooperation with Britain, Anglo-Irish relations generally, policy in regard to Northern Ireland, the likelihood of further serious subversive terrorist activity in our jurisdiction, internal security legislation and its application, and the current state of Irish public opinion all need to be given due weight.

6. Our difficulties with aspects of the British proposals were already made known at the Downing Street meeting. It is possible to foresee, from the manner in which the British presented their case on that occasion, that they will not be persuaded by a repetition of our arguments. If that were our approach it would be likely to appear to British eyes, in broad terms, that our authorities were satisfied with the status quo, which represented

an extreme effort on our part, and that we could not easily envisage any further measures either because they would require changes in the legislative status quo or because they are judged by our police to be likely to be ineffective or even counterproductive. The British side would find a failure on our part to try anything new unreasonably inflexible.

7. It has to be said that there are also certain negative technical arguments advanced against the current British proposals which may leave us open to a strong political counter-attack. For instance, the objection that certain types of inter-police collaboration would lead to individual members of the *Gárda Síochána* and the R.U.C. becoming targets for terrorist attack would carry no serious weight with the British side. It is only too likely that such an argument would lead to counter-questions - similar to those already heard on 5 September - about our political will. Similarly the point which has been made by the *Gárda* that closer involvement with the R.U.C. would alienate the local community in our border areas, is one which could hardly be presented to the British without provoking a damaging reply. It carries a number of implications which the British could hardly fail to seize upon and exploit, such as that the *Gárdaí* only enjoy the confidence of the local community because they operate in a manner which the British maintain is lenient towards I.R.A. activists and fugitives; and that the local community is sympathetic to the I.R.A. and would withhold its cooperation from the *Gárda* once the latter would begin to take "serious" cooperative counter-terrorist measures.

8. The main monument to security cooperation between Britain and Ireland in the past has been the legislation of extraterritorial jurisdiction mutually by the two parties. A major part of the case we have presented, to Britain and to the world, about the treatment of fugitive offenders has been that judicare is as valid a principle as dedere in dealing with criminals of this class. In regard to the operation of the British and Irish Acts we have more than once expressed surprise that the legislation has never or seldom been used, and have urged the British to remedy that neglect.

● The British authorities are apparently now prepared to try this approach and have, perhaps temporarily, left aside demands for extradition. It seems incumbent upon us to examine our law very closely. If we are serious in our desire to see fugitive terrorist criminals convicted here we have the obligation to ensure that provisions for the arrest and interrogation of suspects are likely to be reasonably effective. This may or may not involve closer forms of cooperation with the R.U.C., such as they have sought. The main point is that we have sunk a lot of diplomatic capital in the principle that we shall try for offences committed in other jurisdictions. The principle must be seen to work. It would appear that provisions for the detention of suspects similar to those contained in Section 30 of the Offences against the State Act, 1939 should be enforceable also under the Criminal Law Jurisdiction Act, and that the legislation should be thoroughly reviewed at this stage.

9. In this and other areas, specifically those designated (i) to (iv) in the British Aide-Mémoire, matters arise which are of purely internal concern. In such areas it is suggested that the British be left in no doubt that they are matters for sovereign decision by us and that we are not susceptible to pressure or open to discussion about them. It could be arranged that the British authorities would be informed through appropriate channels of any decisions in this sphere after we have taken them.

10. A suggestion made by our side on 5 September was that the British Army and the R.U.C. should patrol right up to the border in all areas, as our security forces do. It would seem appropriate to develop an appropriate case pressing this request.

11. In regard to procedure, the British propose a preparatory meeting at official level at an early date before the meeting between the Minister, the Minister for Justice and Mr. Atkins. There are certain questions which we would be glad to have the opportunity to put to the British side, notably relating to overflights. For the rest, the British have called the meeting and will no doubt explain their idea of its purpose at the time. The Embassy has indicated that their idea in proposing a meeting

of officials was to prepare the meeting of Ministers by attempting to put the subjects for discussion in a proper and if possible agreed context. This could avoid a situation in which Ministers' time was wasted on "red herrings". Rather than attempt to resolve questions of substance, officials might attempt to set out clearly for the information of Ministers the different points of view of the two sides.

12. It is considered that a refusal on our part to agree to the suggested meeting would probably be interpreted by the British as reluctance on our part to explore fully and urgently the proposals they have made. In the event, unfortunately not improbable, of further major terrorist incidents before the Ministerial meeting, our position would be very much weaker if we were seen to be dilatory on procedure as well as inflexible on substance.

D. M. Neligan
Department of Foreign Affairs