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PIA - Requests

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DEPARTMENT OF FOREIGN AFFAIRS

SECURE FAX

Urgent

COVER SHEET (ONE PER ADDRESSEE)

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(INCLUDING COVER SHEET)

IMMEDIATE / URGENT (DELETE AS NECESSARY)

TO Belfast FROM HQ

FOR Joint Sec. FROM Mr P. Hennessy

REF: YOUR/MY

SUBJECT

COMMENTS

REPLIES TO THIS FAX MESSAGE TO BE SENT BY SECURE FAX TO HQ
FAX NO. 784936

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318/2

Secure FAX

20 May 1993

TO: Belfast FROM: H.Q.

FOR: Joint Secretary FROM: P. Hennessy

Inquests

1. As you are aware the British side have advised us that a review of the Inquest system in Northern Ireland is currently under way under the aegis of the Lord Chancellor's Office. We attach for transmission to the other side a paper setting out our views on the deficiencies of the present system and on possible reform measures. In the main these cover similar ground to that reviewed in the comprehensive SACHR and CAJ reports on this issue. However regarding the suggestion in the SACHR report of a possible move in the long term to the Scottish model of inquisitorial review we have sounded a note of caution at the prospect of the possible abolition of the jury system in NI. There is a danger that in Northern Ireland any such development would leave intact the present severe constraints of law and practice, which are considerably more restrictive than those currently applicable in Scotland.

2. We would not envisage going into this matter in detail under the lethal force item at the Confernce, beyond perhaps noting that we have handed over a paper and that an early meeting at official level is planned particularly focussing on the question of Public Immunity Certificates.

Inquests in Northern Ireland

Views of the Irish Side

1. Background

In the majority of cases of controversial killings in Northern Ireland involving members of the security forces the Inquest system provides the only form of public inquiry into the circumstances in which these killings occurred. It follows therefore that the manner in which the system operates, and the extent to which it is perceived as facilitating a prompt and thorough review of disputed killings, has a significant impact on confidence in the system for the administration of justice.

Measured against these yardsticks the present situation cannot be regarded as satisfactory. A series of measures over the years, most particularly those contained in the Coroners (Practice and Procedures) (Amendment) Rules (Northern Ireland) 1980, have significantly curtailed the scope of inquests. In the process they have produced marked differences as between the manner in which the inquest system operates in Northern Ireland and in England and Wales.

Calls for a review of the inquest system have been made by among others, The Standing Advisory Commission on Human Rights, the Committee on the Administration of Justice, Amnesty International, and the Solicitors Criminal Bar Association. Recent reports by SACHR and the CAJ have made clear that the inquest procedure, as presently constituted, is inadequate for the purposes of fully investigating the circumstances surrounding disputed killings. Indeed by allowing suspicions of cover-ups to develop the present system may in fact be contributing to an erosion of confidence in the justice system.

This paper outlines the areas of the present inquest arrangements which are a cause of particular concern, and makes suggestions for reform which the Irish side would

wish to see considered in the present review of the inquest system in Northern Ireland.

2. Areas of concern

a. Obligation to hold an Inquest

Whereas it is the case in England and Wales, and in this jurisdiction, that coroners must hold an inquest in cases of violent or unnatural death this is not the case in Northern Ireland where Section 11 of the Coroners Act (Northern Ireland) 1959 states that a coroner may "determine whether or not an inquest is necessary". Consideration should be given to the removal or amendment of this optional power to allow for the introduction of a general duty to hold an inquest in cases of violent or unnatural death.

b. Delays

Rule 3 of the Coroners (Practice and Procedures) Rules (Northern Ireland) state that a coroner should decide whether to hold an inquest "without delay" and that "every inquest shall be held as soon as is practicable after the coroner has been notified of the death". However, it is the practice in Northern Ireland for coroners not to open any inquest until they have been informed by the prosecuting authorities that no charges are to be brought in respect of the killing or until charges have been disposed of. This means that in many cases the inquest opens long after the disputed death.

The practice followed in Northern Ireland appears to go beyond the requirements of the relevant legislation and rules. For example, contrary to the norm in England and Wales, it is usual in Northern Ireland to extend the period of delay to include subsequent appeals, rather than limiting it to hearings of first instance. It is also noted that in practice the Northern Ireland authorities appear to be in a position to determine the length of adjournment of inquests, giving the impression, as the SACHR report puts it, that -

> "it is the police and prosecuting authorities who determine the date of the inquest."

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In his report to SACHR Professor Hadden referring to the problem of protracted delays comments -

> "this has resulted in widespread suspicion that at least some of the delays are deliberate and are due to a reluctance on the part of the security forces to submit their actions to public scrutiny."

He notes that this view has been reinforced by the comment of a previous Lord Chancellor that inquests may be delayed for unspecified "policy reasons". It will be appreciated that failure to clarify the basis on which decisions in this area are taken will only add to the scepticism with which many aspects of the inquest system are presently viewed.

Overall, undue delays call into question the ability of the inquest system effectively to inquire into the circumstances of disputed killings. They also hold up the payment of compensation to the families of the victims. We would expect that any review of the system would address these problems, particularly as in many cases they appear to derive from practice not strictly required under the provisions of the existing legislation.

c. Witnesses.

The 1980 Ministerial Order amending the Coroners Rules in Northern Ireland introduced significant changes to the summoning and cross-examination of witnesses at inquests.

Coroners in Northern Ireland were given discretion as to whether to summon and allow cross-examination of particular witnesses and can refuse to call someone who may have relevant evidence. In addition a person who is suspected of causing the death, or has been, or is likely to be, charged with an offence in connection with the death, can no longer be compelled to attend an inquest and give evidence. Members of the security forces responsible for a disputed killing cannot therefore be compelled to give evidence or submit to cross-examination. This was confirmed by the House of Lords in its ruling on the McKerr case in 1990.

Prior to 1981 a coroner had to examine on oath all persons who tendered evidence as to the facts of the death. In England and Wales, and in this jurisdiction, all relevant witnesses are required to attend and provide evidence at an inquest if summoned by a coroner, and their rights are safeguarded by provisions against self-incrimination.

d. Witness Statements

Coroners in Northern Ireland have absolute discretion to accept written, unsworn statements from any witness. These statements are not subject to any form of cross-examination. In practice this allows a coroner to decide to accept without question the unsworn statements of members of the security forces who claim immunity from attending an inquest because they are suspected of causing disputed deaths. This was confirmed by the ruling of the House of Lords in the Devine, Devine and Breslin case in 1992. Serious concern has been expressed that this allows members of the Security Forces involved to make their own case and to make allegations about the behaviour and character of the deceased without fear of examination.

e. Public Interest Immunity Certificates

Public Interest Immunity Certificates are a common law power preventing the disclosure of information in the possession of the authorities usually on the grounds of national security. Certificates were first issued by the Ministry of Defence in relation to alleged lethal force killings at the inquest into the Gibraltar killings, and have been used successfully in Northern Ireland on three occasions to prevent the identification of security force personnel and to restrict the evidence provided. As the other side will be aware the Ministry of Defence has sought a judicial review of the recent coroner's ruling in the Hale, McNeill and Thompson inquest that the issuing of Certificates in this case could not be used to shield the soldiers or limit their oral evidence.

Pending the ruling of the court in this matter, we would recommend that coroners be given powers to review all restricted evidence relevant to the issuing of a Public Interest Immunity Certificate and, on the basis of this

independent assessment, be able if necessary to overturn or modify the restrictions placed on the inquest proceedings by the issuing of such certificates.

f. Access to documents produced at inquests

The entitlement of relatives of the deceased to full post mortem reports is at the discretion of the coroner and in many cases full post-mortem reports are not made available to families or their legal representatives. Families are denied access to other forensic evidence and documents (including material witness statements) pending the opening of the inquest itself, and even then coroners have discretion to refuse access to particular evidence of a "sensitive" nature. In the case of inquests involving the use of lethal force this means that the police and the military authorities can have full access to all available evidence prior to the inquest while equal access to the relatives of the deceased and their legal representatives is restricted.

In England and Wales, and in this jurisdiction, the release of full post-mortem report to the next-of-kin is mandatory and we would wish to see changes made in the Coroners Rules to bring the situation in Northern Ireland into line in this regard. We would also recommend that all parties to an inquest be given equal access to evidence submitted and that adequate time and facilities be provided to allow for a complete examination of the evidence to be made.

g. Juries

Juries at inquests in Northern Ireland can no longer return verdicts: a jury can only record their findings as to the identity of the deceased and how, when and where they died. Juries can no longer make recommendations designed to prevent the recurrence of deaths in similar circumstances and a coroner can no longer add riders to verdicts with similar recommendations.

The Irish side note that the present Coroners Rules in relation to the findings of juries differ from those applying in England and Wales. We would recommend, at a minimum, that the power of juries and coroners to make recommendations be re-established and that coroners be

able to add riders to their findings as is the case in this jurisdiction. In the opinion of the Irish side jury findings in a number of recent inquest cases indicate a need to reinforce and broaden the present procedures in relation to the findings which can be returned by inquest juries, thereby enabling them to discharge their important responsibilities in cases where lethal force has been used.

h. Legal Aid

Full civil legal aid is not available to the next-of-kin in inquest cases. This places the families of disputed shooting victims at a considerable disadvantage in comparison with the security forces who enjoy full legal representation at public expense.

While legal aid is available to families for advice about or in preparation for an inquest, legal aid is not available for the full inquest proceedings. This situation is clearly inadequate and unsatisfactory. The Irish side notes that the House of Commons Select Committee on Home Affairs reported in 1980 that the full legal aid scheme should be extended to inquests, and that the Secretary of State for Northern Ireland has the power to provide for this under the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, but that this power has never been exercised. The Irish side would recommend that consideration be given to providing full legal aid to relatives in all cases involving disputed killings.

3. Conclusions

The Irish side are concerned that the amendments made to the Coroners Rules by the Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 1980 in restricting the scope of inquests has created major difficulties in cases concerning disputed killings involving members of the security forces. Given these concerns we feel that there is a genuine need for reform of the present law and practice governing inquests. We believe that such reforms would contribute to enhancing confidence in the arrangements for the investigation of

controversial cases.

We note that SACHR, in their 1991 report, recommended that in the long term further consideration might be given to moving to a more inquisitorial system, perhaps along the Scottish model. While noting some of the advantages claimed for this approach, in the context of the more extensive powers available under the relevant legislation in Scotland, we are also conscious, as indicated by the CAJ, that the Scottish system

> "suffers from some of the same defects (as Northern Ireland), notably the lack of entitlement to participate for relatives of the deceased, the lack of legal aid, and the inability of material witnesses to insist on being heard. It also has some flaws which do not exist in Northern Ireland, such as the total absence of a jury."

For our part, we would of course expect that juries would continue to play a central role in the operation of the Northern Ireland inquest system.

May 1993