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RÚNAÍOCHT IDIR-RIALTASACH
NA BREATAINE-NA hÉIREANN
BÉAL FEIRSTE

BRITISH-IRISH
INTERGOVERNMENTAL SECRETARIAT
BELFAST

SECURE FAX 31

DATE: 13 JANUARY 2000 **NO. OF PAGES: 2**

TO: SECRETARY GALLAGHER **FROM: JOINT SECRETARY**

Subject: Queen's Counsel Declaration

1. I met today (at their request) with Charlie Hill QC and Jim McSporran QC to discuss the High Court case brought by Seamus Treacy and Barry Macdonald against the current QC Declaration, which requires QC candidates to "well and truly serve Her Majesty the Queen". McSporran is the senior member of the Inner Bar in Northern Ireland. (His father was Leader of the Opposition in Stormont back in the 60's).

2. Both Hill and McSporran believe that the High Court case is a lost cause and the outcome a foregone conclusion because the presiding judge, Brian Kerr, NI Chief Justice Carswell and the Lord Chancellor have dug their heels in on the issue and will not easily be moved. In their view, the only way to avert such a potentially damaging and divisive outcome is if the Taoiseach were to raise the matter with the British Prime Minister.

3. As set out in our previous reports, the central basis for the present challenge to the QC Declaration is contained in the Good Friday Agreement - particularly the section on "Rights, Safeguards and Equality of Opportunity" - and sections 75 and 77 of the Northern Ireland Act, 1998, which provide for equality of opportunity and parity of esteem. In essence, Hill and McSporran have asked if the Taoiseach would consider proposing to PM Blair that the Lord Chancellor - given the new dispensation set out in the Good Friday Agreement and the Northern Ireland Act - should set up a Committee to consider the issues involved, thus effectively kicking the matter into touch until it can be resolved amicably and by agreement. In the interim, the two QC applicants could be appointed without having to make the Declaration. (The title Queen's Counsel could be retained). In addition to avoiding a divisive confrontation, this suggestion is all the more persuasive if, as Weatherup (QC for the Lord Chancellor) is reported to have said, the present QC Declaration will in any event have gone within the year (Bill Nolan's Secure Fax No. 14 of 11 January refers).

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4. As you know, in a separate tactical approach, the two QC applicants have enquired about the possibility of becoming Senior Counsel in the South and subsequently applying to become Queen's Counsel. While we have provided some information on the procedure involved in becoming Senior Counsel, I have registered a doubt about the wisdom or desirability of going down that particular road. Both Alban McGuinness and Charlie Hill share that doubt. As Hill noted, even if it were possible to become Senior Counsel as envisaged (and we had no evidence that it was), the QC Declaration would in any event be likely to remain a requirement as things stand.

5. Both Hill and McSporran stressed the need to try and resolve this problem as speedily and as sensitively as possible, before it becomes much worse. They are very conscious of the need to resolve it correctly and satisfactorily, given the likelihood that there will be many human rights and equality cases which eventually end up before the Courts of Northern Ireland. They are also very conscious of the gravity of asking the Taoiseach to intervene as requested, but they believe that it is that important.

6. The High Court case was adjourned on 11 January for two weeks.

7. I should be grateful for your advice in the matter.

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SECURE FAX NO. 73

To: J Bigsor

From: B Mac

Date: 2/12/99 **No. of Pages (including cover page)** 4

Subject: QC Declaration

COMMENT:

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SF 73

TO : JOHN BIGGAR<HQ.

FROM : BILL NOLAN<BELFAST.

re. QC Declaration (yr two messages on Friday, 17/12/99 refer)

1. You will be aware that two of those due to 'take silk' at a ceremony in Belfast tomorrow Tuesday sought a judicial review of the proposed swearing-in Declaration at the High Court on Saturday last, 18 December 1999. We understand that Lord Justice Kerr of the High Court will give a judgement on the matter today, Monday 20 December1999, on whether or not a judicial review of the Declaration can proceed.

If Lord Justice Kerr turns down the application, the expectation is that the two barristers concerned - Seamus Treacy and Barry Macdonald - will appeal the decision. If he allows the application, then a full High Court hearing will have to be arranged. Either way, therefore, the matter will probably take all day today, Monday, before the High Court or the Appeal Court.

2. As instructed, we forwarded a Note to the British side on this matter on Friday afternoon (copy has been sent to you). We have not had a response so far.

3. Michael Lavery QC appeared on behalf of the two applicants before the High Court at Saturday's hearing. He argued that the existing Declaration is unlawful as it is not in any way relevant to the role the applic- ants have already been determined fit to fulfill. In effect, the 12 new QCs have already been appointed; tomorrow's ceremony is a "swearing in" before Lord Chief Justice Carswell. Michael Lavery also argued on Saturday that the Declaration contravenes the Good Friday Agreement, in that it is discriminatory on grounds of political beliefs and sensibilities.

4. As you would expect, there is deep division on this matter within the legal profession and many are worried that the new challenge will further damage relationships. It was very much with this danger in mind that the Bar Council moved to close the matter down quietly following the success of the 1997 Magee case, which resulted in the abolition of of the oath of allegiance to the Queen. A Committee, chaired by a Protestant barrister, Frazer Elliott, proposed new wording for the Declaration and this was later formally adopted by the Council.

5. It appears that the two applicants in the present case were astonished and annoyed when they discovered that, at the swearing- in ceremony, they were expected to make

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the 'old' Declaration rather than the new form adopted by the Bar Council, which proposed dropping the words "to well and truly serve the Queen". Treacy, Macdonald and their supporters are angry that the Lord Chancellor has allowed the present situation to develop. They believe he should have realised that NI is different when it comes to such matters as oaths and declarations. In court today they will point to the new oaths for police recruits and jurors as evidence of this.

6. We will keep you informed of developments as we learn of them today.

7. Attached is copy of letter to the SOSNI on this matter which Alban Maginness has forwarded to us. The enclosed material referred to in Alban's final para. Is material you already have.

20 December 199920.

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the new
Northern Ireland
Assembly

Parliament Buildings
Belfast BT4 3XX

URGENT

Mr. Peter Mandelson MP,
Secretary of State for Northern Ireland,
Stormont,
Belfast.
17th of December 1999.

Dear Secretary of State,

I wish to bring to your attention an urgent matter relating to the imminent call of Senior Counsel to the Inner Bar in Northern Ireland.

Three of the proposed new Silks take great exception to the taking of a Declaration to the Queen.This Declaration is regarded as offensive in political terms by barristers ,including myself, who are nationalists ,republicans ,or simply Catholics.The imposition of this Declaration is of dubious legality and has been the subject of searching enquiry by the Executive Committee of the Northern Ireland Bar, who recommended to the Lord Chief Justice that the wording be changed to make it politically inoffensive. Furthermore the Declaration runs contrary to the spirit of the Good Friday Agreement. However despite the representations of the NI Bar the LCJ has not responded and the Declaration remains unchanged.The Chair of the NI Bar is to see the LCJ this morning at 10 ..30 am ,but there are no positive indications to suggest any radical change of mind on his part.

I have been requested to make this problem known to you for your intervention at this late stage. Alternatively this may be a matter that the Lord Chancellor could properly intervene on,as he has a role in the selection of Silks together with the LCJ.This intervention could be activated by your Office.

Frankly this is a potentially highly charged political matter ,which if not properly addressed now will cause an almighty public row,with damaging consequences for the Bar and indeed the Judiciary.If the latter are not seen to embrace change here like every one else then they will be storing up trouble for themselves and the government in the future.
It is my political opinion that a direct and decisive political intervention by the government now could resolve a potentially embarrassing situation for everybody.

I enclose some useful and self explanatory correspondence by one of the new Silks for your information.This correpondence explains at reasonable length the nature , history ,and legal aspects of the Silks ' Declaration.

Please don't shunt this off to the Lord Chancellor's Office ,have a serious look at this yourself.

Yours Faithfully,

Alban Maginness,BL..
Assembly Member for North Belfast.Office.
228,Antrim Road.Belfast

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JUDICIAL REVIEW: BARRY MACDONALD & SEAMUS TREACY
RE: DECLARATION OF SERVICE TO CROWN BY SILKS

CHRONOLOGY

20th May 1922	First call of Silk following Partition. Requirement to take Oath of Allegiance to Crown imposed by LCJ (apparently) despite being informed that no oath was required in England: see exhibits to Master Wilson's 2nd affidavit in ***Magee*** case.
May 1939	Oath of Office (as opposed to Oath of Allegiance) replaced by a declaration following advice / decision by LCJ: *ibid.*
September 1971	Governor informed by Clerk of the Crown that LCJ awarded Silk as the successor in office of the Lord Chancellor of Ireland and that there was "no more specific legal authority than this and that the request for the issue of a Warrant by the Governor was merely a custom hallowed by long usage": see JWW7.
30th March 1972	Direct Rule imposed by Northern Ireland (Temporary Provisions) Act 1972, s. 1 of which vested all powers of the Governor in Secretary of State for Northern Ireland. (Provisions made permanent by s. 42 NI Constitution Act 1973)
April 1972	Disagreement about exact legal position re appointment of silks: JWW7
May 1995	Judicial Review application by Philip Magee.
?13th June 1995	Parliamentary Secretary to the LC's Department states in answer to PQ that "any modification to the Oath and Declaration for Queen's Counsel of NI would be made by my Right Honourable friend, the Secretary of State for Northern Ireland in the exercise of the Royal Prerogative. He would be advised on the matter by the Supreme Court authorities after consultation with the General Council of the Bar of Northern Ireland". Oath of Allegiance later found to be unlawful and declaration of Service to Crown amended in line with England & Wales.
21st March 1996	Letter from Hutton LCJ to Secretary of State. (**Copy not provided** but extracts recited in Carswell LCJ's letter of 11th June 1987 to LC.) Hutton LCJ states that QC "holds an office under the Crown with the consequent obligation to the Queen" and a barrister who declines to acknowledge this "is not entitled to be a QC". Also contends that "if there is no longer a declaration to serve the Queen it could be argued that there is no longer any reason why they should be called Queen's Counsel". **Copy of Reply not made available** but SoS "a little reluctant to accept that the decision lay with him".
	Secretary of State informs Seamus Mallon MP that his function is one of the Royal Prerogative functions inherited by him from the Governor. Referring to the consultation between the Supreme Court authorities and the Chairman of the Bar Council about the terms of the Declaration, he states "such consultation about matters of custom and practice is a matter for the Supreme Court authorities and not something in which it would be appropriate for me to intervene."
April / May 1996	Correspondence between Philip Magee and Hutton LCJ's Private Secretary in which serious concerns were expressed about the terms of the Declaration.

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1st May 1996	Meeting between LCJ & SoS. **Minutes not made available** but SoS "made the point that in England the Letters Patent contain no reference to the Declaration"
2nd May 1996	Further letter from Hutton LCJ to Sec of State, pointing out that if requirement removed "it would appear that you are either being influenced by political pressure to alter the procedure relating to an ***office which links NI with the Crown*** or you will appear to be accepting the allegation of Mr Magee … .. that the requirement of the Declaration is discriminatory". Also suggests that reply to P.Q.from Seamus Mallon MP could be regarded as concession that Declaration will not be required if states only that the Warrant will not refer to the Declaration. Refers to letter sent by Sec of State to SACHR **[copy not provided]** that implied that warrant would not refer to Declaration. **[NB Entire 4-page letter concerns the Declaration.]**
15th May 1996	Bar Council sets up Committee under FC Elliott QC to consider all aspects of appointment of QC's.
September 1996	New form of Declaration made by new Silks.
9th December 1996	Letter from FC Elliott QC. to Hutton LCJ seeking views of judges.
3rd January 1997	Reply from Hutton LCJ saying that judges have not had sufficient time to meet to discuss the questions raised in the letter but that they will meet in new term.
6th January 1997	Carswell LJ appointed LCJ.
23rd January 1997	Letter from MacDermott LJ on behalf of Lords Justices and Puisne Judges to FC Elliott. (LCJ not included since he is "personally involved in the procedure for appointment of QC's.") States that appointment of QC's made by Sec of State in exercise of function inherited from the Governor and that he must act upon the advice of the LCJ. States also that Declaration is regarded as a mandatory requirement and "we can see no rational objection to it and we are satisfied that it should be retained". "Recently objection was taken to the Oath of Allegiance but this has been resolved. Neither individually nor collectively have we received complaints, formal or informal, from counsel that the present system is unfair or outdated". [NB Comments re Declaration occupy 3 lines in a 5-page letter. Judges presumably not informed about correspondence from P Magee or between Hutton LCJ and Secretary of State, but this would have been available to Carswell LCJ]
April 1997	Elliott Committee submits report to Bar Council recommending that reference to the Queen in the Declaration should be removed.
? April 1997	Coghlin J appointed.
5th May 1997	New Government. Dr Mowlam appointed Sec of State and Lord Irvine LC.
14th May 1997	Bar Council formally adopts Elliott Committee recommendation that reference to Queen should be dropped from Declaration.
16th May 1997	Elliott Report and Bar Council recommendation submitted to Carswell LCJ
23rd May 1997	Carswell LCJ writes to Chairman of Bar stating that he wishes to consult his colleagues about the matters contained in the Report.

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5th June 1997	Elliott Report, **including Declaration but not the form thereof**, discussed at a meeting of the Supreme Court Judges. "In relation to the issue of the Declaration it was **agreed** that this was a matter for the Secretary of State and **no view** was expressed by the Judges **other than that the matter should be dealt with by the Secretary of State**".
6th June 1997	LCJ informs Bar Chairman that Declaration was a matter for the Secretary of State.
11th June 1997	LCJ writes to LC enclosing Elliott Report, describing Declaration as the **primary issue**. States that **he has consulted with judges** and that they are **opposed** to any change in **form** of Declaration. Clear impression given by LCJ that he had consulted with judges about this **after** Elliott Report but now confirmed that he had **not** done so. (MacDermott LJ's January letter suggested that LCJ not even involved in the **pre**-Elliott Report discussions.) No indication that Coghlin J, appointed after January letter, was ever consulted about form of Declaration. LCJ also endorses views expressed by Hutton LCJ in letter of 21st March 1996 to Secretary of State. States that **"this is all part of an ongoing politically-based campaign** to have the office of Queen's Counsel replaced by a rank entitled Senior Counsel". "I am sure the Secretary of State will want to discuss the matter of the Declaration with me before she makes any comment on it, and I have indicated that I shall be happy to talk to her about it." [Not specified how or when this was indicated.]
June 1997	Copy of the Elliott report forwarded by LCJ's office to the NIO. No indication in affidavits that it was sent to the Secretary of State or that LCJ wrote or spoke to Secretary of State about Declaration, save at a meeting between LCJ and Secretary of State "in relation to other matters" on **23rd June 1997** when "the issue of the declaration was mentioned briefly by the LCJ to the Secretary of State". Content of discussion not specified but **no indication that LCJ informed the Secretary of State of controversy re form of Declaration** or any of the matters contained in his letter of 11th June to LC concerning "this long-running saga". "There was no further contact between the LCJ and the Secretary of State on the issue".
June 1997	LC "commenced consideration of the issue of the transfer of the responsibility for the appointment of Silks in Northern Ireland from the Sec of State to LC .. The LC was of the opinion at that time that the existing Declaration should be retained".
10th February 1998	Letter from LC to LCJ. "At our **meeting some months ago[no minutes provided]**, we also had a preliminary discussion on Silk .. .. Secretary of State has informally indicated her willingness to consider a transfer of this responsibility.. .. you are also aware of **my support for your views** on the question of the Declaration, which is at this point a matter for the Secretary of State. I agree that it seems sensible for this to continue on the **back burner** for a further period .. .. .."
30th May 1998	Secretary of State consents to transfer of power to LC.

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1st June 1998	Meeting between LC and LCJ at which new arrangements agreed.
16th October 1998	Letter from LCJ to Chairman of the Bar re proposals for new arrangements. **No reference to Declaration-** the "primary issue", per 11 June 1997 letter.
22nd March 1999	PM approves transfer. **Not informed of any controversy re Declaration.**
31st March 1999	By letter, HM the Queen consents to transfer of responsibilities.
May 1999	Applications for Silk invited by LCJ. Guide for Applicants makes **no reference to the Declaration.**
30th November 1999	LC notifies 12 successful candidates, including Barry Macdonald and Seamus Treacy (the Applicants), and call arranged for 21st December 1999.
10th December 1999	Following a direct inquiry, Applicants learn that Declaration still refers to Queen.
15th December 1999	Letter from Applicants to Bar Council explaining objections to Declaration and seeking support.
15th December 1999	Bar Council expresses support in principle for Applicants and agrees to speak to LCJ but, to avoid delaying call for others, decides not to apply for Judicial Review.
17th December 1999	LCJ rejects representations from Bar Chairman and says LC's decision.
	Applicants lodge application for Judicial Review.
18th December 1999	Application for leave to apply for Judicial Review heard (Kerr J) but adjourned.
20th December 1999	Leave granted but substantive application adjourned until 4th January 2000.
	Bar Council pledges support for and funding of Judicial Review.
21st December 1999	Call of new Silks goes ahead without Applicants.
3rd January 2000	Counsel for Applicants informed by Crown Counsel (for LC) that in 1997 judges had all been consulted about the Elliott Report and unanimously decided to reject recommendation to drop reference to Queen.
4th January 2000	Application that Kerr J should discharge himself and that no other judge involved in the decision should hear the case.
5th January 2000	Court informed by Crown Counsel that LCJ had not in fact consulted judges *post* Elliott but had relied on January 1997 letter when he told LC that the judges were opposed to any change in the Declaration. Application that Kerr J should discharge himself maintained on basis of his view expressed in January 1997 letter.
	Applicants make application to amend Order 53 Statement to add LCJ and application for discovery of all relevant documents. Kerr J reserves judgment.
6th January 2000	Start of new term. Applicants unable to appear as Silks pending result of JR.
	Kerr J rules that he will not discharge himself since he had not been consulted post-Elliott Report about form of Declaration and had formed no view about its recommendation. No reference to agreement at Judges' meeting of 5th June 1997 that Declaration a matter for S of S. Application adjourned to 10th January.
10th January 2000	Leave given to amend Order 53 Statement to add LCJ. Respondents given 2 weeks to file further affidavits. Crown Counsel indicates possibility of Public Interest Immunity certificate to prevent disclosure of some correspondence and documents.
17th January 2000	Northern Ireland Human Rights Commission given leave to file written submissions as *amicus curiae*. Application to make oral submissions deferred.

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21st January 2000	Respondents further affidavits and exhibits were served.
24th January 2000	Resumed hearing before Kerr J.

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