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The judgement is something of a quater's egg. As Mr. [unclear] suggests, we should refrain from comment as far as possible.

12/3

- 1. Mr Leach cc
- 2. PS/Secretary of State (L) 27/ni

- PS/Secretary of State (B) B
- PS/Ministers (L&B) M
- PS/PUS (L&B) B
- PS/Sir K Bloomfield B
- Mr Burns o/r
- Mr Chesterton
- Mr Miles B
- Mr Spence M
- Mr Daniell M
- Mr Kirk B
- Mr J McConnell B
- Mr Masfield B
- Mr Wood (L&B) B

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McGIMPSEY CASE : HIGH COURT JUDGMENT

In the High Court in Dublin this morning, Mr Justice Barrington found against the McGimpseys on every substantive argument they put forward. But some of his reasoning was unwelcome to us, and unionists may make capital from it. We should avoid comment for the present.

Article 1 of the Agreement/Articles 2 and 3 of the Constitution

2. This is, as we always recognised, the critical argument in the case in political terms. It involves forming a judgment on the interpretation of (a) Articles 2 and 3 and (b) Article 1. On the first question, Mr Justice Barrington is mildly helpful. Both the McGimpseys and the Irish Government argued that the two Articles constituted a claim in law to Northern Ireland. The judge said he "preferred" the view that it was merely a political claim. But he did not find it necessary to decide, because he held that Article 1 would not conflict with it on either interpretation:

"it appears to me that in Article 1 of the Agreement, the two governments merely recognise the situation on the ground in Northern Ireland [Article 1(b)], form a political judgment about the likely course of future events [Article 1(a)] and state what their policy will be should events evolve in a particular way [Article 1(c)]."

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This is not a very satisfactory portrayal of Article 1(a) from our point of view; it is difficult to argue that, so interpreted it is much of a consolation to Unionists. The language is some way away from talk of "binding reassurances", which we have applied to Article 1(a) before. We may expect the McGimpseys (if they do not appeal) to argue that the Article is shown by the judgment to be hollow.

Other aspects of the judgement

3. Mr Justice Barrington said that the Constitution "is a nationalist Constitution", and quoted from another recent judgment to the effect that reunification "is a constitutional imperative and not one the pursuit... or non-pursuit of which is with the discretion of the government or any other organ of state". Unionists may seize on this. In a more helpful passage, he held that "the search for a solution to the partition problem may be a constitutional imperative, but the Constitution guides the Government towards a pacific settlement of that dispute." But in one rather loosely drafted paragraph, he speaks of it as being "of its nature an interim Agreement... [of] the kind... an Irish government may enter into pending the reintegration of the nationalist territory".

4. He dismissed the McGimpseys' arguments on the basis of the Irish European Act decision fairly briskly; and so with all their other arguments: that the Irish government neglected unionists' rights in negotiating the Agreement, that it should have consulted unionists, that by signing the Agreement it underpinned the undemocratic system of direct rule.

Press Line

5. We do not yet know whether the McGimpseys will appeal. For the time being we would best stay quiet, as we would while an appeal was possible in a case at home. Anything we said based on the judgment

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could fly back in our face when the Supreme Court gave its view. So while we might say we were obviously looking at the judgment with interest, disputes about the Irish constitution are a matter for the Irish authorities, the Agreement remains binding on both parties and both are committed to it and comment from us while an appeal was a possibility would be unhelpful.

6. But there is considerable scope in the judgment for unionists to make capital (see especially para 3 above). If they begin to do so while the possibility of an appeal inhibits our responding openly, we might have to consider unattributable briefing of some sort. If the McGimpseys decide not to appeal, we might then be able to speak more forcefully than we have felt able while the litigation continued of our interpretation of Article 1.

7. We shall address these possibilities, and meanwhile study the judgment further.

S.J. Leahy

A J WHYSALL
SIL Division
29 July 1988

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