CONFIDENTIAL

Mr Chesterton - B

c.c. Mr Burns - B
Mr Innes - B
Mr Miles - B
Mr Bell
Mr Daniell - M
Mr Hewitt - B
Mr Masefield - B
Mr Saunders, LOD
Mr Grange, LOD
Mr Bentley, HO
Mr Cobley, HO
Mr George, RID - FAX
Mr Ferguson Dublin - FAX

MEETING OF WORKING GROUP II: 5 OCTOBER 1988

I attach an internal note of last week's meeting of Working Group II.

2. The next meeting is likely to be in Dublin on 4 November; the Irish have yet to confirm. By that time the paper for the Irish review (see paragraph 10 of the note) should, if not ready, be at an advanced stage of completion.

S A MARSH
SIL DIVISION
12 October 1988

1. cc MJ Jackson
(I believe you may have an interest!)

2. MJ Dalzell for pa.

SB Hewitt 13/10.

CONFIDENTIAL

JEN/9709

JLJ
14.10.88

1. Mr Steele

May care to see the actual note of the meeting, although we knew about the gist of the discussion.

INTERGOVERNMENTAL CONFERENCE: LEGAL SUBGROUP

NOTE OF A MEETING OF WORKING GROUP II,
HELD IN LONDON ON 5 OCTOBER 1988

Those present:

British Side	Irish Side	
Mr Chesterton	Mr Brosnan	- Dept of Justice
Mr Saunders	Mr Russell	- AG's Office
Mr Bentley	Mr Ryan	- Secretariat
Mr George	Mr O'Donovan	- DFA
Mr Masefield	Mr O'Connor	- London Embassy
Mr Cobley	Mr Dillon	- Dept of Justice
Mr Marsh	Mr Hickey	- Dept of Justice

This was the first full meeting since December 1987 and followed Ministerial agreement that the Group should get together again. The British side had a list of points they wished to raise. The Irish said that they were very committed to extradition, and that this was confirmed by the recent return to Northern Ireland of three fugitives, two of whom were terrorists. But they had three areas of concern: delays in bringing returned fugitives to trial, the fact that some GB warrants were still getting through unchecked, and speciality, on which they were coming under pressure to make an order under section 3(1) of their 1987 Act. But most importantly, they said, there was an emerging feeling that in tricky cases there would be advantage in opting for the extraterritorial route rather than extradition; one such case was Finucane.

Finucane

2. The Irish side made clear that the Taoiseach himself felt that if the UK refused to answer some of the allegations in Finucane's affidavit and the warrants had to be withdrawn as a consequence it would have a grave effect on public perception of the extradition process. It was not worth the risk. The British side responded that all this had been on the table since July and that the Irish knew all the arguments. Withdrawal of the warrants would be only a

last resort if the court insisted on getting answers; in this worst-case scenario it was hoped that the Irish would prosecute extraterritorially as a fall-back. But extraterritoriality was not seen as a satisfactory alternative, if only because there was no usable evidence in respect of the more serious charges and there would be no means of compelling Finucane to serve the outstanding portion of his sentence.

3. The Irish returned to the charge. They saw a very real risk of a disaster with wide effects on public opinion; surely the best course was to forestall it. The dissenting judgment in Russell had shown that the matters on which the UK were proposing to refuse to answer would be considered relevant. Once the case had been lost Finucane could not be kept in custody pending an appeal or a switch to extraterritoriality as a fall-back, even if the latter were possible, which they contended it was not. This applied whether the warrants had been withdrawn or whether judgment had been given against the State following the UK's refusal to answer questions.

4. There followed a discussion of the relevance to the case of the questions the UK intended refusing to answer. The British side maintained that the questions were irrelevant and that they did not wish to set a precedent for extradition hearings to develop into inquisitions on the administration of justice in Northern Ireland. The Irish observed that in Russell the Chief Justice had held that extradition should be refused if it was probable that the fugitive would be subjected to ill-treatment on his return. Paragraphs 17(b) and (c) of Finucane's affidavit, if they remained uncontested, would satisfy that probability. But if the UK witness could answer the questions the likelihood was that the court would reject the claim; those paragraphs were the only points at issue and the rest of the UK system had already been given a clean bill of health by the Irish courts. So it was essential, if we were to go ahead, that the questions be answered; otherwise the implication would be that there was something to hide. Future cases would also be prejudiced and political problems could ensue. Either the questions were answered or the case should be switched to the extraterritorial route.

5. The British side pointed out that extraterritoriality was not a satisfactory alternative in this case. It had been considered most carefully but there were problems with witnesses' availability to travel in respect of all the charges except the relatively minor one of escape. Taking evidence on commission would not be satisfactory. The Irish appeared unimpressed and observed that witnesses from the Republic were always willing to travel to the UK to give evidence; the least the UK could do was to reciprocate. The British repeated that if tried extraterritorially for escape Finucane could not be made to serve the remainder of his sentence; he would be imprisoned for only 7 years, not 17. The Irish confirmed that it would not be easy to seek his extradition on a section 72 warrant once he had been prosecuted extraterritorially for escape but that in their view the choice was between 7 years and going free.

6. Summing up what had at times been a prickly discussion, the British side said that they understood the Irish position and recognised all the dangers. They would now consider whether it would be possible to go a little further in answering the questions; the lawyers on both sides should get together before the case was heard and a UK lawyer should be present in court. But it was not now possible to switch to the extraterritorial route, given its limitations (and especially the security of witnesses) and the late stage. They hoped the Irish would continue to fight the case hard. For the future, they were perfectly happy to discuss the use of extraterritoriality in suitable cases.

7. The Irish confirmed they were not resiling from extradition generally; they simply saw the Finucane case as a potential disaster. They appreciated that Working Group II was not the correct forum for discussing individual cases but in view of the urgency and the political implications wished to use every possible route. It would not set a precedent.

Extraterritoriality

8. The British side looked forward to an early discussion of the subject in the round. They were aware of the political problems that extradition caused for the Irish and were ready to look at the possibility of a mixed diet of extradition and extraterritorial cases. They were willing to be pragmatic; the aim was to get terrorists behind bars. The Irish were grateful but said they had no instructions. They did however feel that extraterritoriality was an idea whose time had come given the resource implications of extradition. Witness availability would be crucial; this should be looked at.

Irish review

9. The Irish confirmed that despite the extremely limited number of cases under the new arrangements the 1987 legislation would be renewed in December. There had been in the latter part of last year a perceived need for safeguards; that perception had not changed in the meantime. The British expressed disappointment but not surprise. The Irish legislation caused considerable extra effort and non-terrorist traffic had declined. They would prefer that it did not exist.

10. In response to a question, the Irish said that they did not yet know what form the statutory review early in 1989 would take. But it would cover all UK cases and the Attorney General's Office and the Department of Justice would make an input. No decisions had yet been made. It should be remembered that it might result in the extradition arrangements being made more restrictive rather than the opposite. The British side said that they would wish to feed in views; it was agreed that a paper in Working Group II followed by discussion would be the best course.

Point of departure

11. The British side referred to the problems associated with the Killeen crossing point and suggested that air transport or an alternative location on the border would be preferable. This did not appear to be ruled out by the existing legislation. The Irish confirmed that there was no legal impediment to either suggestion, except that the High Court had ruled out flying if there appeared to be a valid medical reason. But on policy grounds there was everything to be said for making the arrangements as normal as possible and not being pushed into dramatic hype by the terrorists. The Garda were undertaking a study of all border crossings and this should be awaited; but it might turn out that the conclusion was that Killeen was no worse than any of the others. This was very much a matter for the RUC and Garda to consider and balance their respective opinions.

Next meeting

12. Given that so much of the agenda had not been reached it was agreed to meet again at an early date. The first week in November, in Dublin, should be considered.

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