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FROM: E M POWER
CRIMINAL JUSTICE POLICY DIVISION
15 APRIL 1993

- cc: PS/Secretary of State (B & L) - B
- PS/Mr Mates (L) - B
- PS/PUS (B & L) - B
- PS/Mr Fell - B
- Mr Ledlie - B
- Mr Bell - B
- Mr Lyon - B
- Mr Steele - B
- Mr Cooke - B
- Mr Marsh - B
- Mr Lavery - B
- Mr Duncan - B

PS/Mr Mates (B)

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ALLEGED MISCARRIAGES OF JUSTICE IN NORTHERN IRELAND

Ms Jane Winter, Chairperson of British Irish Rights Watch (BIRW), wrote to Mr Mates on 15 February, inviting queries or comments on a letter which BIRW had sent to the United Nations Special Rapporteurs on the Right to a Fair Trial, who are currently undertaking a world-wide survey. The letter contains details prepared by BIRW of alleged miscarriages of justice in Northern Ireland. It also makes a number of critical comments about the Northern Ireland criminal justice system, in particular drawing attention to difficulties allegedly suffered by convicted persons in submitting case papers to ESDA testing. We have, with the agreement of your office, taken time to look at the cases in detail.

Background

2. BIRW (formerly the Britain and Ireland Human Rights Project) describes itself as an independent and non-sectarian organisation (set up in 1990) to promote the observance of human rights in Britain and Ireland. Michael Mansfield QC is active in it. In addition to the current submission to the UN, they have made two to the UN Special Rapporteur on the

Independence of Lawyers, alleging breaches of discipline by the RUC and intimidation of both suspects and their lawyers in Holding Centres.

3. The latest correspondence from BIRW embodies two dossiers. The first lists 40 cases of alleged miscarriage of justice in Northern Ireland; the second, 10 cases (6 of which are also in the first dossier) that concern problems with ESDA tests and missing documents. According to the letter, all the cases were spontaneously brought to the attention of BIRW by the prisoners themselves or their lawyers; BIRW speculates that they may be the "tip of an iceberg".

4. We have looked closely at the 44 cases covered by the dossiers. The results are listed in the schedule. In summary:

twenty cases are at, or are awaiting, trial or appeal. The matters set out in the dossiers are accordingly subject to the judgment of the courts, and it is not for us to take a view;

in a further six cases, representations have already been received, examined and found insufficient to justify a reference to the Court of Appeal. Nothing in the BIRW dossier appears to add anything; we do not, therefore, propose to take these cases further;

three cases (Kane, Timmons and Kelly) are at present under consideration by the Secretary of State. Nothing in the dossier adds to the representations already received;

four further cases have already been brought to our attention in a list of possible miscarriages received last year from the National Association of Probation Officers (NAPO), Liberty (the old NCCL) and a group called Conviction. With the Minister's agreement, we

wrote to each prisoner (as did the Home Office in respect of parallel cases in England and Wales), setting out the normal criterion for references to the Court of Appeal and inviting them to provide any further information they might wish in support of the reference of their cases. We have received no responses and do not propose to take any further action;

eleven cases that we have not previously come across in this context: as with the NAPO cases, we propose to write to each prisoner;

5. Six of the cases have already been the subject of UN review under the so-called "1503" procedure, whereby an individual or non-government organisation can petition the UN about human rights issues. Although not obliged to respond in full to any of these cases, as domestic remedies had not been exhausted, SIL Division did so, as a courtesy to the UN. They were not selected to go forward to the Commission and we have heard no more about them.

Problems over ESDA tests

6. The other dossier, on "the failure of the police force to make original documents available for forensic testing designed to establish whether or not they are a true record by means of the ESDA tests", gives details of ten cases, in six of which it is claimed that the police have refused to hand over original interview notes. It is implied that the failure of the RUC to provide the documents prevents these individuals from obtaining information necessary to right possible injustices. POB are aware of some of these cases through recent Ministers' cases but have no information on others. The RUC are extremely reluctant to make public any information in this field; POB have been pressing them recently in relation to a number of Ministers' cases and PQs.

TO: Mr. John Winter
 British Irish Rights Watch
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Mr. Stacie
 Mr. Harsh
 Mr. Lavery
 Dr. Power

Diplock Courts

7. All the cases mentioned in the dossiers were tried in single-judge 'Diplock' courts. BIRW in its submission argues that the special rules of evidence and procedure, together with the modification of the right of silence, persistent allegations of ill-treatment, and the fact that there are only 10 judges in the Court of Appeal to hear appeals in 'Diplock' cases (leading to alleged case-hardening) mean that the UK is failing to uphold the right to a fair trial.

Suggested Response

8. A draft reply is attached, prepared with contributions from colleagues in SPOB2, POB and SIL. It summarises the results of our consideration of the cases listed in the dossier of alleged miscarriages of justice and deals with the issue of ESDA tests and missing papers, including the recent tightening-up in police procedures. It also briefly states why the Government believes that the standard of justice is in no way lower in terrorist cases than in other cases, and deals with the main points raised in the letter to the UN Special Rapporteurs.

9. If the Minister is content, we shall write as proposed to the prisoners whose cases are new to us. In the remaining cases, where trial or appeal is pending and it would, as I am sure you will agree, be premature to draw any conclusion before the legal process has run its full course. In the remaining cases, where no previous representations have been received, we are writing to those concerned, setting out the Secretary of State's rules of reference to the Court of Appeal and inviting them to provide any information that they feel would meet the criterion for such a reference.

(SIGNED)
E M POWER
 Ext 25228

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MC Ref JMO/00070/93

TO:	HCC	PS/Sofs(B&L)	Mr Steele
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DRAFT LETTER FOR SIGNATURE BY PS/MR MATES

April 1993

ALLEGED MISCARRIAGES OF JUSTICE IN NORTHERN IRELAND

Mr Mates has asked me to reply to your letter of 15 February, with which you enclose a copy of a letter sent to the UN Special Rapporteurs on the right to a fair trial.

The Minister has had each case in the dossier of alleged miscarriages of justice carefully considered. Most have already come to our attention by way of representations, either from the prisoners themselves or from others on their behalf, and consideration has been given to referring each to the Court of Appeal. In some, such consideration is continuing; in the others it was found that there were no grounds for a reference, the normal criterion for which is that there should be some new evidence, or other consideration of substance, which has not previously been before the courts and which appears to cast doubt on the safety of the conviction. Your dossier does not appear to add to the material already considered.

In a number of other cases cited in the dossiers, either trial or appeal is pending and it would, as I am sure you will agree, be premature to draw any conclusion before the legal process runs its full course. In the remaining cases, where no previous representations have been received, we are writing to those concerned, setting out the Secretary of State's role regarding references to the Court of Appeal and inviting them to provide any information that they feel would meet the criterion for such a reference.

ESDA testing is a comparatively recent phenomenon, and has only featured in Northern Ireland courts since the 1980s. There has however been a progressive tightening-up of RUC procedures since the significance of preserving original interview notes for testing came to be appreciated. On 29 July 1992, the Chief Constable announced the introduction of new procedures for the recording of notes of persons detailed. These require that all notes of interviews with terrorist suspects must be recorded in booklets that are electronically date and time stamped, both upon issue and following the completion of each interview. Additional measures have been introduced to safeguard the long-term storage and security of these interview records. These procedures are intended to ensure that the integrity of interview notes is maintained. It is noted that some of the requests for access to papers to which you refer are very recent ones to which the outcome is not yet clear, while others date back to a time when the importance of retaining original notes was not as clear as it is today.

Turning to your more general points, in the Government's view, the procedural changes in the system of criminal justice, made necessary by the continuing threat to life and liberty in Northern Ireland, have in no way led to a lowering of the standard of justice. The continuing risk of intimidation of jurors means that non-jury 'Diplock' courts remain necessary for terrorist-type offences. Extra safeguards are in place for such cases: there is a requirement for the judge to set out in writing his reasons for conviction, and the defendant has an automatic right of appeal against conviction and sentence.

The criteria for the admissibility of confessions are set out in Section 11 of the Northern Ireland (Emergency Provisions) Act 1991. The Government believes this standard is wholly appropriate in terrorist cases. Notably, the Act provides the judge with a wide discretion to exclude any confession if it appears appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice.

You mention allegations of ill-treatment during police detention. Any such ill-treatment is entirely unacceptable, and the Government is committed to ensuring that adequate safeguards and complaints mechanisms are in place. In addition to the existing safeguards (right to legal advice, right to have someone notified, regular reviews of detention, etc), the Secretary of State recently appointed an Independent Commissioner for the Holding Centres to monitor and report on procedures and conditions. Codes of practice governing the detention, treatment, questioning and identification of terrorist suspects in police custody are soon to be placed before Parliament. These will provide a further guarantee of detainees' rights. It must, however, be remembered that terrorist organisations will seek, wherever possible, to discredit the process of the investigation of crime by making spurious allegations of ill-treatment.

You have also expressed concern about the fact that adverse inferences can be drawn from defendants' exercise of their right to remain silent. The purpose of the Criminal Evidence (Northern Ireland) Order 1988, which applies to terrorist and non-terrorist suspects alike, is to ensure that defendants cannot obtain improper advantage by failing to disclose information in certain clearly defined circumstances. The accused is warned by police caution and at the trial of the consequences of remaining silent, but no one is obliged to make a statement or incriminate himself.

Mr Mates hopes this goes some way to reassuring you that the Government is wholly committed to ensuring that, despite the strains of terrorism, the highest possible standards apply to the administration of justice in Northern Ireland.

SCHEDULE

PRESENT POSITION OF CASES MENTIONED IN BIRW DOSSIER

Awaiting trial (13)

Michael Beck	Ciaran McAllister
Liam Coogan	Jim McCabe
Tony Garland	Brendan McCrory
Laurence Hillick	Hugh McLaughlin
Kevin Lynch	Stephen McMullan
James Morgan	Mark Prior
Kevin Mulholland	

Appeal pending or reserved appeal judgment awaited (7)

Michael Hillen	Gerard McFadden
Gerard Magee	Sean McMonagle
Sean Mathers	Daniel Pettigrew
Anthony Millar	

Already considered: no grounds found for reference to Court of Appeal (6)

Thomas Green	Edward McClelland
Neil Latimer	Michael McKee
Barry Murray	Dermot Quinn

Under consideration (3)

Patrick Kane	Michael Timmons
Sean Kelly	

Already identified in NAPO Dossier: prisoners invited to provide information supporting reference to Court of Appeal (no responses received) (4)

Kevin Murray	Ronan McCartan
	Brian McClernon
	Gary McKay

New cases, where it is proposed to invite prisoners to provide information supporting reference to Court of Appeal (11)

Patrick Grimes	Peter Markey
Edmund Harkin	Alex Murphy
Joseph Harper	Sean McKinley
Harry Maguire	Eamon Nolan
Seamus Mullan	Tom O'Dwyer
Declan Murphy	

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