

F.R.

PI 155/87

CC Mr Steele

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MR J STEPHENS

GERARD KELLY: COMPUTATION OF SENTENCE

We spoke briefly about this. I am grateful to Mr Gilmore for his minute of 10 May and for all the work which has been done on the awkward point which arises in respect of the period which Kelly spent in custody in Holland before his extradition.

2. My own view at this stage is that Kelly should not be given credit for this time, and that we should sit tight and wait to be challenged on the point. The strict legal position seems to be that the Dutch time does not fall within section 26(2) of the Treatment of Offenders Act (a) because it was outside the jurisdiction and (b) because Kelly was detained awaiting extradition, not on foot of an order made in connection with the fresh charges. And whatever the legal position may be, he was also liable to be detained under the life sentence until it was remitted; in other words he has no case in terms of fairness or equity (bearing in mind that there are prisoners sentenced to life with him who are still serving sentences in England, also Feeney in Maze compound, the only one of the four Old Bailey bombers transferred to Northern Ireland in 1975 who is still serving his life sentence).

3. Subject to your views I think we should agree this approach with [REDACTED], ie following up [REDACTED] minute of 30 March. I am not sure if it is necessary to seek legal advice: if so this might be done through the Home Office Legal Adviser's Branch in view of the Home Office interest. Perhaps it would also be appropriate to consult the Home Office Administrative Division which deals with this area of work.

3. Please proceed accordingly if you are content.

SCJ

S C JACKSON

12 May 1988

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10 MAY 1988

Mr Jackson ✓

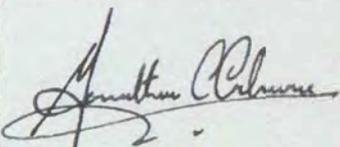
GERARD KELLY - SENTENCE

1. You expressed an interest in the case of Gerard Kelly recently, and I attach the relevant papers. I am afraid the file is very bulky.
2. Kelly was sentenced to 5 years' imprisonment on each of 5 counts of false imprisonment, sentences to run concurrently. He was found not guilty of attempted murder, causing greivous bodily harm.
3. Kelly was extradited from the Netherlands under the terms of Article VII of the Extradition Treaty which provides that a returned fugitive may not be held in prison for any matters other than those in respect of which the extradition has taken place. For this reason HMG approved a Royal Warrant under the Royal Prerogative which remitted the balance of all outstanding sentences of imprisonment which Kelly was still liable to serve, from 4 December 1986. Specifically there were 2 terms of life imprisonment and 20 years, to run concurrently, imposed at Winchester Crown Court on 15 November 1973 and one term of 3 years' imprisonment and one of 2 years imposed at Belfast Crown Court on 1 March 1983.
4. Kelly was formally arrested and charged with offences relating to the Maze Escape on his return to UK jurisdiction on 3 December 1986. This produces an interesting one-day discrepancy as the Royal Warrant actually remits his other sentences from 4 December 1986. Technically, he did in fact serve one day as a sentenced prisoner following his extradition.
5. In calculating the sentence imposed at the Crown Court by Lord Lowry on 27 April 1988, we have allowed a period of remand running from 3 December 1986 to 26 April 1988 amounting to 511 days; the 5 concurrent sentences amount to 1,826 days, thus the balance to serve to a long date would be 1,315 days. This would mean a release date of 2 December 1991. Remission however reduces that period to 402 days, producing an EDR of 2 June 1989.

6. The question inevitably arises regarding the period that Kelly was held in custody in the Netherlands while awaiting the outcome of extradition proceedings. Kelly was arrested by Dutch police on 16 January 1986 and - so far as I can determine - extradition warrants were served immediately.
7. In principle, it might be argued that Kelly was held in custody, in connection with offences alleged to have been committed during the escape from Maze on 25 September 1983, without a break between 16 January 1986 and 26 April 1988, a period of 832 days. Were this period of 'remand' to be applied to Kelly's actual sentence the resulting calculation would produce an LDR of 15 January 1991 and an EDR of 16 July 1988.
8. As you are probably aware, however, there exists no provision in law, in the UK jurisdictions, to allow the counting of time spent in custody awaiting extradition to count against eventual sentence.
9. The existing Home Office policy on such matters was well covered in some detail in [REDACTED] minute of 26 February 1987 to Mr Stephens; in summary, it seems that the law recognizes the principle that time spent in custody in relation to the charge(s) on which a prisoner is convicted will count towards eventual sentence. Since there is no statute provision for this, consideration can be given, where justified, to exercise of the Royal Prerogative of Mercy. Such consideration is only to be given where a Court in imposing sentence has not taken such custody into account.
10. We are not aware that Lord Chief Justice Lowry took Kelly's Dutch custody into account in determining the length of sentence, indeed everything we know seems to point to the fact that he did not.
11. There has been no approach from either Kelly or his legal advisers regarding his sentence; indeed we do not know yet whether an appeal is to be lodged. In the light of the relatively light sentences passed upon the escapers and the fact that most were imposed concurrently it seems probable that no appeals will be lodged.
12. In Kelly's case however, it would be greatly to his benefit to succeed in having his 'Dutch custody' counted, and I believe that it is likely that he may move in this direction sooner, rather than later.

- 13. While I hold no particular brief for Kelly, the case must be looked at dispassionately; if the legal principle is that time spent in custody should count (if the Court has not actually already done so) then it may be difficult to argue against any petition from Kelly.

- 14. This minute does nothing more than summarise the position; it may be that nothing will come of my fears. If, on the other hand, we are approached by Kelly or his lawyers time may be short and we should perhaps be considering a measured view of any line that we would wish to take.



J C GILMORE
PRB1

10 May 1988

cc 

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