

PART TWO

Confidential Filing.

European Convention on Human Rights.

EUROPEAN
POLICY

Part 1: Nov. 1980

Part 2: June 1986.

Attached Folder - European Court of Human Rights.

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
6.6.86							
11.7.86							
22.10.86							
6.11.86							
21.11.88							
5.12.88							
22.12.88							
6.7.89							
Part ends							

PREM 19/2673

PART 2 ends:-

C.O. to PM 29. 9. 89

PART 3 begins:-

CDP to PM 4. 10. 89

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PRIME MINISTER

PREVENTION OF TERRORISM
ECHR: BROGAN V. THE UNITED KINGDOM

OBJECT OF THE MEETING

You are to chair a meeting at 9.45 am on Thursday 5 October to decide:

- whether in the wake of the judgement of the European Court of Human Rights (ECHR) in Brogan v. the United Kingdom, we should introduce, as the Home Secretary proposes, a judicial element into the procedures for the detention of terrorist suspects in Great Britain,
or
- whether, as the Northern Ireland Secretary prefers, the present procedures should be retained throughout the United Kingdom.

The Home Secretary's proposals are set out in his minute of 20 July (Annex A), the Northern Ireland Secretary's doubts in his minute of 1 August (Annex B). Also relevant are letters to the Home Secretary from the Solicitor General (C) and the Lord Chancellor (D).

2. In addition to the Home Secretary and Northern Ireland Secretary, the Lord President, the Lord Chancellor, the Foreign Secretary, the Defence and Scottish Secretaries and the Attorney General will be present.

THE BROGAN CASE

3. Under Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 (PTA), terrorist suspects can be detained for up to 7 days by order of the Secretary of State following application by the police. Towards the end of last year, the European Court of Human Rights found that Article 5.3 of the European Convention on Human Rights had been violated in that neither Brogan nor three other applicants in the case had been brought promptly before a judge or other judicial officer following their arrest under PTA powers.

4. You chaired a meeting on 5 December last year which decided that the Home Secretary should try to produce proposals for introducing a judicial element into the procedures for the detention of terrorist suspects under the PTA, while at the same time preserving or stiffening powers against terrorism. It rapidly became clear, however, that producing proposals would be very difficult: in particular the Northern Ireland judiciary were deeply opposed to their involvement in any such procedure. The Home Secretary therefore told the Standing Committee on the Prevention of Terrorism Bill on 22 December that while the Government wished to find a judicial solution if possible, finding one would take some time. Meanwhile, in order to remove any doubt about the ability of the police to deal effectively with such cases, the Government was derogating under Article 15 from the ECHR and Article 4 of the International Convention on Civil and Political Rights in respect of the PTA powers to detain those suspected of involvement in Northern Ireland terrorism. In respect of international terrorism, where the powers were less used and the threat less serious, extensions of detention of suspects would be restricted to a maximum of four days in total, pending Ministerial conclusions. He would inform the House as soon as the Government had reached a final view.

THE HOME SECRETARY'S PROPOSALS

5. The Home Secretary proposes the introduction in Great Britain of a procedure involving the judiciary which would apply to the detention of both Northern Irish and international terrorist suspects. The scheme, which is set out in detail in the annex to the Home Secretary's minute, provides for suspected terrorists to be detained for up to 72 hours on police authority - this is an increase of 24 hours on the present position and will be welcome to the police. Thereafter the police would have to apply to a judge to authorise detention up to a maximum of 7 days.

6. The Home Secretary acknowledges that such a scheme could not be introduced in Northern Ireland, where the judiciary remain opposed to their involvement in any procedure. Nor would substituting experienced lawyers for judges in Northern Ireland be feasible. He therefore proposes that the derogation from the ECHR in respect of Northern Ireland should continue. He recognises that the great majority of extended detention cases arise in Northern Ireland, but argues that a decision to continue the derogation for the whole of the United Kingdom would be open to successful legal challenge at Strasbourg and give ammunition to critics of our human rights record abroad. Nor would continued derogation help with the problem of international terrorists, where the temporary limit of 4 days detention would probably have to be made permanent.

7. In letters of 26 and 28 July, the Solicitor General and the Lord Chancellor have endorsed the Home Secretary's proposals. The Solicitor General notes that following consultation with leading Counsel, the Attorney General has advised that it would probably be difficult to sustain a continuing derogation in respect of Great Britain, though not in respect of Northern Ireland. The Lord Chancellor sees little prospect of the judiciary in Northern Ireland changing their view and notes that

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the working of the Home Secretary's scheme in Great Britain will depend very much on judicial goodwill.

THE NORTHERN IRELAND SECRETARY'S POSITION

8. The Northern Ireland Secretary argues that Ministers should rest on the status quo rather than proceed with the Home Secretary's proposals. He acknowledges that continued derogation for the United Kingdom as a whole will leave the Home Secretary with a problem in relation to international terrorism, but argues that:

- derogation for Northern Ireland alone will mark yet another important legal difference between the Province and the rest of the UK;
- it will be difficult to explain why judicial procedures can be introduced in Great Britain but not in Northern Ireland;
- because most cases arise in Northern Ireland, responding to the judgement by introducing new procedures in Great Britain only will be seen as inadequate;
- the new procedures are not very convincing from the point of view of the suspect and there will be pressure in connection with any Bill introducing them to increase safeguards and to extend them to Northern Ireland;
- the result could be an increased risk that dangerous terrorist suspects will walk free;
- there is no strong pressure for change. Introducing the Home Secretary's proposals would generate

controversy and debate from which the Government would gain little credit.

MAIN ISSUES

9. There are a number of factors which you and colleagues may wish to weigh in the balance before attempting to reach a conclusion:

- i. The chances of a successful legal challenge to continued derogation - the Attorney General has advised that the Strasbourg Court is likely to accept continued derogation for Northern Ireland alone, but not for the rest of the UK. Under Article 15 of the European Convention it would be necessary in order to derogate to demonstrate that Northern Irish terrorism constituted "a public emergency threatening the life of the nation" not only in Northern Ireland but in Great Britain as well. Two cases challenging derogation have been lodged with the European Court. How does the Attorney General see the prospects for those cases? Have recent events, including the explosion at Deal, done anything to alter the Attorney's assessment of the position?
- ii. Judicial attitudes - the success of the Home Secretary's proposals depends on the willing cooperation of the judiciary in Great Britain. Does the Lord Chancellor think that will be forthcoming? Conversely, does he foresee any circumstances in which the Northern Ireland judiciary's opposition to involvement in the detention procedures might alter?
- iii. Police attitudes/security aspects - how willing are the police to contemplate the new procedures? The Home Secretary acknowledges that a judicial scheme might

heighten the risk of terrorist suspects going free. Is any increase in this risk acceptable?

- iv. International terrorism - at present, the maximum period of detention of international terrorist suspects is limited to 4 days (two on police authority and up to two more on the authority of the Secretary of State). The Home Secretary's proposals would have the advantage of increasing that limit back to 7 days. The number of cases in which international terrorist suspects are detained is small, however, compared with the number of Northern Ireland cases. How much of a disadvantage would it be if the status quo was retained?

- v. Overseas attitudes - on one view, continued derogation for the whole of the United Kingdom would be damaging to our international standing. It would firmly align us with the Soviet Union, Nicaragua and Turkey in respect of derogation from the UN Convention. On the other hand, continued derogation for Northern Ireland alone would leave the Province exposed, perhaps presenting an even starker problem for relations with the Republic of Ireland. The new procedures might be seen as representing little advance in human rights terms. It should also be possible to mount a strong defence of our position on human rights issues. You may wish to take the Foreign Secretary's view on these points.

- vi. Legislative and Parliamentary implications - the Home Secretary notes that if his proposals are agreed, a short Bill will be required in the next Parliamentary session. This might be suitable for House of Lords introduction. QL meets to finalise next session's legislative programme the day before your meeting.

You may wish to invite the Lord President to report on the prospects for a Bill. Does he believe that a Bill such as the Home Secretary proposes will be generally welcomed, or share the Northern Ireland Secretary's belief that it will have a difficult passage because it will leave out Northern Ireland and be seen as insufficiently judicial? What would be the Parliamentary implications of a decision to continue UK-wide derogation? Conversely, would the introduction of legislation run the risk of being presented as a softening of the Government's attitude towards terrorists?

ANNOUNCEMENT OF THE GOVERNMENT DECISION

10. The Home Secretary proposes that if colleagues accept his view, the intention to legislate should be announced in the Queen's Speech. To publicise Ministers' decision before then might well increase the risk of a successful challenge to the UK derogation.

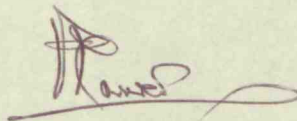
11. If, however, colleagues disagree with the Home Secretary's proposals, you will wish to consider how best an announcement of Ministers' conclusions can be made. If the decision is for continued derogation, there might be much to be said for letting that outcome be known before Parliament reassembles.

HANDLING

12. You may wish to begin by inviting the HOME SECRETARY to speak to his memorandum and then invite the NORTHERN IRELAND SECRETARY to comment. Thereafter it may be convenient to take

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the issues in the order set out in paragraph 9. of this brief, beginning with the Attorney General's views on the legal aspects.

A handwritten signature in dark ink, appearing to read 'P J C Mawer', with a long horizontal flourish extending to the right.

P J C MAWER

29 September 1989

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LORD PRESIDENT
OF THE COUNCIL
RECEIVED
20 JUL 1989

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PRIME MINISTER

PREVENTION OF TERRORISM

ECHR: BROGAN v THE UNITED KINGDOM

You will recall that we met on 5 December 1988 to discuss the implications of the judgment of the European Court of Human Rights in the Brogan case. This concerned the period during which terrorist suspects could be held before being brought before a court or released.

2. In accordance with the conclusions of that meeting I undertook to produce proposals for introducing a judicial element into the procedure under which the detention of terrorist suspects arrested under the Prevention of Terrorism Act could be extended on application by the police. On 22 December I told Parliament that it remained our wish to respond to the Court's judgment by introducing a judicial element into the procedures for extending detention, but that problems remained and, in order to ensure that the police continued to have effective powers, we were entering notices of derogation from the European Convention on Human Rights and the comparable United Nations Covenant in respect of Northern Irish terrorism.

3. It has been possible to devise a scheme (outlined at Annex A) which we believe would meet Strasbourg requirements. The judiciary in Great Britain have indicated their willingness to operate such a scheme. But the Lord Chief Justice for Northern Ireland remains opposed to the Northern Ireland judiciary introducing any procedure in which Northern Ireland judges would be involved in the same way as their English and Scottish counterparts. We have examined the possibilities of introducing a judicial procedure in Northern Ireland which would use experienced lawyers rather than judges. But there are substantial practical as well as security difficulties standing in the way here, which we do not believe can be overcome.

4. We can, therefore, (if we wish) introduce a judicial scheme for Great Britain, once the necessary legislation is through and thus withdraw the derogation in respect of Great Britain but not Northern Ireland.

5. Introducing a judicial procedure in Great Britain would demonstrate a willingness to comply with the Convention. But by far the majority of cases of arrest and detention under the Prevention of Terrorism Act occur in Northern Ireland and not Great Britain; and it is those cases with which the European Court's judgment was principally concerned. It may therefore be thought to be a less than satisfactory response to the Court's judgment to introduce a judicial scheme where it will be least used. There is also some risk that a judicial procedure could allow some persons credibly suspected of involvement in terrorism to go free in circumstances in which they might have remained in detention if the decision had been that of a Secretary of State. We would need to give a convincing explanation in Strasbourg and in Parliament of the reasons why we can devise a judicial procedure for Great Britain and not Northern Ireland, though this should not be too difficult.

6. But the alternative, continued derogation for the whole of the United Kingdom (even if it can be sustained against a challenge at Strasbourg) is an unattractive proposition. It would leave us vulnerable to those at home and abroad who wish to pick holes in our human rights record. Many people accept that terrorism in Northern Ireland presents unique problems for the administration of justice there and we believe that the Strasbourg organs would be mindful of this if a derogation confined to Northern Irish terrorism were to be challenged under the Human Rights Convention. Continued derogation for the United Kingdom as a whole would be of no help in dealing with international terrorist suspects because the derogation can only apply to terrorism in connection with the affairs of Northern Ireland. We would probably have to accept an upper limit on these detentions of four days. On balance, but subject to the views of my colleagues, my preferred option would be to maintain the derogation for

3.

Northern Ireland alone in respect of Northern Irish terrorism and to introduce legislation for Great Britain under which a judicial procedure would be applied to Northern Irish and international terrorism. We could make it clear in any announcement that if it later becomes possible to introduce a judicial scheme in Northern Ireland also we would do so.

7. If you and colleagues agree that this is the right way forward, I should be grateful if the Lord President would agree to the introduction of a short Bill in the 1989/90 Session to give effect to the scheme. It might be thought suitable for House of Lords introduction. I believe that if we are agreed on legislation, it would be wise to do so fairly soon. The risk of a challenge to our derogation will increase once it becomes known that we intend to go down the judicial route. My present inclination would therefore be to make no announcement before The Queen's Speech.

I am copying this minute to the Foreign Secretary, other members of H and QL Committee and to Sir Robin Butler.

Day - Ann

20 July 1989

ANNEX A

THE PROCEDURE IN GREAT BRITAIN FOR JUDICIAL CONTROL OF EXTENDED DETENTIONS UNDER THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1989 (PTA)

This annex describes the procedure which might be introduced in Great Britain for judicial control of extended detentions. It would relate to detentions under Section 14 of and paragraph 6 of Schedule 5 to the PTA. It would thus be concerned with cases in which police terrorist investigations are taking place, where consideration is being given by the Secretary of State to deportation under the Immigration Act 1971 or exclusion under the Act or where consideration is being given by the Attorney General, the Director of Public Prosecutions or the Lord Advocate to the institution of criminal proceedings.

Initial Detention

In connection with the procedure, it is proposed to make a change to the maximum period permitted under the PTA of police authorised detention. At present this is 48 hours. This would be increased to 72 hours. During this time, the periodic police review process already set out in Schedule 3 to the Act, would be carried out. Detention for longer than 72 hours would require the authorisation of a judge. Once an application had been made to the judge it would no longer be necessary to continue with the periodic review process under Schedule 3 to the Act.

Application to Judge

The procedure would begin with an application by the police to the judge. (The application could not be made until at least 24 hours after the detention begins.) The application would be in writing. Its contents would be modelled on the information to be provided by the police in connection with applications for warrants for further detention pending charge under the Police and Criminal Evidence Act 1984. Neither the detained person nor his legal representative would be provided with a copy of the application by the police.

The application would describe the general nature of the suspicions which form the basis of the initial detention, in the case of detention under Section 14 or, in the case of detention under paragraph 6 of Schedule 5, the grounds for having continued the port examination. It would describe the general nature of the inquiries made to date and what action would be taken during any extension of the detention. The application would also describe the general reasons for believing that continued detention was necessary whilst that takes place.

Notice to the Detained Person

The detained person would be given a notice by the police that an application to the judge had been made for his continued detention. (This follows S14(5) in the Act). The notice would indicate when the application was made. It would also state the general nature of the suspicions held in relation to the detained person. Bearing in mind that the application would be made after the person has been detained for 24 hours he will very often have already learnt something of the suspicions of the police in relation to him from the nature of the questions put to him. In addition, provided it would not prejudice any police investigation or the safety of, or of persons in, the United Kingdom or some other country, the notice would state the general nature of the inquiries already made and those to be made during the extended detention or, as appropriate, that consideration was being given to the detained person's exclusion or deportation or to the institution of criminal proceedings against him.

A copy of the notice given to the detained person would also be given to the judge.

Consideration by the Judge

The judge's function will be to decide whether the detention should continue, and if so for how long. This consideration will embrace what it is proposed is to take place during any period of extended detention and whether it is necessary to detain the person at all whilst this takes place and if so for how long.

The judge would begin his consideration by considering the police application. This would be in the absence of both the police and the detained person. Thereafter the judge, who would by now be present in the building where the detained person was being held, would have the opportunity to hear the police, in the absence of the detained person and his legal representative, and to question the police. It is envisaged that the police would by way of their written application to the judge and in answering questions put by him, provide him with the same information as they would have used to support an application to the Secretary of State for extended detention. This will mean that there is a meaningful basis for the judge's consideration of the police application.

The next stage will be for the detained person to be brought before the judge. The judge will first ensure that he has been given the notice referred to above. He should ensure the detained person understands the notice (but it is not intended that he should go further than does the notice in dealing with the suspicions held, the enquiries to be made or the reasons why detention is considered necessary). He should give him the opportunity to make representations (orally or in writing) about his detention but no caution would be administered. The judge would be allowed to set a time limit within which any written representations would have to be made and to proceed in their absence if they are not made within that time.

The judge would be able to ask the detained person questions relating to the matters in the written notice. (It is not proposed to impose an obligation on the detainee to answer a judge's questions on pain of criminal sanction.) Anything he said in reply would be admissible in evidence in any subsequent proceedings in accordance with ordinary rules of evidence. A detained person's silence needs to be considered in relation to the proceedings before the judge and in relation to any subsequent criminal proceedings brought against him. So far as the former is concerned, the judge can be expected in practice to draw appropriate conclusions from the detained person's silence and bearing. He is not considering the detained person's guilt or innocence, only whether he should continue to be detained. In relation to subsequent proceedings, it is not proposed to anticipate the decision in relation to the right to silence.

The police could be present whilst the detained person is before the judge.

Legal Representation

It is proposed that a detained person should be able to be legally represented when he is brought before the judge. The judge should adjourn the matter if he is not represented and wishes to be so. If the detained person has been refused access to a lawyer under s58 of the Police and Criminal Evidence Act 1984 the application should not proceed until after the person has had access to a solicitor or until the expiry of 48 hours. If any adjournment is necessary for the purpose of legal representation the person may continue to be held in police custody. His lawyer should be given a copy of the police notice given to the detained person.

Evidence

Provision would be made in the Bill to enable a judge to receive oral or documentary evidence which might be inadmissible in court proceedings.

Criteria for Authorising Continued Detention

The Bill would provide that the judge could authorise a person's extended detention if he is satisfied that that person's continued detention was necessary -

either to obtain or preserve evidence of certain offences under the Act, or of his involvement in terrorist acts or that he was the subject of an exclusion order, and that the investigation was being conducted diligently and expeditiously;

or whilst consideration was continuing as to whether he was already the subject of an exclusion order, whether to make an exclusion order or deportation order against him or to institute criminal proceedings against him.

He could also authorise the detention to continue while he completes his enquiries and consideration.

The judge would state the period of extended detention which he authorised. That would be up to a maximum detention of seven days in all, as now.

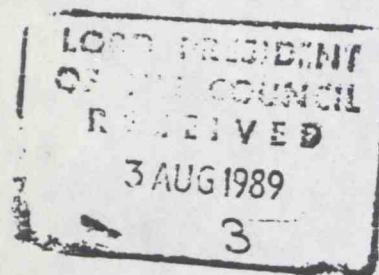
If the judge did not authorise extended detention he would order the detained person's release.

A written record of the judge's decision would be made which would include, where extended detention was authorised, the grounds for this and the period of authorised further detention. A copy would be given to the police and the detained person. The Bill would provide that a copy of the written record was sufficient evidence of the authorisation of the extended detention.

Further Applications

Before the expiry of any period of further detention authorised by the judicial officer it would be possible for the police to apply for a further authorisation of continued detention. Once such a further application had been made it would be possible to detain the person until the application had been dealt with up to the seven days maximum period of detention under the Bill, and if the authority is given for the period of the authorisation.

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PRIME MINISTER

PREVENTION OF TERRORISM: ECHR :BROGAN

The Home Secretary sent me a copy of his minute to you of 20 July outlining a proposed response by the Government to the judgment of the European Court of Human Rights in the case of Brogan. I have serious reservations about this and I hope that no decision will be taken to proceed without a further meeting under your chairmanship.

2. The Home Secretary wants us to withdraw our UK-wide derogation under the European Convention. Instead he wants us to derogate for Northern Ireland only and introduce a system under which judges (rather than the Secretary of State as at present) will consider police applications to extend the detention without charge of terrorist suspects up to a maximum period of seven days. For the reasons he has given, it will not be possible to introduce any similar system in Northern Ireland.
3. As the Home Secretary knows, I am happy with the present position. This allows the detention of persons suspected of involvement in terrorism in Northern Ireland (whether arrested in GB or Northern Ireland) to be regulated in the same way as it was before the Court's judgment. I acknowledge that this would still be the case in Northern Ireland if his proposals were accepted and that a "Northern Ireland only" derogation is most unlikely to be successfully challenged at Strasbourg.
4. Nevertheless, I would see an abandonment of UK-wide derogation

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as a most unwelcome further example of the isolation of Northern Ireland from the rest of the UK. It would also conflict with our policy of ensuring that, so far as possible, the whole of the UK should be subject to the same laws.

5. If we legislate only for Great Britain, we will be strongly pressed to explain why what we are doing for the rest of the United Kingdom cannot also be done in Northern Ireland. It will be very difficult publicly to explain these reasons - some of which are sensitive in security terms. We will undoubtedly be told that legislation with such a limited effect is not a proper response to the Strasbourg judgment. There are only a handful of extensions of detention in GB each year compared with some 500 in Northern Ireland. Moreover, there must also be a risk that there will be pressure in Parliament to provide more "safeguards" for the detained suspect than are contained in the procedures described in the Home Secretary's annex. (The Lord Chief Justice for Northern Ireland has told me of his own concern that the proposed arrangements are so weighted against the suspect as not to be properly judicial in character. It was, of course, our original contention at Strasbourg that the decision required is basically executive rather than judicial in character). If such pressure were to succeed, the result would be that there would be a greatly increased risk that dangerous terrorist suspects would walk free at a time when the police wished to question them further. I note that the Home Secretary has acknowledged that even the arrangements proposed in his annex could have this effect.

6. I acknowledge that the Home Secretary may have a special problem with suspected 'international' terrorists, who, since the Brogan judgment, can be held only up to a four day maximum. But, putting that to one side, I am not convinced that further action in relation to 'Northern Irish' terrorism is either necessary or desirable.

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C O N F I D E N T I A L



7. It is not necessary because we are under no strong pressure to change a system which continues to work effectively. Our UK-wide derogation has not yet been challenged, and any challenge that might be made would take years to bring to a conclusion. I acknowledge that we need to have regard to our human rights record; but I do not think we should be too defensive about this. Persons detained on suspicion of involvement in terrorist offences have substantial rights. They are statutorily entitled to have someone informed of their arrest and to consult a solicitor. There are strict rules governing the conduct of their interrogation; and they have the certainty of knowing that within seven days they will either have been charged and brought before a court or released.

8. Action is not desirable because we cannot know where it will lead. The arrangements described in the Home Secretary's annex might not survive Parliamentary scrutiny and could easily be weakened. They could then prove to be the 'thin end of the wedge' for Northern Ireland. At present, there is virtually no controversy surrounding the detention of terrorist suspects. Legislation would change all that. I suspect that a Bill, especially one excluding Northern Ireland, would have a difficult passage in both Houses. It would be attacked for leaving out Northern Ireland and probably also because its procedures were seen as insufficiently judicial. It could not be other than controversial and I am doubtful about how much credit it would bring us with the human rights lobbies either at home or abroad.

9. I remain therefore unconvinced that we need to go down this road at all.

10. I am sending copies of this minute to the Foreign and Commonwealth Secretary, the Defence Secretary, other members of H and QL Committees and to Sir Robin Butler.

P.B.

PB

C O N F I D E N T I A L

1 AUGUST 1989



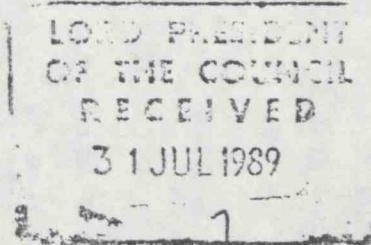
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ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

01-936 6269

Rt Hon Douglas Hurd CBE MP
 Secretary of State for the Home Department
 Home Office
 50 Queen Anne's Gate
 London
 SW1H 9AT



26 July 1989

Dear Douglas,

PREVENTION OF TERRORISM
 ECHR: BROGAN v UNITED KINGDOM

I refer to your Minute of 20 July to the Prime Minister.

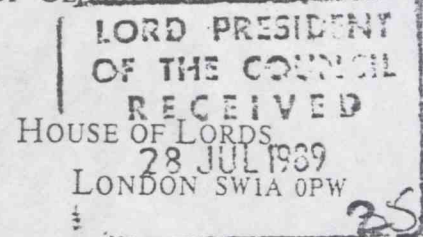
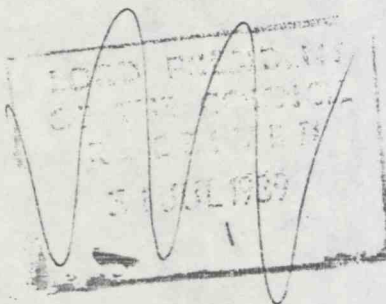
I welcome the proposals that you put forward for the introduction of a judicial procedure to review the detention of terrorist suspects. I strongly support the introduction of your proposals at an early stage, even though the judicial procedure, and the consequent withdrawal of our derogation under Article 15 of the Convention, can apply under present circumstances only to Great Britain. I well understand the grave difficulties which would face the judiciary in Northern Ireland if similar proposals were introduced there; and I have little doubt that the Court of Human Rights would uphold a derogation limited to Northern Ireland. But as the Attorney General has already advised, following consultation with leading counsel, it would probably be difficult to sustain a continuing derogation in respect of Great Britain.

I am copying this letter to the Prime Minister, the Foreign Secretary, to other members of H and QL committees and to Sir Robin Butler.

*Yours ever
 Nick.*



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25 July 1989

Dear Douglas,

PREVENTION OF TERRORISM: BROGAN

I have seen your memorandum of 20 July to the Prime Minister setting out the way forward following the Brogan judgment of the European Court of Human Rights.

Following my correspondence with the Lord Chief Justice of Northern Ireland there is plainly no prospect of introducing a judicial scheme in Northern Ireland and I concur with your view that maintaining derogation in the Province as the only way forward, at least for now. I doubt very much whether it will be possible to produce a judicial scheme for Northern Ireland in the longer term but I will be seeing Sir Brian Hutton at some stage to explore future prospects.

In the meantime I agree that we should go ahead along the lines you suggest in paragraph 7 of your memorandum. We will of course have to discuss fully with the judges the detailed procedures to be incorporated in the scheme for the judicial control of extended detentions. The working of the scheme will depend very much on their goodwill.

I am copying this letter to the Prime Minister, the Foreign Secretary, other members of H and QL Committee and to Sir Robin Butler.

Yours ever,
 Jan.

The Right Honourable
 Douglas Hurd CBE MP
 Secretary of State
 for the Home Department
 Home Office
 Queen Anne's Gate
 London SW1H 9AT



FILE
DA

10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

4 August 1989

8F 11
Further to my telephone call this morning, I am writing to confirm that the meeting on ECHR: Brogan will be held at Downing Street on Thursday 5 October. The meeting will begin at 0945 and will last 45 minutes.

I am copying this letter to the diary secretaries to the Lord Chancellor, Attorney General, Secretary of State for Scotland, Secretary of State for Northern Ireland, Foreign and Commonwealth Secretary, Lord President, Secretary of State for Defence and to Trevor Woolley (Cabinet Office).

(MRS. AMANDA PONSONBY)

Ms. Helen Murray,
Home Office.

de



10 DOWNING STREET

~~Att/Gen's Office~~ *confirmed* *see 4/8.*

Meeting at
0945 on Thursday
5th Oct.

Note will be
sent confirming
meeting.

AP

4/8



LEGAL SECRETARY

cg/c
THE LEGAL SECRETARIAT TO THE LAW OFFICERS
ATTORNEY GENERAL'S CHAMBERS
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

C. D. Powell Esq.,
Private Secretary to the Prime Minister,
Prime Minister's Office,
10 Downing Street,
London,
SW1A 2AA

C.D.
- 2/8

1 August 1989

Jean Charles.

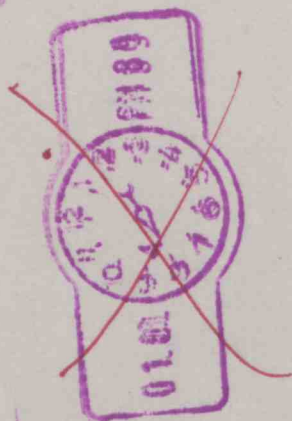
You telephoned me the other day to ask a question on the Brief on the Brogan case which had been provided by the Home Office for Prime Minister's Questions. This Department had not in fact been involved in the preparation of the Brief (nor would we have expected to), but we have now been provided with a copy of that part of the Brief submitted to Home Office Ministers which dealt with Brogan. I have read it and am satisfied that it correctly represents the position as we see it over here.

Yours truly,

Michael.

M. L. SAUNDERS

THE LEGAL SECRETARY TO THE LAW OFFICERS
STATIONERY GENERAL'S CHAMBERS
ROYAL COURT OF JUSTICE
LONDON W.C.2



CONFIDENTIAL



cePK ②

Fin Minute

PRIME MINISTER

ms

The Northern Ireland
Security does not want
a derogation from
July 1989
to ECHR for Northern
Ireland alone. He asks for
a further meeting under
your chairmanship. cdd
1/r

PREVENTION OF TERRORISM: ECHR : BROGAN

The Home Secretary sent me a copy of his minute to you of 20 July outlining a proposed response by the Government to the judgment of the European Court of Human Rights in the case of Brogan. I have serious reservations about this and I hope that no decision will be taken to proceed without a further meeting under your chairmanship.

2. The Home Secretary wants us to withdraw our UK-wide derogation under the European Convention. Instead he wants us to derogate for Northern Ireland only and introduce a system under which judges (rather than the Secretary of State as at present) will consider police applications to extend the detention without charge of terrorist suspects up to a maximum period of seven days. For the reasons he has given, it will not be possible to introduce any similar system in Northern Ireland.

3. As the Home Secretary knows, I am happy with the present position. This allows the detention of persons suspected of involvement in terrorism in Northern Ireland (whether arrested in GB or Northern Ireland) to be regulated in the same way as it was before the Court's judgment. I acknowledge that this would still be the case in Northern Ireland if his proposals were accepted and that a "Northern Ireland only" derogation is most unlikely to be successfully challenged at Strasbourg.

4. Nevertheless, I would see an abandonment of UK-wide derogation

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as a most unwelcome further example of the isolation of Northern Ireland from the rest of the UK. It would also conflict with our policy of ensuring that, so far as possible, the whole of the UK should be subject to the same laws.

5. If we legislate only for Great Britain, we will be strongly pressed to explain why what we are doing for the rest of the United Kingdom cannot also be done in Northern Ireland. It will be very difficult publicly to explain these reasons - some of which are sensitive in security terms. We will undoubtedly be told that legislation with such a limited effect is not a proper response to the Strasbourg judgment. There are only a handful of extensions of detention in GB each year compared with some 500 in Northern Ireland. Moreover, there must also be a risk that there will be pressure in Parliament to provide more "safeguards" for the detained suspect than are contained in the procedures described in the Home Secretary's annex. (The Lord Chief Justice for Northern Ireland has told me of his own concern that the proposed arrangements are so weighted against the suspect as not to be properly judicial in character. It was, of course, our original contention at Strasbourg that the decision required is basically executive rather than judicial in character). If such pressure were to succeed, the result would be that there would be a greatly increased risk that dangerous terrorist suspects would walk free at a time when the police wished to question them further. I note that the Home Secretary has acknowledged that even the arrangements proposed in his annex could have this effect.

6. I acknowledge that the Home Secretary may have a special problem with suspected 'international' terrorists, who, since the Brogan judgment, can be held only up to a four day maximum. But, putting that to one side, I am not convinced that further action in relation to 'Northern Irish' terrorism is either necessary or desirable.

C O N F I D E N T I A L



7. It is not necessary because we are under no strong pressure to change a system which continues to work effectively. Our UK-wide derogation has not yet been challenged, and any challenge that might be made would take years to bring to a conclusion. I acknowledge that we need to have regard to our human rights record; but I do not think we should be too defensive about this. Persons detained on suspicion of involvement in terrorist offences have substantial rights. They are statutorily entitled to have someone informed of their arrest and to consult a solicitor. There are strict rules governing the conduct of their interrogation; and they have the certainty of knowing that within seven days they will either have been charged and brought before a court or released.

8. Action is not desirable because we cannot know where it will lead. The arrangements described in the Home Secretary's annex might not survive Parliamentary scrutiny and could easily be weakened. They could then prove to be the 'thin end of the wedge' for Northern Ireland. At present, there is virtually no controversy surrounding the detention of terrorist suspects. Legislation would change all that. I suspect that a Bill, especially one excluding Northern Ireland, would have a difficult passage in both Houses. It would be attacked for leaving out Northern Ireland and probably also because its procedures were seen as insufficiently judicial. It could not be other than controversial and I am doubtful about how much credit it would bring us with the human rights lobbies either at home or abroad.

9. I remain therefore unconvinced that we need to go down this road at all.

10. I am sending copies of this minute to the Foreign and Commonwealth Secretary, the Defence Secretary, other members of H and QL Committees and to Sir Robin Butler.

P.B.

PB
C O N F I D E N T I A L
-3-

Env Pdr Human Rights Pr 2.



ylc



CONFIDENTIAL

HOUSE OF LORDS,

LONDON SW1A 0PW

29 July 1989



COO
2/17

Dear Douglas,

PREVENTION OF TERRORISM: BROGAN

I have seen your memorandum of 20 July to the Prime Minister setting out the way forward following the Brogan judgment of the European Court of Human Rights.

Following my correspondence with the Lord Chief Justice of Northern Ireland there is plainly no prospect of introducing a judicial scheme in Northern Ireland and I concur with your view that maintaining derogation in the Province as the only way forward, at least for now. I doubt very much whether it will be possible to produce a judicial scheme for Northern Ireland in the longer term but I will be seeing Sir Brian Hutton at some stage to explore future prospects.

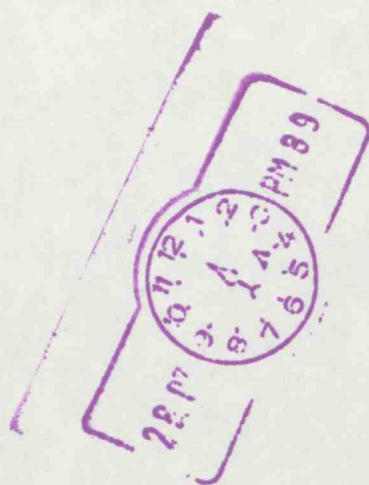
In the meantime I agree that we should go ahead along the lines you suggest in paragraph 7 of your memorandum. We will of course have to discuss fully with the judges the detailed procedures to be incorporated in the scheme for the judicial control of extended detentions. The working of the scheme will depend very much on their goodwill.

I am copying this letter to the Prime Minister, the Foreign Secretary, other members of H and QL Committee and to Sir Robin Butler.

Yours ever,

Jan.

The Right Honourable
Douglas Hurd CBE MP
Secretary of State
for the Home Department
Home Office
Queen Anne's Gate
London SW1H 9AT





01-936 6269

Rt Hon Douglas Hurd CBE MP
Secretary of State for the Home Department
Home Office
50 Queen Anne's Gate
London
SW1H 9AT

ROYAL COURTS OF JUSTICE

LONDON, WC2A 2LL

CDG
27/7.

26 July 1989

Dear Douglas,

PREVENTION OF TERRORISM

ECHR: BROGAN v UNITED KINGDOM

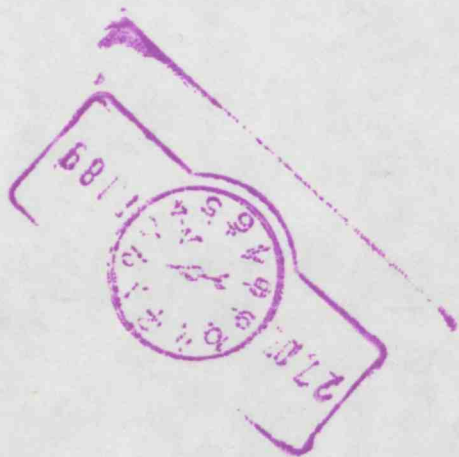
I refer to your Minute of 20 July to the Prime Minister.

I welcome the proposals that you put forward for the introduction of a judicial procedure to review the detention of terrorist suspects. I strongly support the introduction of your proposals at an early stage, even though the judicial procedure, and the consequent withdrawal of our derogation under Article 15 of the Convention, can apply under present circumstances only to Great Britain. I well understand the grave difficulties which would face the judiciary in Northern Ireland if similar proposals were introduced there; and I have little doubt that the Court of Human Rights would uphold a derogation limited to Northern Ireland. But as the Attorney General has already advised, following consultation with leading counsel, it would probably be difficult to sustain a continuing derogation in respect of Great Britain.

I am copying this letter to the Prime Minister, the Foreign Secretary, to other members of H and QL committees and to Sir Robin Butler.

Yours ever
Nick.

Euro Rd - Human Rights
Pr2.



CONFIDENTIAL

SWYDDFA GYMREIG

GWYDYR HOUSE

WHITEHALL LONDON SW1A 2ER

Tel. 01-270 3000 (Switsfwrdd)
01-270 0538 (Llinell Union)

Oddi wrth Ysgrifennydd Gwladol Cymru



WELSH OFFICE

GWYDYR HOUSE

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Tel. 01-270 3000 (Switchboard)
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From The Secretary of State for Wales

The Rt Hon Peter Walker MBE MP

21 July 1989

R. Smith

*This shows that your
colleagues are now
on their
toes.*

*can
21/7.*

Dear Secretary of State *minutes
attached*

At the meeting of OD(E) at the beginning of June we were asked to be vigilant in identifying potential extensions of the European Commission's competence and to combat them wherever necessary. The role of the European Court in extending previously understood interpretations of EC legislation was also to be treated with caution. I believe the European Commission are using the Court for such a purpose in respect of a case concerning the Directive for the conservation of Wild Birds.

The Commission have made an application to the European Court that a German land drainage and coast protection scheme is in breach of the Directive. A Court consideration of this case could undermine the UK's whole approach to statutory planning in respect of balancing development and conservation interests. It could be very damaging indeed for projects of national policy significance such as the Cardiff Bay Barrage.

At the heart of the Commission's case is that once a special protection area has been specified under the Wild Birds Directive, Article 4 of that Directive does not permit any harmful interference which might have an adverse effect on the birds' habitat. In making its case the Commission has reasoned that the Directive does not in any way allow for a balance to be made between the requirements of birds' protection and other demands. I am unable to understand why the Commission are taking such a rigid and unrealistic stance since in a Reasoned Opinion given just over a year ago on the Caenlochan case, they appeared to reach a contrary view which was in sympathy with our approach that a balance has to be struck. My only conclusion is that this is a deliberate attempt to extend their competence into members states' domestic planning policies.

/We cannot allow the...

Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign and
Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON SW1A 2AL



We cannot allow the Commission's view to go unchallenged before it reaches the European Court. The UK approach, which is wholly sensible and takes full account of conservation concerns, is set out in the Nature Conservancy Circular issued to local planning authorities in December 1987. It lays down clear procedural guidance to be followed, including the requirement that in SPA's, or proposed SPA's, there has to be a careful evaluation of the balance between the needs of rare and migratory birds and economic and recreational requirements.

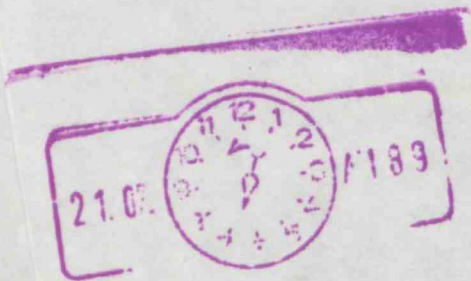
Apart from my concern about the impact of this case on planning policy in general, it will be most harmful to the Cardiff Bay project at a time when the Private Bill has just been introduced into the Commons. The sponsors of the Private Bill for the barrage have, as we know, undertaken the most comprehensive and detailed economic and environmental evaluation studies for any project of this nature. They did so to the full satisfaction of the Committee in the Lords which considered the consequences of the Bill.

Treasury Solicitor is examining the legal grounds for intervention. But the UK Government must intervene urgently and directly in support of the German case. In doing so we should use it as an example to seek the support and obtain the alliance of other member states which could find themselves just as seriously inhibited in their ability to seriously balance conservation with other issues.

/ I am copying this to the Prime Minister, Nicholas Ridley, Malcolm Rifkind, other members of OD(E) and Sir Robin Butler.

Yours sincerely

Keith Jarvis



Approved by the Secretary of State
and signed in his absence.



PRIME MINISTER

PREVENTION OF TERRORISM

ECHR: BROGAN v THE UNITED KINGDOM

Flap
You will recall that we met on 5 December 1988 to discuss the implications of the judgment of the European Court of Human Rights in the Brogan case. This concerned the period during which terrorist suspects could be held before being brought before a court or released.

2. In accordance with the conclusions of that meeting I undertook to produce proposals for introducing a judicial element into the procedure under which the detention of terrorist suspects arrested under the Prevention of Terrorism Act could be extended on application by the police. On 22 December I told Parliament that it remained our wish to respond to the Court's judgment by introducing a judicial element into the procedures for extending detention, but that problems remained and, in order to ensure that the police continued to have effective powers, we were entering notices of derogation from the European Convention on Human Rights and the comparable United Nations Covenant in respect of Northern Irish terrorism.

3. It has been possible to devise a scheme (outlined at Annex A) which we believe would meet Strasbourg requirements. The judiciary in Great Britain have indicated their willingness to operate such a scheme. But the Lord Chief Justice for Northern Ireland remains opposed to the Northern Ireland judiciary introducing any procedure in which Northern Ireland judges would be involved in the same way as their English and Scottish counterparts. We have examined the possibilities of introducing a judicial procedure in Northern Ireland which would use experienced lawyers rather than judges. But there are substantial practical as well as security difficulties standing in the way here, which we do not believe can be overcome.

4. We can, therefore, (if we wish) introduce a judicial scheme for Great Britain, once the necessary legislation is through and thus withdraw the derogation in respect of Great Britain but not Northern Ireland.

5. Introducing a judicial procedure in Great Britain would demonstrate a willingness to comply with the Convention. But by far the majority of cases of arrest and detention under the Prevention of Terrorism Act occur in Northern Ireland and not Great Britain; and it is those cases with which the European Court's judgment was principally concerned. It may therefore be thought to be a less than satisfactory response to the Court's judgment to introduce a judicial scheme where it will be least used. There is also some risk that a judicial procedure could allow some persons credibly suspected of involvement in terrorism to go free in circumstances in which they might have remained in detention if the decision had been that of a Secretary of State. We would need to give a convincing explanation in Strasbourg and in Parliament of the reasons why we can devise a judicial procedure for Great Britain and not Northern Ireland, though this should not be too difficult.

6. But the alternative, continued derogation for the whole of the United Kingdom (even if it can be sustained against a challenge at Strasbourg) is an unattractive proposition. It would leave us vulnerable to those at home and abroad who wish to pick holes in our human rights record. Many people accept that terrorism in Northern Ireland presents unique problems for the administration of justice there and we believe that the Strasbourg organs would be mindful of this if a derogation confined to Northern Irish terrorism were to be challenged under the Human Rights Convention. Continued derogation for the United Kingdom as a whole would be of no help in dealing with international terrorist suspects because the derogation can only apply to terrorism in connection with the affairs of Northern Ireland. We would probably have to accept an upper limit on these detentions of four days. On balance, but subject to the views of my colleagues, my preferred option would be to maintain the derogation for

3.

Northern Ireland alone in respect of Northern Irish terrorism and to introduce legislation for Great Britain under which a judicial procedure would be applied to Northern Irish and international terrorism. We could make it clear in any announcement that if it later becomes possible to introduce a judicial scheme in Northern Ireland also we would do so.

7. If you and colleagues agree that this is the right way forward, I should be grateful if the Lord President would agree to the introduction of a short Bill in the 1989/90 Session to give effect to the scheme. It might be thought suitable for House of Lords introduction. I believe that if we are agreed on legislation, it would be wise to do so fairly soon. The risk of a challenge to our derogation will increase once it becomes known that we intend to go down the judicial route. My present inclination would therefore be to make no announcement before The Queen's Speech.

I am copying this minute to the Foreign Secretary, other members of H and QL Committee and to Sir Robin Butler.

Day - Ann

20 July 1989

ANNEX A

THE PROCEDURE IN GREAT BRITAIN FOR JUDICIAL CONTROL OF EXTENDED DETENTIONS UNDER THE PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1989 (PTA)

This annex describes the procedure which might be introduced in Great Britain for judicial control of extended detentions. It would relate to detentions under Section 14 of and paragraph 6 of Schedule 5 to the PTA. It would thus be concerned with cases in which police terrorist investigations are taking place, where consideration is being given by the Secretary of State to deportation under the Immigration Act 1971 or exclusion under the Act or where consideration is being given by the Attorney General, the Director of Public Prosecutions or the Lord Advocate to the institution of criminal proceedings.

Initial Detention

In connection with the procedure, it is proposed to make a change to the maximum period permitted under the PTA of police authorised detention. At present this is 48 hours. This would be increased to 72 hours. During this time, the periodic police review process already set out in Schedule 3 to the Act, would be carried out. Detention for longer than 72 hours would require the authorisation of a judge. Once an application had been made to the judge it would no longer be necessary to continue with the periodic review process under Schedule 3 to the Act.

Application to Judge

The procedure would begin with an application by the police to the judge. (The application could not be made until at least 24 hours after the detention begins.) The application would be in writing. Its contents would be modelled on the information to be provided by the police in connection with applications for warrants for further detention pending charge under the Police and Criminal Evidence Act 1984. Neither the detained person nor his legal representative would be provided with a copy of the application by the police.

The application would describe the general nature of the suspicions which form the basis of the initial detention, in the case of detention under Section 14 or, in the case of detention under paragraph 6 of Schedule 5, the grounds for having continued the port examination. It would describe the general nature of the inquiries made to date and what action would be taken during any extension of the detention. The application would also describe the general reasons for believing that continued detention was necessary whilst that takes place.

Notice to the Detained Person

The detained person would be given a notice by the police that an application to the judge had been made for his continued detention. (This follows S14(5) in the Act). The notice would indicate when the application was made. It would also state the general nature of the suspicions held in relation to the detained person. Bearing in mind that the application would be made after the person has been detained for 24 hours he will very often have already learnt something of the suspicions of the police in relation to him from the nature of the questions put to him. In addition, provided it would not prejudice any police investigation or the safety of, or of persons in, the United Kingdom or some other country, the notice would state the general nature of the inquiries already made and those to be made during the extended detention or, as appropriate, that consideration was being given to the detained person's exclusion or deportation or to the institution of criminal proceedings against him.

A copy of the notice given to the detained person would also be given to the judge.

Consideration by the Judge

The judge's function will be to decide whether the detention should continue, and if so for how long. This consideration will embrace what it is proposed is to take place during any period of extended detention and whether it is necessary to detain the person at all whilst this takes place and if so for how long.

The judge would begin his consideration by considering the police application. This would be in the absence of both the police and the detained person. Thereafter the judge, who would by now be present in the building where the detained person was being held, would have the opportunity to hear the police, in the absence of the detained person and his legal representative, and to question the police. It is envisaged that the police would by way of their written application to the judge and in answering questions put by him, provide him with the same information as they would have used to support an application to the Secretary of State for extended detention. This will mean that there is a meaningful basis for the judge's consideration of the police application.

The next stage will be for the detained person to be brought before the judge. The judge will first ensure that he has been given the notice referred to above. He should ensure the detained person understands the notice (but it is not intended that he should go further than does the notice in dealing with the suspicions held, the enquiries to be made or the reasons why detention is considered necessary). He should give him the opportunity to make representations (orally or in writing) about his detention but no caution would be administered. The judge would be allowed to set a time limit within which any written representations would have to be made and to proceed in their absence if they are not made within that time.

The judge would be able to ask the detained person questions relating to the matters in the written notice. (It is not proposed to impose an obligation on the detainee to answer a judge's questions on pain of criminal sanction.) Anything he said in reply would be admissible in evidence in any subsequent proceedings in accordance with ordinary rules of evidence. A detained person's silence needs to be considered in relation to the proceedings before the judge and in relation to any subsequent criminal proceedings brought against him. So far as the former is concerned, the judge can be expected in practice to draw appropriate conclusions from the detained person's silence and bearing. He is not considering the detained person's guilt or innocence, only whether he should continue to be detained. In relation to subsequent proceedings, it is not proposed to anticipate the decision in relation to the right to silence.

The police could be present whilst the detained person is before the judge.

Legal Representation

It is proposed that a detained person should be able to be legally represented when he is brought before the judge. The judge should adjourn the matter if he is not represented and wishes to be so. If the detained person has been refused access to a lawyer under s58 of the Police and Criminal Evidence Act 1984 the application should not proceed until after the person has had access to a solicitor or until the expiry of 48 hours. If any adjournment is necessary for the purpose of legal representation the person may continue to be held in police custody. His lawyer should be given a copy of the police notice given to the detained person.

Evidence

Provision would be made in the Bill to enable a judge to receive oral or documentary evidence which might be inadmissible in court proceedings.

Criteria for Authorising Continued Detention

The Bill would provide that the judge could authorise a person's extended detention if he is satisfied that that person's continued detention was necessary -

either to obtain or preserve evidence of certain offences under the Act, or of his involvement in terrorist acts or that he was the subject of an exclusion order, and that the investigation was being conducted diligently and expeditiously;

or whilst consideration was continuing as to whether he was already the subject of an exclusion order, whether to make an exclusion order or deportation order against him or to institute criminal proceedings against him.

He could also authorise the detention to continue while he completes his enquiries and consideration.

The judge would state the period of extended detention which he authorised. That would be up to a maximum detention of seven days in all, as now.

If the judge did not authorise extended detention he would order the detained person's release.

A written record of the judge's decision would be made which would include, where extended detention was authorised, the grounds for this and the period of authorised further detention. A copy would be given to the police and the detained person. The Bill would provide that a copy of the written record was sufficient evidence of the authorisation of the extended detention.

Further Applications

Before the expiry of any period of further detention authorised by the judicial officer it would be possible for the police to apply for a further authorisation of continued detention. Once such a further application had been made it would be possible to detain the person until the application had been dealt with up to the seven days maximum period of detention under the Bill, and if the authority is given for the period of the authorisation.

European Policy Pt 2

European Convention on

Human Rights

20 JUL 1989



CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

11 July 1989

Prime Minister
To note. The outcome will
become public in a few weeks
fine
AT 11/2

Dear Andrew

EUROPEAN COURT OF HUMAN RIGHTS:
HEWITT/HARMAN V UNITED KINGDOM:
NIMMO V UNITED KINGDOM

The European Commission considered the handling of their adverse findings on these cases at the week-end. They decided not to refer them to the European Court; but to allow them to go direct to the Committee of Ministers.

This is the result we wanted to achieve. The cases will be considered by the Committee in the autumn. We shall prepare careful briefing nearer the time, taking full account of the points made by Sir Robin Butler and set out in your letter to me of 6 July.

at final
I am copying this letter to Michael Saunders and Trevor Woolley.

Concise
Colin Walters

C J WALTERS

Andrew Turnbull, Esq.
No 10 Downing Street
London, S.W.1.

CONFIDENTIAL

Euro bl: Humer
Right A2

11 JUL 1989

CONFIDENTIAL



FILE

PM

10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

6 July 1989

EUROPEAN COURT OF HUMAN RIGHTS: HEWITT AND HARMAN v UK
NIMMO v UK

Sir Robin Butler sent the Prime Minister a copy of Mr. Lyons submission to the Home Secretary of 4 July under cover of a minute of his own. Subject to the views of the Attorney General, the Prime Minister is content that we should seek to persuade the ECHR to refer the findings in these two cases direct to the Committee of Ministers rather than going through the stage of the European Court. She has also noted Sir Robin's advice that, in reporting our decision to the ECHR, we should neither confirm nor deny the applicants' allegations, and that we should make clear that our acceptance of the findings does not amount to an admission that the applicants' allegations about the activities of the security services were true.

I am copying this letter to Michael Saunders (Law Officers' Department) and Sir Robin Butler.

ANDREW TURNBULL

Colin Walters, Esq.,
Home Office.

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CONFIDENTIAL



10 DOWNING STREET

LONDON SW1A 2AA

From the Principal Private Secretary

6 July 1989

Dear Colin

EUROPEAN COURT OF HUMAN RIGHTS: HEWITT AND HARMAN v UK
NIMMO v UK

Sir Robin Butler sent the Prime Minister a copy of Mr. Lyons submission to the Home Secretary of 4 July under cover of a minute of his own. Subject to the views of the Attorney General, the Prime Minister is content that we should seek to dissuade the ECHR to refer the findings in these two cases direct to the Committee of Ministers rather than going through the stage of the European Court. She has also noted Sir Robin's advice that, in reporting our decision to the ECHR, we should neither confirm nor deny the applicants' allegations, and that we should make clear that our acceptance of the findings does not amount to an admission that the applicants' allegations about the activities of the security services were true.

I am copying this letter to Michael Saunders (Law Officers' Department) and Sir Robin Butler.

Yours sincerely

Andrew Turnbull

ANDREW TURNBULL

Colin Walters, Esq.,
Home Office.

CONFIDENTIAL

Ref. AO89/1809

MR TURNBULL

Prime Minister
The Home Secretary has accepted the
advice that we should not contest
these findings, but should seek to
limit damage by getting the matter
direct to the Committee of Ministers rather
than through the European Court.

Agreed to

AT 5/7

European Court of Human Rights: Hewitt and Harman v UK Nimmo v UK

-- The copy of the submission (attached) from the Home Office to the Home Secretary reports that, as expected, the findings of the European Commission on Human Rights (ECHR) in two cases relating to the operations of the Security Service have gone heavily against the Government. The submission recommends that we should seek to persuade the Commission to refer these findings direct to the Committee of Ministers rather than go through the stage of the European Court. This involves accepting the findings, agreeing to the publication of the reports and agreeing to pay the applicants' costs and expenses now.

2. As the submission makes clear, we always expected that these cases would go against us. That was one of the reasons for getting ahead with the Security Service Act before we were forced to. We can now say that the Security Service Act provides a framework of law governing these operations of the Security Service. The advantage of accepting the findings now in the hope that the cases will not then be referred to the Court is that the outcome before the Court will not be any better but the cases would be likely to achieve even greater publicity and the European Court might comment unfavourably on the adequacy of the legislation we have subsequently put in place.

3. I support the Home Office's recommendation that we should seek to prevent these cases going forward to the Court (although we cannot prevent it if the Commission decide otherwise). In accordance with our normal policy of not disclosing the operations of the Security Service, we shall neither confirm



nor deny the applicants' allegations in reporting our decision to the ECHR (see draft letter attached to Home Office submission). But in explaining the decision publicly, we shall need to make clear that our acceptance of the findings does not amount to an admission that the applicants' allegations about the activities of the Security Service were true.

4. The Home Secretary has not yet expressed a view on the submission. If he agrees with it, I recommend that the Prime Minister should also go along with it, subject to the point in the previous paragraph.

F.R.B.

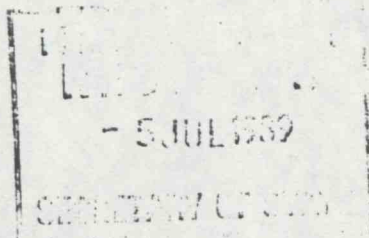
ROBIN BUTLER

5 July 1989

225
E.R.

CONFIDENTIAL

From: J M Lyon
F6 Division
Ext 3238
4 July 1989



cc Mr Yates* ✓
Mr Hammond*
Mr Chilcot*
Mr Boys Smith*
Mrs Evans*
Mr Warne*
(*without reports)

Mr Walters

EUROPEAN COURT OF HUMAN RIGHTS: HEWITT & HARMAN V UK AND NIMMO V UK

This submission is to seek the Home Secretary's agreement to us trying to persuade the Commission at Strasbourg not to refer the adverse opinions on these Security Service cases to the European Court - with the result that they will instead go straight to the Committee of Ministers. To do so, we shall need to write to the Commission on 6 July undertaking to accept the adverse findings, and agreeing to the publication of the Reports, and the payment of costs.

Background

2. Mr Sutton reported the Commission's findings in both the Harman/Hewitt case and the Nimmo case in his submission of 22 May.

3. The Hewitt & Harman case was based on allegations (made by Cathy Massiter in 1985) that the Security Service had kept surveillance and records on them and that this could hinder their political careers. Nimmo complained he had been denied employment because he had failed to get the necessary security clearance. Rep

4. In both cases the Commission have found against us on the basis that there were breaches of Articles 8 and 13 (copies of the reports are attached). The Commission in effect has found that there was interference with the private life of all the applicants, which was not in accordance with the law - and that they have had no effective remedy.

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5. None of this comes as any surprise. One of the reasons for moving forward with the Security Service Act was that we saw these findings coming. It is not possible to say how the reports as drafted might influence future cases - references in the Harman/Hewitt report to indirect interception might help to found an action that there is not sufficient protection under the Interception of Communications Act 1985; and references in the Nimmo report to the Security Service Directive not providing the requisite degree of certainty about the exercise of discretion could be levelled also against the Security Service Act: but all this we knew.

6. The Harman/Hewitt case is bound to attract the most attention because of the prominence of the petitioners - and because it relies so heavily on the Massiter allegations. Indeed, the report quotes at some length from the Massiter affidavit including Ms Massiter's references to indirect interception and her statement that security assessments are made of newly elected MPs. Presented in this direct form, it could well re-open all these matters and provide a ready quarry for PQs.

7. We have no telling arguments which we could put to seek to overturn the Commission's decisions. Our strategy now is to seek to minimise the damage by making clear that the findings have been overtaken by the new Act - without encouraging Strasbourg to comment on the detail of that legislation.

8. The Commission is to meet on 8 July to decide whether to refer its reports to the European Court or to leave the cases for decision by the Committee of Ministers. We understand that there is a strong inclination in the Commission to go for the Court. This would give much greater prominence to their findings. If the Commission decide to refer the cases to the Court, we can do nothing about it. It would, of course, be open to us to refer the cases to the European Court ourselves but, without a leg to stand on, there would be no mileage for us in doing this.

9. The following paragraphs assess the effect of the two options open to the Commission on 8 July and our scope for influencing them.

The Committee

10. If the Commission were to decide to leave the cases with the Committee of Ministers, the cases would be likely to be dealt with in the autumn of this year. We should in theory have the option of abstaining on the findings (or

(need voting against them,) and of resisting publication of the reports. But these courses would be relatively unusual and would be contrary to our general policy of seeking to bolster the Committee as an alternative to the Court.

11. Leave the cases to the Committee would have the advantage of getting them out of the way in one go this autumn; it would prevent the Court adding unhelpfully to the findings; it would give lesser prominence to the violations; and we are reasonably confident that the Committee would accept the Act as the answer to the violations without analysing the detail.

12. But our assessment is that we have little hope of the Commission leaving these cases to the Committee of Ministers unless we take the unusual step of writing to the Secretariat suggesting this course. This might work. But only if we are prepared to make clear that this will not disadvantage the applicants. This means we should have to undertake now to accept the findings and agree to the publication of the reports and the payment of costs.

European Court

13. If the Commission refer the cases to the European Court, they would be likely to come up next year. But the Commission's reports themselves would be published in the next few weeks. We could only prevent this by trying to persuade the President that major national security considerations prevented their publication - and we see no reasonable hope of that. Indeed by treating the cases in this very unusual way, they would only achieve greater prominence. Once the Court had had its say, the cases would then go to the Committee of Ministers where, once again, we would hope that it would see the new Act as a satisfactorily response to the violations.

Assessment

14. We think the balance of advantage lies firmly in seeking to persuade the Commission to leave these cases with the Committee of Ministers. Since a reference to the Court is bound to maintain the adverse findings against us, will anyway oblige us to pay costs and will lead to early publication, we think in practice we have little to lose. We stand to gain the chance to minimise the prominence of these cases and to deal with the publicity all in one go.

15. We shall need to move quickly if we are to take this option. I attach a draft letter which we propose should be sent and which has been prepared on the

E.R.

advice and with the support of the Foreign Office Strasbourg experts and of the Law Officers Department. It will need to arrive with the Commission Secretariat by 7 July at the latest if it is to influence the Commission's meeting the following day. We see no need at this stage - nor is there the time - to consult more widely: but this submission is being copied to Sir Robin Butler's office in case he would think it necessary to put the Prime Minister's office in the picture.

Conclusion

16. I invite the Home Secretary to agree that we should seek to persuade the Commission to leave these cases with the Committee of Ministers and not to refer them to the European Court; and that a letter should be sent to the Secretariat before 8 July on the lines of the draft below.

17. If the Home Secretary agrees, we shall report the outcome. If the attempt fails and the Commission decides nevertheless to refer the cases to the Court, then we shall need to be ready with briefing to counter the effect of the publication of the adverse reports sometime in the next few weeks.

F6 Division
WU/88 470/22/1

J M LYON
4 July 1989

E.R.

DRAFT LETTER TO BE SIGNED BY THE FOREIGN AND COMMONWEALTH OFFICE

Mr H C Kruger
Secretary to the European Commission
of Human Rights
Council of Europe
STRASBOURG

APPLICATION NO 12175/86: HEWITT AND HARMAN V THE UNITED KINGDOM
APPLICATION NO 12327/86: NIMMO V THE UNITED KINGDOM

Sir,

I have the honour to refer to the Commission's Reports in the above-mentioned cases, which were adopted on 9 May 1989 and transmitted to the Government under cover of letters from the Secretary General of the Council of Europe dated 12 and 20 June 1989, and to inform you that the Government do not intend to refer these cases to the Court for the following reasons.

It will be recalled that each of these cases deals with a sensitive area of national security. In each case the Government, in line with their policy of not disclosing information about the operations of the Security Service, neither confirmed nor denied the applicants' allegations (paragraph 26 of each Report).

In each case the principal finding of the Commission was that the interference with the applicant's right to respect for his or her private life could not be justified under paragraph 2 of Article 8 of the Convention because it was not "in accordance with the law". That finding, which in each case was by a very large majority within the Commission, was an application of the settled case-law of the Convention organs, and in particular of the Klass and Malone judgements. In the Government's view, no new issues, or at least none that are likely to be resolved by the judgement of the Court, arise in the present cases.

E.R.

Moreover, the Security Service Act 1989 (c.5), a copy of which was enclosed with my letter of 10 May 1989, received the Royal Assent on 27 April 1989. This Act, which will enter into force as soon as practicable, addresses the domestic legal position underlying the present cases (and which forms the basis of the Commission's findings), and is drafted to conform to the Convention.

The Government are conscious of the current workload of the Court, and of the need to ensure that the Court's burden is kept to a minimum.

The position of the present applicants will in no way be adversely affected if their case is decided by the Committee of Ministers acting under Article 32 of the Convention rather than by the Court. The Government will indicate in the Committee of Ministers that they accept the conclusions of the Commission set out in the Reports and that they have no objection to publication of the Reports. The Government will be willing to meet the applicants' costs and expenses on the usual basis (if necessary following a recommendation of the Commission).

I have the honour to be,
Sir,
Your obedient Servant,

M C WOOD
(Agent of the Government of the
United Kingdom)

From: THE PRIVATE SECRETARY



CC PAB
Q
L
men
DC
HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

22 December 1988

CDD 22/12

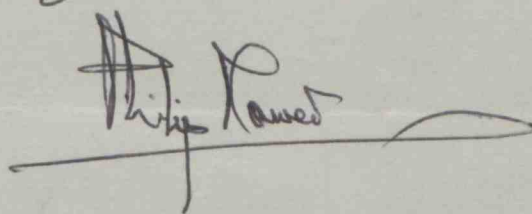
Dear Charles,

BROGAN

I am grateful for the comments received on the draft of the statement by the Home Secretary which I circulated yesterday.

... Attached is a copy of the final text. The main change involves the deletion of the final paragraph of the draft on international terrorism: this seems prudent while there is uncertainty about ... the cause of last night's air disaster. Also enclosed is a copy of the line which the Home Secretary will take if the question of detention of international terrorist suspects is raised in Committee.

I am copying this letter and enclosures as before.

Yours sincerely,


P J C MAWER

C D Powell, Esq
Private Secretary
10 Downing Street
LONDON, SW1

BROGAN: STATEMENT BY THE HOME SECRETARY

At the Second Reading of this Bill, I told the House that the Government was considering the Judgement of the European Court of Human Rights in the case of Brogan and others. I said then that we would bring forward proposals before the Bill left this House. My hon Friend was pressed on the point in this Committee and explained that we hoped, if possible, to be able to outline our proposals for the benefit of the Committee before the House rose for Christmas. I should now let the Committee know how far we have got.

When I spoke to this matter at Second Reading I explained that the Judgment of the European Court of Human Rights raised highly complicated issues. It left open two ways in which we could proceed. We could decide to derogate under the Convention in respect of the powers to detain persons on reasonable suspicion of involvement in the commission, preparation or instigation of an act of terrorism as provided for in Article 15 of the Convention; or we could introduce a judicial element into the procedure for authorising extensions of detention in order to comply with Article 5.3 of the Convention. I reminded the House that the Court had recognised the difficulties of judicial control over decisions to arrest and detain suspected terrorists. The Court acknowledged that these factors might call for suitable procedural precautions. It also acknowledged the particular circumstances of Northern Ireland.

Sir John, it remains our wish to find a judicial route through this problem if this can be achieved. But our own criminal justice system is radically different from those of the continental countries to which the European Commission and the Court of Human Rights are more accustomed. In those countries it is often the practice for an examining magistrate to have the power to authorise detention while himself leading the investigation. The periods of detention which may be authorised before there is anything we should recognise as a charge are often much more than the seven days maximum permitted under the Prevention of Terrorism legislation in this country. In authorising detention, the continental examining magistrate is not exercising a judicial function as we should interpret the role. The continental inquisitorial system and our system are different, having developed separately over centuries. Grafting the procedures of one system on to the other is not easy. It is reasonable to need weeks rather than days to consider the issues. We must pay proper regard to the tremendous pressures which are already faced by the judiciary, especially in Northern Ireland where most cases have to be considered. We are also concerned that information about terrorist intentions, which often forms part of the case for an extension of detention, does not find its way back to the terrorists as a consequence of judicial procedures which at least in the United Kingdom legal tradition generally require someone accused and his legal advisors to know the information alleged against him.

In the time available since the European Court of Human Rights published its Judgment on 29 November, we have begun work on these difficult issues. We have entered into discussions with the Judiciary. These have persuaded us that a further period of reflection and consultation is necessary before we can bring forward a firm and final view. We will of course inform the House as soon as that view is reached.

In the meantime, the position cannot be left as it stands. I have already made clear to the House that we shall ensure that the police continue to have the powers they need to counter terrorism, and they continue to need to be able to detain suspects for up to seven days in some cases. In order to ensure that there can be no doubt about the ability of the police to deal effectively with such cases the Government is today taking steps to give notice of derogation under Article 15 of the European Convention on Human Rights and Article 4 of the International Convention on Civil and Political Rights. There is a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom. The notices of derogation are in respect of the powers contained in the 1984 Act and to be re-enacted in this Bill to detain those suspected of involvement in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

Sir John, I explained to the House on Second Reading that it would not be sensible to rush into hasty decisions on a highly complicated problem such as this in a short timescale. Our further deliberations have reinforced us in the view that we should proceed with great caution, and make sure that we have in our sights a system which is both workable and credible before deciding finally which of the routes left open by the ECHR judgment we should select.



What about International Terrorism?

Why aren't you also derogating for that?

It is true that the derogation distinguishes between Irish and international terrorism. This is one of the points we are considering. But there are no immediate cases involving the detention of international terrorist suspects. That is why, at this moment and given the provisional nature of my announcement, we have limited derogation to the powers to detain those suspected of acts of terrorism connected with the affairs of Northern Ireland



CONFIDENTIAL



10 DOWNING STREET

LONDON SW1A 2AA

From the Private Secretary

21 December 1988

Dear Paul,

PREVENTION OF TERRORISM BILL: BROGAN CASE: CONSEQUENTIALS

The Prime Minister has considered the Lord Chancellor's minute of 21 December about the implications of the European Court of Human Rights Judgement in the Brogan case. She agrees that we should make a temporary derogation under Article 15 of the ECHR for the United Kingdom as a whole in respect of acts of terrorism connected with the affairs of Northern Ireland, the purpose being to leave us more time to devise a system of judicial involvement in decisions on extensions of detention applications to meet the requirements of the ECHR. She would also be content for the Home Secretary to speak on the lines proposed in the House on 22 December.

I am copying this letter to the Private Secretaries of the Home Secretary, the Northern Ireland Secretary, the Foreign Secretary, the Scottish Secretary, the Lord President, the Attorney General, the Lord Advocate and Sir Robin Butler.

Yours sincerely,

(C.D. POWELL)

Paul Stockton, Esq.,
Lord Chancellor's Office.

CONFIDENTIAL

From: THE PRIVATE SECRETARY

CCR



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

21 December 1988

Dear Charles,

CD 24/12

BROGAN

with CD

.....
Further to the Lord Chancellor's minute to the Prime Minister of earlier today, I enclose the draft text of the statement which the Home Secretary would propose to make tomorrow morning in Committee on the Prevention of Terrorism Bill.

Copies go to Paul Stockton (Lord Chancellor's Office) and the Private Secretaries to the other recipients of the Lord Chancellor's minute.

Should anyone have any comments on the draft I would be grateful for them by not later than 9 a.m. tomorrow.

Yours sincerely,

P J C MAWER

C D Powell, Esq.

BROGAN: DRAFT STATEMENT

At the Second Reading of this Bill, I told the House that the Government was considering the Judgement of the European Court of Human Rights in the case of Brogan and others. I said then that we should bring forward proposals before the Bill left this House. My hon Friend was pressed on the point in this Committee and explained that we hoped, if possible, to be able to outline our proposals for the benefit of the Committee before the House rose for Christmas. I should now let the Committee know how far we have got.

When I spoke to this matter at Second Reading I explained that the Judgment of the European Court of Human Rights raised highly complicated issues. It left open two ways in which we could proceed. We could decide to derogate under the Convention in respect of the powers to detain persons on reasonable suspicion of involvement in the commission, preparation or instigation of an act of terrorism as provided for in Article 15 of the Convention; or we could introduce a judicial element into the procedure for authorising extensions of detention in order to comply with Article 5.3 of the Convention. I reminded the House that the Court had recognised the difficulties of judicial control over decisions to arrest and detain suspected terrorists. The Court acknowledged that these factors might call for suitable procedural precautions. It also acknowledged the particular circumstances of Northern Ireland.

Sir John, it remains our wish to find a judicial route through this problem if this can be achieved. But our own criminal justice system is radically different from those of the continental countries to which the European Commission and the Court of Human Rights are more accustomed. In those countries it is often the practice for an examining magistrate to have the power to authorise detention while himself leading the investigation. The periods of detention which may be authorised before there is anything we should recognise as a charge are often much more than the seven days maximum permitted under the Prevention of Terrorism legislation in this country. In authorising detention, the continental examining magistrate is not exercising a judicial function as we should interpret the role. The continental inquisitorial system and our system are different, having developed separately over centuries. Grafting the procedures of one system on to the other is not easy. It is reasonable to need weeks rather than days to consider the issues. We must pay proper regard to the tremendous pressures which are already faced by the Judiciary, especially in Northern Ireland where most cases have to be considered. We are also concerned that information about terrorist intentions, which often forms part of the case for an extension of detention, does not find its way back to the terrorists as a consequence of judicial procedures which normally rightly require someone accused and his legal advisors to know the information alleged against him.

In the time available since the European Court of Human Rights published its judgment on 29 November, we have begun work on these difficult issues. We have entered into discussions with the Judiciary. These have persuaded us that a further period of reflection and consultation is necessary before we can bring forward a firm and final view. We will of course inform the House as soon as that view is reached.

In the meantime, the position cannot be left as it stands. I have already made clear to the House that we shall ensure that the police continue to have the powers they need to counter terrorism, and in the case of Irish terrorism they continue to need to be able to detain suspects for up to seven days in some cases. In order to ensure that there can be no doubt about the ability of the police to deal effectively with such cases the Government is today taking steps to derogate under Article 15 from the European Convention on Human Rights and Article 4 of the International Convention on Civil and Political Rights in respect of the powers contained in the 1984 Act and to be re-enacted in this Bill to detain those suspected of involvement in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

In respect of terrorism of an international character the powers available under the legislation are used to a substantially lesser degree, and the threat does not constitute an emergency threatening the life of the nation. Extensions of detention in respect of international terrorist suspects will be restricted to a maximum of two days (making four days in total) until final decisions have been taken on this matter.

Sir John, I explained to the House on Second Reading that it would not be sensible to rush into hasty decisions on a highly complicated problem such as this in a short timescale. Our further deliberations have reinforced us in the view that we should proceed with great caution, and make sure that we have in our sights a system which is both workable and credible before deciding finally which of the routes left open by the ECHR Judgment we should select.



HOUSE OF LORDS,
LONDON SW1A 0PW

CONFIDENTIAL

21 December 1988

PRIME MINISTER

Prime Minister

Agreed

Re proposal in letter we should take a Temporary derogation for the whole UK, for terrorist crimes connected with Northern Ireland, to give ourselves longer to devise a system of judicial control. We cannot move faster because the Northern Ireland & Scottish

PREVENTION OF TERRORISM BILL: BROGAN CASE: CONSEQUENTIALS

Judges refuse to participate.

Agreed?

1. Since the meeting on 5 December we have been working on the options which could be followed to deal with the consequences of the Brogan case. Yesterday I chaired a meeting of colleagues to consider what course should be followed.
2. The Home Secretary has put forward a scheme whereby judicial officers would take decisions on extensions of detention applications. These judicial officers would probably be drawn in the main from the existing judiciary. They would receive sensitive intelligence material, but this material would not be made available to the detained person or his legal representative.
3. A scheme on these lines would satisfy the ECHR. There would, however, be very serious difficulties in implementing such a scheme in Scotland and Northern Ireland. It is clear that the judiciary in both of these jurisdictions would not be prepared to co-operate. Their fundamental objection is to a procedure whereby the judicial officer would be expected to act upon material which is not disclosed to the person detained. They regard this as incompatible with the role of a judge who is independent, and who is seen to be so. The English judiciary have not put forward any definite views on this issue but I would not rule out their following their Scottish and Northern Irish colleagues.
4. I should add that the Lord Chief Justice of Northern Ireland took a number of other objections to the establishment of a judicial system, including very substantial practical problems in setting up such a system for Northern Ireland.

CDD
21/12

Yes
no

5. This leaves us in a profound dilemma. If we were to seek to use Article 15 of the ECHR to derogate from the convention this would, as the Foreign Secretary has pointed out, be extremely damaging to our international standing, especially as we would have to derogate from the United Nations covenant on human rights; we should be joining the Soviet Union, Nicaragua and Turkey. It would also be difficult, in the Attorney General's view to sustain the argument that the criteria for derogation from the ECHR are met in Great Britain. Derogation for Northern Ireland alone would not solve the problem for Scotland.
6. The other options - to let the detained person see all the material on which the detention is based; to restrict the material given to the judicial officer to that which the detained person could see; or to reduce the maximum period of detentions to 4 days - would be far too damaging to the fight against terrorism to be acceptable.
7. The meeting concluded that the best way forward is to try to construct a system which would meet the ECHR requirements without necessarily involving the existing judiciary (at least in Scotland and Northern Ireland) and which would have to be different in significant respects from the judicial system as it is generally understood in the United Kingdom. It seems clear that under the ECHR this approach would be acceptable since in European countries examining magistrates and the like appear to operate in a way that permits them to examine evidence not disclosed to a suspect. What is equally clear is that such a system could not be devised quickly, and certainly not within the time-table imposed by the Prevention of Terrorism Bill. The Home Secretary therefore proposes to announce, at the meeting of the standing committee on 22 December, that the United Kingdom will, on a temporary basis, use its power under Article 15 of the ECHR, to derogate but with the objective of devising a system which can meet the ECHR's requirements. The derogation, would be for acts of Terrorism connected with the affairs of Northern Ireland throughout the United Kingdom. That would mean that the maximum period of detention under the Prevention of Terrorism Act for people suspected of other forms of terrorism would have to be reduced to 4 days - though foreign suspects would remain subject to deportation procedures. The derogation would be UK-wide but the Foreign Secretary suggested that it should be possible to frame the instrument in such a way as to be severable as between the different jurisdictions should it be challenged.
8. The Home Secretary proposes to make a further announcement in January, when the Committee comes to deal with the relevant clause in the Bill, and report progress in the light of the position then, and, if a suitable system can be

devised, to bring forward legislation as soon as practicable to implement it.

9. It would obviously be better if we could make a definite announcement now but for the reasons I have outlined the meeting today concluded that there is no alternative.
10. I am copying this minute to the Foreign Secretary, the Home Secretary, the Secretary of State for Northern Ireland, the Secretary of State for Scotland, the Lord President, the Attorney General, the Lord Advocate and Sir Robin Butler.

MAC

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GCB 1

Time limit ②

CDP
4/12

draft letter from SG to Rt.Hon. Douglas Hurd

BROGAN

Patrick Mayhew and I have been considering the legal implications of the options available to the Government to implement the Brogan Judgment. It appears that the only two feasible options are (a) derogation under Article 15 of the Convention or (b) the institution of a system of judicial supervision.

Although derogation might at first sight seem appropriate it has considerable limitations and disadvantages; whereas a carefully devised system of judicial supervision might not only secure our position under the European Convention but significantly strengthen our hand against the terrorist.

Derogation would enable us to continue the present arrangements in Northern Ireland, and we could justify it to the Court in the light of conditions over there. But we would not be able to derogate in relation to international terrorism, so we would lose the possibility of extended periods of detention in relation to international terrorists. Furthermore, derogation would mean conceding that we were unable to apply normal standards of human rights (as interpreted by the Court) in relation to the situation in Northern Ireland. This is compounded by the

requirements for derogation in accordance with the UN covenant on civil and political rights. To comply with this we must first proclaim a public emergency and then derogate. We would find ourselves in company with countries such as Chile. Uruguay.

On the other hand a new system of judicial supervision, towards which the Court is clearly steering us, presents considerable opportunities not only to overcome the immediate problem of compliance with the Convention but also to gain some of the advantages enjoyed by countries with an inquisitorial system. This point was drawn to our attention last year by David Calcutt QC.

Although it clearly recognised our difficulties (vide the twelve:seven verdict and certain comments to which I refer below) the Court is heavily influenced by the inquisitorial system which prevails on the Continent and the majority therefore have insisted, even more than did the Commission, on judicial control even at the very early stages of the investigation.

However, I believe this can be turned considerably to our advantage, not only to overcome our immediate need following the judgment to devise means of complying with the Convention, and to enhance our image, but gravely to discomfort the terrorist.

(a) Once the judicial system is in place there is no reason to continue with any absolute time-limit for the investigation process such as the present seven days. The period during which the suspect can be detained prior to charge is entirely a matter for Judge. While good grounds would no doubt be needed for extension beyond seven days these might well be satisfied for example by the need to await the results of forensic evidence involving genetic fingerprinting. The suspect would no longer know that provided he "survived" seven days in silence he would then have to be released.

(b) The suspect could be brought under very proper pressure over his refusal to answer questions. Such a system might for example enable us to institute rules under which a suspect might be invited to answer questions in the presence of the investigating Judge. This would lend significant weight to any refusal to answer reasonable questions in the circumstances contemplated by our recent amendments to Northern Ireland law.

(c) No challenge would lie to the ECHR once the requirement to bring him before the Court would have been fulfilled.

I recognise that practical problems exist but I believe they can be overcome. The appropriate judiciary must be recruited or deputed. They must be protected. There must be confidence that they and the system can be trusted not to reveal sensitive information or its sources.

My preferred choice would be for a panel of hand-picked ^{Crown} Court Judges to be deputed to these tasks as part of their general judicial functions. This would be preferable both to the use of resident Magistrates, though this is a possibility as is a mixed system, ^{and} ~~or~~ the creation of a new team drawn from say retired Judges or Senior Public Officials to exercise a new quasi judicial supervisory role.

The Judges are themselves already in receipt of considerable protection. The fact that they were a team would help to deflect attention from specific individuals.

The Court itself has shown that it recognises, in paragraph 61 of the Judgment, that modifications of normal court procedure are likely to be appropriate. "The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implication of Article 5, paragraph 3 for example in calling for appropriate procedural

precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5(3) dispensing altogether with "prompt judicial control".

The nature of the information to be provided will probably not need to descend into dangerous detail. If it does there is no reason in any event why it should be provided to the suspects and their lawyers. It is sufficient that they should know the general gist of the case against them. It will probably be possible to devise rules which prevent or limit the cross-examination, and indeed the procedure in which the opposite sides appear before the Judge but at different times may well be acceptable.

It is worth remembering that on the Continent both in relation to terrorist cases and criminal cases generally the investigating Judge or "Juge d'instruction" in practice gathers a formidable dossier. In the course of doing so only a very small percentage of suspects escape having their case brought before the ultimate court. The 1968 figure was 2.6%. Ultimate conviction rates are also significantly higher than under our adversarial system. I do not advocate that we should go very far down the inquisitorial system but in relation to terrorist cases and this particular problem I believe it has some real advantages.

draft letter from SG to Rt.Hon. Douglas Hurd

BROGAN

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requirements for derogation in accordance with the UN covenant on civil and political rights. To comply with this we must first proclaim a public emergency and then derogate. We would find ourselves in company with countries such as Chile. *Uruguay*.

On the other hand a new system of judicial supervision, towards which the Court is clearly steering us, presents considerable opportunities not only to overcome the immediate problem of compliance with the Convention but also to gain some of the advantages enjoyed by countries with an inquisitorial system. This point was drawn to our attention last year by David Calcutt QC.

Although it clearly recognised our difficulties (vide the twelve:seven verdict and certain comments to which I refer below) the Court is heavily influenced by the inquisitorial system which prevails on the Continent and the majority therefore have insisted, even more than did the Commission, on judicial control even at the very early stages of the investigation.

However, I believe this can be turned considerably to our advantage, not only to overcome our immediate need following the judgment to devise means of complying with the Convention, and to enhance our image, but gravely to discomfort the terrorist.

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My preferred choice would be for a panel of hand-picked ^{Crown} Court Judges to be deputed to these tasks as part of their general judicial functions. This would be preferable both to the use of resident Magistrates, though this is a possibility as is a mixed system, ^{and} or the creation of a new team drawn from say retired Judges or Senior Public Officials to exercise a new quasi judicial supervisory role.

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precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5(3) dispensing altogether with "prompt judicial control".

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SUBJECT
CE MASTER.EURO. POL: Euro.
Convention on Human Rights Pt. 2
10 DOWNING STREET

file MM

bc: PC

LONDON SW1A 2AA

From the Private Secretary

5 December 1988

Dear Philip,

EUROPEAN COURT OF HUMAN RIGHTS:
JUDGEMENT IN THE CASE OF BROGAN AND OTHERS

The Prime Minister held a meeting this morning to consider the Government's response to the judgement of the European Court of Human Rights in the case of Brogan and Others. There were present the Foreign Secretary, the Home Secretary, the Lord Chancellor, the Northern Ireland Secretary, the Lord President and the Attorney-General.

The Home Secretary said that colleagues were in no doubt that the police continued to need the power to detain suspects under the Prevention of Terrorism Act for at least seven days. This gave the Government two basic options in response to the European Court of Human Rights' judgement: we could seek a derogation, either for the United Kingdom as a whole or for Northern Ireland alone; or we could establish some form of judicial machinery to consider applications for detention beyond four days. Both options posed problems. The Lord Chief Justice for Northern Ireland had, for instance, put forward strong objections to giving members of the judiciary in Northern Ireland responsibility for the extension of detentions under the Prevention of Terrorism Act. Further work was therefore needed. Meanwhile, he would have to make a holding statement during the Second Reading of the Prevention of Terrorism Act on 6 December. This would refer to the ECHR judgement, reiterate the importance of retaining the power of detention for at least seven days, explain the options which were being considered and undertake to bring forward an appropriate amendment before the Bill left the House.

The following points were made in discussion:

- the Government's overriding concern must be to protect innocent people from terrorism. The police must have the powers necessary to ensure this. The Government's response to the ECHR judgement must not involve a retreat or any weakening of our ability to fight terrorism;

- a derogation was not an attractive option. It would put us on the defensive and diminish the reputation of British justice in the eyes of other countries, including those whose cooperation we might need in extradition cases. On the other hand, the ECHR had recognised that a derogation for Northern

Ireland could be justified. It would be preferable to any weakening of our defences against terrorism;

- it was not necessarily inappropriate for members of the judiciary to have responsibility for extension of detentions as argued by the Lord Chief Justice of Northern Ireland. The basic question to be determined in most such applications was whether there were reasonable grounds for an extension, for instance, to allow the production of further evidence. This was a perfectly legitimate function for a judge or magistrate; and there were powers in the Police and Criminal Evidence Act which could be a useful precedent. Against this, there was a risk that introduction of judicial machinery would make it significantly more difficult to obtain an extension;

- we should only introduce a judicial mechanism in return for a quid pro quo that strengthened the powers available to us against terrorism. For instance, with such a mechanism, the period of detention might be extended considerably beyond seven days. This would only bring us into line with practice in many continental European countries;

- it would be helpful if Government backbenchers were to trail this possibility in the second reading debate on the Prevention of Terrorism Act.

The Prime Minister concluded that further work was needed to see whether we could devise a judicial mechanism which would allow us simultaneously to stiffen our powers against terrorism. The Home Secretary should come forward with proposals as soon as possible, in consultation with colleagues. Meanwhile he should make a holding statement in tomorrow's debate on the lines he had foreshadowed.

I am copying this letter to the Private Secretaries to those present at the meeting and to Sir Robin Butler.

Yours sincerely,
Chris Powell

C. D. POWELL

Philip Mawer, Esq.,
Home Office.



FILE KK
bc PC

10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

5 December 1988

Dear Philip,

BROGAN

I have seen a copy of your letter of 5 December containing paragraphs on the Brogan judgment for the Home Secretary's speech on the Second Reading of the Prevention of Terrorism Bill tomorrow. I am confident that the Prime Minister would be content with the text.

Yours sincerely,

(C. D. POWELL)

Philip Mawer, Esq.,
Home Office.

KK

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cc/c

From: THE PRIVATE SECRETARY



HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

5 December 1988

Dear Mike,

BROGAN

.... Following this morning's meeting at No 10 officials have prepared the attached paragraphs on the Brogan judgment for inclusion in the Home Secretary's speech tomorrow on the Second Reading of the Prevention of Terrorism Bill. I should be glad to know by noon tomorrow whether your Secretary of State is content with the text.

I am copying this letter and attachment to Charles Powell (No 10), Lyn Parker (FCO), Paul Stockton (LCD), the Private Secretaries to the Secretaries of State for Defence and Scotland, Alison Smith (Lord President's Office), Michael Saunders (Law Officers' Department) and Trevor Woolley (Cabinet Office).

Yours sincerely,

P J C MAVER

M Maxwell, Esq.

BROGAN JUDGMENT
DRAFT PARAGRAPHS FOR INCLUSION IN THE
HOME SECRETARY'S SECOND READING SPEECH

The power to arrest and detain persons on reasonable suspicion of involvement in the commission, preparation or instigation of an act of terrorism has shown itself to be an invaluable part of our armoury and Lord Colville had no hesitation in recommending its continuance.

The House is already aware of the Judgment of the European Court of Human Rights in the case of Brogan and others which was delivered last week. The Court found that the purpose of the arrests of the four applicants in this case fell well within the purposes permitted by the Convention - that these arrests were based on reasonable suspicion of the commission of an offence within the meaning of the Convention, and that the intention behind the arrests was to bring charges if sufficient and usable evidence could be obtained. This Judgment makes it clear that the arrest powers - a cornerstone of our prevention of terrorism legislation - do not conflict with the European Convention on Human Rights.

Where the Court differed from the Government was not over the arrest power or the length of detention available under the Act, but the need for detainees to be brought before a Judge or other officer authorised by law to exercise Judicial power.

The Government has no doubt that the seven days detention which has been available under the 1974 Act and its successors is fully justified in some cases in order to give the police sufficient time to complete often complex enquiries and conduct questioning. In his report, Lord Colville set out 14 reasons why the police might need further detention in such cases. The extended period of detention has led to major charges in respect of a number of terrorist crimes. I give the following example. Following the shooting at close range of an off duty part-time RUC reservist, and, acting on information, the police detained a person in connection with the crime. A three day extension of his detention was requested for questioning about the suspect's alleged involvement in the incident and to await the completion of forensic and fingerprint comparisons. But it was only after a further two day extension for the police to check out an alibi that the detainee could be charged with murder. He is now serving a life sentence.

Against the background of the terrorist campaign this country continues to suffer, and the overriding need to bring terrorists to Justice, we do not believe that the maximum time a detainee is available for interview under the terrorism legislation should be any less. We wish to ensure that the police continue to have the powers which they and we believe they need to counter terrorism. It follows that

there are two ways in which we can proceed. We can decide to derogate under the Convention in respect of the exercise of these powers, as provided for in Article 15 of the Convention; or we can introduce a judicial element into the procedure for authorising extensions of detention in order to comply with Article 5.3. The Court recognised the difficulties of judicial control over decisions to arrest and detain suspected terrorists. It acknowledged that these may call for suitable procedural precautions. It also acknowledged the particular circumstances of Northern Ireland. The decision to be taken on further detention is one which in the British tradition has a strong executive flavour to it, in contrast to the Continental system in which examining magistrates supervise police enquiries and also authorise detention. The practical problems of arranging a form of judicial control in Northern Ireland are formidable.

I have no doubt that the House would have preferred to see this matter resolved before debating the Second Reading of the Bill today. But it would not have been sensible to rush into hasty decisions on a highly complicated problem between last week's judgment and today's debate. I believe the House will understand why we feel it necessary to proceed with a little more deliberation in this case. We are examining the problem with an open mind, and I shall bring forward our proposals before the Bill leaves this House.

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PMR

CONFIDENTIAL

PRIME MINISTER

EUROPEAN COURT OF HUMAN RIGHTS

You are to have a meeting on Monday morning to decide the response we should make to the European Court of Human Rights' judgement, which requires us to reduce the time for which people can be detained under the Prevention of Terrorism Act without being brought before a Judge or Judicial Officer to four days. The Home Secretary feels he must indicate the Government's position during the Second Reading debate on the PTA next Tuesday.

This is going to be a difficult one. The attached minute by the Home Secretary makes clear that the police regard it as essential to retain the power to detain a terrorist suspect for more than four days. In these circumstances the Home Secretary identifies two options:

- to seek a derogation, either for Northern Ireland alone or for the United Kingdom as a whole. The European Court on Human Rights itself recognised that a derogation could well be warranted in Northern Ireland;
- to introduce a new system under which the authorisation of a Judge or Magistrate would be required for detention beyond four days.

The general opinion of your colleagues is that a derogation should be avoided if at all possible, because it would appear a blemish on our human rights record. They think the introduction of judicial control is preferable. However, the minute notes that it is far from certain that a system of judicial control could in practice operate in Northern Ireland. It might be necessary, therefore, to have a split system: a derogation for Northern Ireland and a system of judicial control for the rest of the United Kingdom. The Home

CONFIDENTIAL

Secretary proposes that he should tell the House on Tuesday that the Government are intending to devise a system of judicial control for Great Britain but need to study the options in Northern Ireland at greater length.

However, the Northern Ireland Chief Justice has tossed a grenade into these plans by entering strong objections to involvement by the judiciary in Northern Ireland in the extension of detentions. He argues that it would involve Judges or Magistrates in a function which is not judicial; that it would blur the distinction between a judicial decision based on proper evidence and an executive decision based on information from security sources; and that it is no more than an attempt to dress up an executive decision as a judicial decision and thus bound to be unsatisfactory. In the light of this, it is hard to see how we can come up with any solution for Northern Ireland except a derogation. We do not yet know what view the Lord Chief Justice in Great Britain takes. But if he were to reach the same conclusion, it would be difficult to introduce a system of judicial control in defiance of his advice. The options would then be either to seek a derogation for the United Kingdom as a whole; or simply to ignore the requirements of the police and end the power to detain for more than four days.

No

There is no doubt that derogation is politically the more difficult choice. The Government's opponents - and some of its so-called supporters - will make a song and dance about riding rough-shod over human rights and eroding a free society. This, more than the fact of the derogation itself, will damage other countries' perception of our justice and thus their willingness to help us over extradition. But if we are serious about tackling terrorism and giving the police and security forces the power that they need, such criticism may be a price we have to pay. It is hard to see any third way between the derogation and the system of judicial control.

C.D.P.

C. D. POWELL

3 December 1988

SLHBBY



JW
PRIME MINISTER

cc PK
BYP

EUROPEAN COURT OF HUMAN RIGHTS:
JUDGMENT IN THE CASE OF BROGAN AND OTHERS

As you know, the European Court of Human Rights has found that Article 5.3 of the Convention had been violated in respect of each of these four applicants, as none of them had been brought promptly before a Judge or other judicial officer following their arrest under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA). We need to decide how we should respond to this judgment, and I believe that I must announce our response in general outline, though not in detail, in the debate on the Second Reading of the Prevention of Terrorism Bill on 6 December. I have discussed the possible terms of our response with Tom King and other colleagues with a close interest, and this minute reflects what we have agreed.

2. The powers to detain terrorist suspects for up to seven days contained in section 12 of the 1984 Act are included in the Prevention of Terrorism Bill before Parliament, and we believe they are still needed by the police. Of 20 detainees held in Great Britain for five days or more in 1987, 12 were charged with serious offences and seven were convicted. In Northern Ireland in 1987, 83 persons were detained for the full seven days and 44 were charged with serious terrorist offences, including 22 charged with murder. Although some of these charges would no doubt have been brought if a shorter period of detention had been available, the police believe that a reduction in the length of detention available under the PTA would seriously impair their ability to deal effectively with terrorist suspects. We support their view.

3. If we are to maintain the maximum period of detention at seven days we must therefore comply with the ECHR Judgment, either by introducing a judicial element into the arrangements for authorising extended detention, or by derogation from Article 5.3 of the Convention.

4. To derogate from Article 5.3 of the Convention (and a similar provision in the UN Covenant on Civil and Political Rights) we should have to claim that there existed a public emergency threatening the life of the nation and that derogation was strictly required by the exigencies of the situation. While I believe that such a claim would be successful in respect of Northern Ireland, and might succeed in respect of Irish terrorism on the mainland, I do not believe that the claim could be made with any hope of success in respect of international terrorism. Derogation would in any case be a serious setback to our international standing on human rights issues at a time when we are about to engage in some difficult discussions on these issues on the world stage. It would give fresh ammunition to critics and to enemies who seek to undermine the reputation of our system of criminal justice.

5. Colleagues are agreed that it would be possible to construct a system of judicial control over the authorisation of extended detention under the PTA on the mainland which would be workable and would satisfy the requirements of the European Convention on Human Rights. The details need to be worked up carefully. In particular we need to consider if it would be possible to confine the control to whether further detention should be authorised and not also to whether the initial arrest and detention were lawful, matters which I and colleagues in Northern Ireland and Scotland now take into account. If possible this would be desirable in order to limit the extent to which there is exposed to the judicial individual information derived from intelligence sources.

At this stage all we need to do as regards the mainland is commit ourselves to amending the Prevention of Terrorism Bill during its Parliamentary progress to include a system of judicial control for mainland extensions of detention. The police have been consulted about such a system in outline and believe that they could live with it.

6. The Secretary of State for Northern Ireland is not attracted by the possibility of derogation from Article 5.3 in respect of detentions in Northern Ireland. This would be a considerable setback to the Government's human rights stance in the Province and would add substantially to existing difficulties in North-South relations. He would in principle like to introduce a judicial system for control of extensions of detention in Northern Ireland, but needs to carry out further work on the practical arrangements which would be necessary in the Province before he can be sure that a workable system can be introduced there. For this reason, he does not believe that we should altogether rule out the possibility of derogation for the Province at this stage.

7. In these circumstances I propose to tell the House during Second Reading of the Prevention of Terrorism Bill on 6 December that we believe the police should continue to have available the possibility of detention of more than four days for terrorist suspects; that we are persuaded that it would be right to go down the judicial path for authorising extended detentions in Great Britain, and I shall be bringing proposals before the House before the Bill leaves the Commons; but that the ECHR itself recognised the very different circumstances which prevail in Northern Ireland which would in fact warrant a derogation being entered, and where obvious practical circumstances would make it much more difficult to provide a judicial process; though the Secretary of State is actively exploring the possibilities and will bring his conclusions to the House before the Bill leaves the Commons.

8. If you are content that I should handle Second Reading in this way, we shall set to work on a detailed scheme of Judicial control, and I will seek colleagues' agreement to my proposals in due course.

Finally, Tom King, Malcolm Rifkind and I have the problem of dealing with applications for extension of detention which fall foul of the ECHR Judgment. Since the Judgment did not specify an upper limit for detention under the PTA we cannot be absolutely certain of the point beyond which detentions might now be the subject of successful applications to the Commission. But it seems reasonable to assume that any detention of more than four days could form the basis for a successful application. The police will now be more cautious in putting forward applications for extensions which would take the period of detention to more than four days, and our officials will exercise particular care to ensure that any applications put to us which would take detention beyond four days are cases in which there is a strong public interest in longer detention. But in the interests of public safety we cannot rule out the possibility of detentions of more than four days. We recognise that this policy will attract criticism and we propose to defend it on the basis that our prime duty is to use the powers available to us to protect the public from the threat of terrorism. Any persons detained for more than four days will of course be able to mount further cases at Strasbourg which may well succeed. In this event we should need to be prepared to pay any compensation awarded under the Convention; there is considered to be little likelihood of further cases being sent to the Court, particularly if the Government has announced its intention to bring the law into line with the findings of the Court. I should be grateful to know whether you are content with the proposals set out in this minute; your office has set aside time on Monday morning when we can discuss this.

CONFIDENTIAL

5.

9. Copies of this minute go to the Foreign Secretary, the Secretaries of State for Defence, Scotland and Northern Ireland, the Attorney General, the Lord Chancellor, the Solicitor General and Sir Robin Butler.

M. J. Sanson

APPROVED BY THE HOME SECRETARY
AND SIGNED IN HIS ABSENCE

2.12.1988.

This minute was written before I heard the news today that the Lord Chief Justice for Northern Ireland has strong objections to giving members of the Judiciary in Northern Ireland responsibility for the extension of detentions under the PTA. I believe he takes the view that this is not a proper judicial function. This is, of course, tantamount to a rejection of the ECHR finding (although consistent with our pleadings before the Court). If shared by his counterparts in Great Britain the Lord Chief Justice's view would present us with a grave handling problem, and I hope that the Lord Chncellor will be able to provide us with further enlightenment on Monday. We shall certainly need Tom King's advice on the line he would prefer me to take in the Second Reading debate in the light of the Lord Chief Justice for Northern Ireland's reported views.

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1718 p



ROYAL COURTS OF JUSTICE
BELFAST
BTI 3JF

CONFIDENTIAL

2nd December 1988

Dear Secretary of State,

Thank you for asking me for my views on the legal problem which has arisen following the recent decision of the European Court of Human Rights.

It appears that the Government has to decide between two courses: whether to provide for judicial intervention pursuant to Article 5 (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to determine whether the questioning of a terrorist suspect should continue for a further period after the initial period of two days following arrest, or whether the Government should derogate from its obligations under Article 15 of the European Convention.

I would be very strongly opposed to the former course, and I am certain that the entire judiciary in Northern Ireland would also be very strongly opposed to it.

I state my reasons below, but before doing so I would add that, whilst I have not had the opportunity to consider the point in any detail, I would have some doubt as to whether the proposed judicial intervention would be effective in the context of Northern Ireland to comply with Article 5 (3) of the Convention. This would be because I would assume that the judge would have to consider information which would not be disclosed to the suspect or his lawyer, and it might be argued that the obligation to present a

... /

The Right Honourable

Tom King MP

Secretary of State for Northern Ireland

Witness against the suspect for examination by his lawyer imposed by Article 6 (3)(d) of the Convention should be imported into Article 5 (3).

My reasons for being opposed to judicial intervention to determine whether questioning should continue are these:

- (1) It would involve judges or magistrates in a function which is not judicial. The decision whether a terrorist suspect, who has not confessed after he has been questioned for two days, will confess after he has been questioned for a further five days is not, in my opinion, a matter for a judge or magistrate to decide.
- (2) If a statute provided that a judge or magistrate would decide whether there was material pointing to the involvement of a suspect in terrorist activities which would justify the police holding him for questioning for a further five days, this would presumably involve the judge or magistrate in having to consider intelligence information such as reports from informers or "traces". But, again, this is not the proper function of a judge or magistrate.
- (3) If a judge or magistrate were required by statute to perform either of the functions to which I have referred in (1) and (2) above this would involve the judge or magistrate much too closely in a function which is essentially one for the Executive and members of the security forces and not one for judges or magistrates. Those who, for political reasons, criticise the judiciary and the administration of justice in Northern Ireland are unable to point to any specific cases or circumstances to justify their criticisms. But to involve the judges or the magistrates in deciding whether, and for how long, a terrorist suspect should be questioned would be to blur the vital distinction between a judicial decision based on proper evidence and an executive decision based on information from security sources. Such a step would gravely harm the standing of the judiciary in Northern Ireland and would provide real and effective ammunition for those who seek to denigrate the judiciary. Moreover if judges or magistrates became concerned in assessing

intelligence information against terrorist suspects it could be argued with great force that they had thereby become disqualified from hearing cases against terrorist suspects based on legal evidence.

An attempt to "dress up" what should be an executive decision to make it appear a judicial decision usually fails and incurs more censure which is valid than if the reality is faced at the outset that the decision is an executive one and should and can be justified on that basis. An example of this was the creation of the tribunals in the Maze Prison to decide whether persons should be detained without trial because of their involvement in terrorism. The lawyers who sat as commissioners in those tribunals did their work honestly and fairly but it could not be validly maintained that they were performing a judicial function when they based their decisions on security information which could not be revealed to a detainee or his lawyer, and the existence of those tribunals merely provided the critics of detention with additional ammunition.

(4) I am not familiar with the French system of examining magistrates, but I think it probable that a French examining magistrate only acts on admissible evidence and not on information from the security forces.

(5) Even if statute placed the task of deciding whether a terrorist suspect should continue to be questioned on a magistrate and not on a High Court or County Court judge, I think that the High Court might become involved by reason of a suspect applying to the High Court for judicial review of the magistrate's decision. Moreover there might not be a consistency of approach by magistrates.

I do not propose to comment on matters which fall outside the legal sphere. However I think it falls within the legal sphere to observe that Article 15 of the European Convention on Human Rights expressly permits derogation from the obligations under the

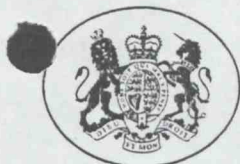
Convention "in time of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation" and about twelve years ago both the European Commission of Human Rights and the European Court of Human Rights expressly upheld the submission of the United Kingdom Government that the Republican terrorist campaign in Northern Ireland constituted a "public emergency threatening the life of the nation".

I am sending copies of this letter to the Lord Chancellor and the Attorney General.

Yours sincerely,

Brian Hutton.

From: THE PRIVATE SECRETARY



CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

2 December 1988

Dear Mike,

BROGAN

Your Secretary of State discussed with the Home Secretary yesterday how matters should be taken forward in the wake of the ECHR judgment in the Brogan case. The Solicitor General, Lord James Douglas-Hamilton, Sir Clive Whitmore, Sir John Blesloch and Mr John Boyd were among officials also present.

Opening the discussion, the Home Secretary said that he had called the meeting in order to decide the terms on which he should advise the Prime Minister in a minute which he proposed to get into her week-end box. He wished to be in a position to make a considered statement of the Government's position during the Second Reading of the Prevention of Terrorism Bill which was to be taken on Tuesday, 6 December. There might be need for a meeting of Ministers with the Prime Minister on Monday, and contingency plans for this had been made. Earlier discussions between officials had produced convincing arguments for not departing from the seven day detention provision in the prevention of terrorism legislation. That left two main options for Ministers to consider: derogation from the Convention in respect of part or all of the United Kingdom, or the introduction into the extended detention process of a judicial element. His own inclination was to try to avoid derogation if at all possible. But much depended on whether a practical proposal could be formulated for introducing a judicial element into the process in Northern Ireland.

In subsequent discussion it was agreed that derogation should be avoided if possible. It would be very bad in presentational terms, difficult to justify for the United Kingdom as a whole, and derogation for Northern Ireland alone would further emphasise the differences between the Province and the rest of the United Kingdom. Turning to the judicial option, officials suggested that the judicial officer's role would be prospective rather than retrospective. His role would not be to review the grounds for the original arrest, but to satisfy himself that there were grounds for continued detention. There was a model for these grounds already in Schedule 3 of the Prevention of Terrorism Bill. It was agreed that in England and Wales and in Scotland there did not seem to be any practical difficulty about establishing a judicial process. Officials envisaged a panel of specially appointed officers who would travel to the point at which a person was detained and interview him and his legal representatives there. The precise practical arrangements still needed to be worked out. But in principle there did not seem to be any problem about working up a procedure on these lines.

CONFIDENTIAL

The practical difficulties were, however, much greater in relation to Northern Ireland. Principal among these was the question whether the existing judges would be prepared to take the job on. If not, the question immediately arose as to who else might undertake the function and whether they could be protected. The difficulties about source protection were particularly acute in the Province. And it would be particularly difficult there to envisage any arrangements which involved taking the detained person to the court. On the other hand it was noted that the ECHR judgment did recognise the particular difficulties in Northern Ireland, and justifiable variations in practice there would not necessarily be open to further challenge before the Strasbourg court.

It was noted that the Strasbourg judgment had not said in terms that detention of up to four days without judicial involvement was acceptable under the Convention. Nevertheless the Solicitor General felt that there was no realistic prospect of a challenge to detention of up to four days at Strasbourg. However, the introduction of a judicial procedure for detention in excess of four days would inevitably eat into the time available to the police for questioning the detained person. It was suggested that some increase in the time limit for detention from, say, seven to ten days might be feasible if a judicial procedure was introduced. Indeed the Solicitor General thought that the Strasbourg court might well be content with a procedure without any time limit provided that a judicial officer entered the procedure at a sufficiently early stage. The Home Secretary commented, however, that it would be very difficult in Parliamentary terms, even with the addition of a judicial officer, to move in one go from the present seven day limit to an open-ended detention provision.

The meeting also discussed whether the introduction of a judicial officer should inevitably lead to a three stage procedure, or whether that procedure might be reformed so that Ministerial involvement in the process was ended. Doubt was expressed about whether it would be right to remove executive involvement altogether, but this was a point on which further advice from officials was required. Particular care would have to be taken not to increase the burden which would fall on the judiciary if any two-stage process was envisaged. The Solicitor General commented that the best outcome from the Strasbourg point of view would be to introduce the judicial figure after 48 hours. If this was not practicable, however, then some element of external supervision between 48 and 96 hours was desirable. The Home Secretary invited the Solicitor General to put his thoughts on the procedure to his colleagues in writing.

Summing up the discussion, the Home Secretary said that the importance of the seven day detention provision was agreed, as were the disadvantages in derogation. The alternative was the judicial option, which seemed feasible for Great Britain but posed practical difficulties in Northern Ireland. Officials should now work up advice to Ministers on the ways in which a judicial option might be implemented both in Great Britain and in the Province, taking into account the Solicitor General's views which he would confirm in writing. As regards his speech on Second Reading of the Prevention of Terrorism Bill, he would propose to emphasise the importance of the seven day detention provision. He would confirm that the Government was exploring the judicial option, but that it entailed practical difficulties which would have to be addressed. If necessary, the Government believed it could defend derogation for Northern Ireland. But there too the Government was working hard to see if a judicial option could be developed.

CONFIDENTIAL

3.

Officials would draft and circulate a precise form of words for his speech on Tuesday. In the meantime he would minute the Prime Minister, setting out the conclusions reached at the meeting and how he proposed to handle the issue in the debate on the Bill and thereafter. The minute would make clear the agreement of Ministers concerned that in respect of current cases there should be no change in the existing practice of detaining beyond four days where there was a clear-cut case for doing so. This might eventually entail the payment of some compensation to those concerned, but that was a price worth paying in the circumstances. Officials should now prepare substantive advice for Ministers as soon as possible in order that the Government could give a clearer indication of its intentions to the House as the Prevention of Terrorism Bill progressed.

I am copying this letter to Charles Powell (No 10), Lyn Parker (FCO), Michael Saunders (Law Officers' Department), the Private Secretaries to Lord James Douglas-Hamilton, Sir Clive Whitmore and Sir John Belloch, and Mr John Boyd (FCO), *and Andrew Smith (Lord Chancellor's Office)*

Yours truly

Nick Saunders

for

P J C MAWER

M Maxwell, Esq.

CONFIDENTIAL

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Foreign and Commonwealth Office

London SW1A 2AH

From The Parliamentary Under-Secretary of State

30 November 1988

CD
7/12

Dear Colleague,

Many colleagues will have been contacted by groups or individuals in their constituencies about the 40th Anniversary of the Universal Declaration of Human Rights on 10 December 1988. Successive governments have regarded the Universal Declaration as an extremely important statement of international standards. Together with the two international covenants which we ratified in 1976, it makes up the international bill of Human Rights. It might be helpful to let you know what the Government will be doing to commemorate the event.

First, and perhaps most important, we introduced agreed amendments to the Criminal Justice Bill earlier this year which will clear the way to ratify the United Nations Convention Against Torture and other Cruel, and Inhuman and Degrading Treatment and Punishment. We intend to complete the process of ratification next month. I shall be announcing this when I address the Special Session of the United Nations General Assembly which will meet in New York on the 8th of December. I will also be restating our position on Human Rights, in a longer speech in New York later that day.

During the week of the Anniversary we have arranged for United Nations and Union flags to be flown in Parliament Square. We have also in recent months been working closely with the NGOs who play such an important role in Human Rights matters. Co-operating with the British Section of Amnesty International the FCO has sponsored the Children's Painting Competition which they organised to commemorate the Anniversary. I was very pleased to assist in the opening of an Exhibition of the winning entries in Westminster Hall on November 29th. It is well worth a visit. We have used three of the winning entries on the cover of a brochure we have

/produced



produced to draw attention to the Anniversary and to our approach to Human Rights. The brochure reproduces the text of the Universal Declaration and will be distributed to Sixth Forms throughout the country. Copies are available from my office (01-270-2135).

In co-operation with the United Nations Association and Amnesty International the British Council of Churches are arranging a service of rededication in Westminster Abbey on the morning of Friday the 9th December. The service will be addressed by Mr Jan Martenson the United Nations Under Secretary-General responsible for Human Rights issues. He will be in London as a guest of the Government. I understand that all members of the House have been invited to attend.

If we can help in any way with enquiries about the 40th Anniversary do please let me know.

A handwritten signature in dark ink, appearing to read 'Jan', with a long horizontal stroke extending to the right.

A handwritten signature in dark ink, appearing to read 'Tim', with a long horizontal stroke extending to the right.

Tim Eggar



CONFIDENTIAL

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SW1H 9AT

21 November 1988

Dear Charles,

EUROPEAN COURT OF HUMAN RIGHTS:BROGAN, COYLE, McFADDEN & TRACEY v THE UNITED KINGDOM

We have heard that judgment in this case, which involves the detention under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 of four men in Northern Ireland, will be given on 29 November. Neither side will have advance warning of its terms.

The crux of the case is whether the detention of terrorist suspects for up to seven days under the Prevention of Terrorism Act is compatible with the European Convention on Human Rights.

Brogan, Coyle, McFadden and Tracey were detained under section 12 in Northern Ireland for between four and six days. Details of the cases and the claims made by each of the applicants are at Annex A. Their principal complaints were that their detention was contrary to Article 5 of the European Convention on Human Rights because, it was said, they were arrested solely for the purposes of interrogation contrary to Article 5(1)(c) and were detained for a period in excess of that permitted under Article 5(3) (the right to be brought promptly before a judge or other judicial authority).

The Commission adopted its report on the case in June 1987. It concluded that there had been no breach of Article 5(1)(c). In the case of Brogan and Coyle (detention for period in excess of five days) they concluded, by ten votes to two, that there had been a breach of Article 5(3), but in the case of McFadden and Tracey (detention for periods in excess of four days) they concluded, by eight votes to four, that no breach had occurred. In the latter case the four dissenting members of the Commission indicated their objections to the length of detention permitted by section 12 of the PTA. They did not accept the arguments submitted on behalf of the Government that people arrested under the PTA should not have to be taken before a judicial authority which would then decide whether to allow detention to continue, and they argued that there was too great a risk of abuse of the power to detain in the absence of judicial control. Both the Commission and the Government referred the case to the European Court of Human Rights.

The Court heard the case on 25 May in Strasbourg when Her Majesty's Government was represented by the Solicitor General and Counsel. The proceedings before the Court were not confined to those matters on which the Commission expressed their view that we had violated the Convention -

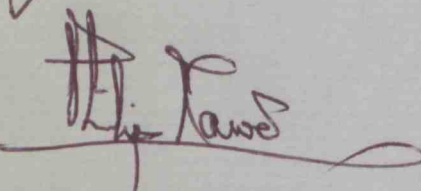
the issues were heard afresh, and it is for the Court to decide, unfettered by the Commission's findings, whether, and in what respects, we have violated the Convention. We are reasonably confident that the Court will follow the Commission in finding no breach of Article 5(1)(c). We think that there is a reasonable chance that the Court will be persuaded that the periods of detention of up to five days are not incompatible with Article 5(3). But the chances are less good that the Court will uphold detention for as long as seven days. It is quite likely that the Commission's view (that the maximum which should be allowed is four days in most circumstances, and five days for terrorist cases) will prevail.

The options available to the Government in the event of an adverse judgment can only be determined when we have seen the precise terms of the judgment. They are likely to range from derogation in some form to changing the law on the maximum permitted length of detention or the procedure for authorising continued detentions, but we shall have to study the judgment carefully in conjunction with colleagues in the Northern Ireland Office, the Foreign and Commonwealth Office and the Law Officers' Department before advice can be submitted. We shall do this as quickly as possible after the judgment has been received so that Ministers can consider the line they should take at the Second Reading debate on the Prevention of Terrorism Bill, which we expect to take place on 6 December: this may need to be a holding line, given the complexity of the issues which will need to be addressed.

The judgment is likely to attract media attention, especially as the Prevention of Terrorism Bill (which will allow detention for up to seven days) will have been published four days previously. Our press line will be that the judgment is being studied carefully, and that the Government's response to it will be made known during the debates on the Prevention of Terrorism Bill.

We shall report the outcome of the case to you as soon as it is known on 29 November. The Home Secretary will then bring forward his proposals for responding to the judgment as soon as possible.

Copies of this letter go to the Private Secretaries to the Foreign Secretary, the Secretaries of State for Scotland and Northern Ireland, the Attorney General and Sir Robin Butler.

Yours sincerely,

P J C MAWER

C D Powell, Esq.



This should of
been attached to
the letter from
Philip Mawer to
Charles Powell
dated 21 November,
classified CONFIDENTIAL
& entitled "EUROPEAN
COURT OF HUMAN RIGHTS
BROGAN, COYLE, McFADDEN
& TRACEY v THE UNITED
KINGDOM."

Apologies for the
oversight & for any
inconvenience caused

M.M. Rapaccioli

HOME SECRETARY'S
OFFICE

23/11

WITH CDP?

ANNEX A r

the applicants and their complaints1. The applicants

Three (3) members of PIRA, one INLA) were detained in Northern Ireland in 1984 for periods of 4 - 6 days) as below:

<u>Name</u>	<u>arrested</u>	<u>grounds for arrest</u>	<u>released</u>	<u>length of detention</u>
Terence Frogan	17.09.86 06.15 hours	Suspicion of involvement in an attack on police mobile patrol in August 1984 in Co. Tyrone, killing 1 police sergeant and seriously injuring another.	22.09.84 17.20 hours	5 days 11 hours
Dermot Coyle	01.10.84 06.35 hours	Suspicion of involvement in several acts of terrorism including plant- ing land mine in Co. Tyrone on 23.02.84 and a blast incendiary bomb attack in Co. Tyrone on 13.07.84	07.10.84 23.05 hours	6 days 16 hours
William McFadden	01.10.84 06.52 hours	Suspicion of involvement in several acts of terrorism including the murder of a soldier in a bomb attack in Londonderry on 15.10.83 and the murder of a soldier during a petrol bomb and gun- fire attack in Londonderry on 23.04.86	05.10.84 13.00 hours	4 days 6 hours
Michael Tracey	01.10.84 07.04 hours	Suspicion of involvement in several acts of terrorism including the armed robbery of post offences in Londonderry on 03.03.84 and 29.05.84 and conspiracy to murder members of the security forces.	05.10.84 18.00 hours	4 days 11 hours

2. The Claim

The four applicants claimed that their detention (for varying periods) under section 12 of the PTA was contrary to Article 5 of the European Convention of Human Rights:

1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3) Everyone who is arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial powers and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

3. The main argument of the applicants was that their detention was inconsistent with 5(1)(c) because, it was said, they were arrested solely for the purposes of interrogation and that they were detained for a period in excess of that permitted under 5(3). They also claimed that the Government was in breach of Article 13:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

EURS POL

Herman Reg VI

p 2



M.L. SAUNDERS
LEGAL SECRETARY

C. Powell, Esq.,
10, Downing Street,
LONDON, SW1.

Jean Charles.

HUMAN RIGHTS CASES

The Solicitor General has suggested that an important recent judgment of the European Court of Human Rights in favour of the United Kingdom might interest the Prime Minister.

The applicant, a company known as AGOSI, owned krugerrands which were impounded by H.M. Customs and Excise when they were imported illegally into this country by a third party. The applicant claimed that the forfeiture was in breach of the Government's obligations regarding a person's right to property. The Court held that the Government had fulfilled its obligation to strike a fair balance between the interests of the State and the individual, but that the balance would not have been achieved unless the applicant had been given a reasonable opportunity to put its case to the responsible authorities.

The Court's judgment in favour of the United Kingdom is important for its finding that the remedy of judicial review in English law was sufficient to satisfy this requirement. The Commission and the Court have in other contexts been reluctant to accept that judicial review is a sufficiently substantive remedy to meet the Convention's requirements, and the judgment is expected to be a particularly useful one in this respect.

This judgment brings to four the number which have been given by the Court this year in cases involving the United Kingdom. In each case the Court has found in our favour.

*Yours faithfully,
Michael Saunders.*

M.L. SAUNDERS

~~CDD~~ (2)
LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

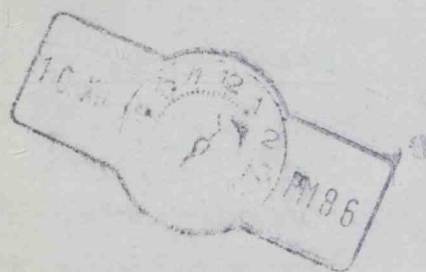
Prime Minister

CDD
6 November 1986
10/11
ms

LAW OFFICERS' DEPARTMENT
ROYAL BOUNTY OF JUSTICE
LONDON W. 1



LEGAL SECRETARY
H. STELLINGMA





10 DOWNING STREET
LONDON SW1A 2AA

From the Private Secretary

22 October 1986

LEGAL CHALLENGES TO MINISTERIAL DECISIONS

Your minute of 22 October sought agreement to your writing to Departments to give guidance on steps to minimise the risk of legal challenges to ministerial decisions. I am content with this.

Charles Powell

T.A. Woolley, Esq.,
Cabinet Office.

07A

Ref. A086/2994

MR POWELL

Legal Challenges to Ministerial Decisions

at PT1

--- You will recall consideration earlier this year of the Home Secretary's proposals for improving the machinery for "Strasbourg-proofing" future legislation. It was agreed then that guidance to Departments on this should be issued in parallel with that to be given on domestic legal challenges following Ministerial consideration of the Report of the Ministerial Group on Legal Challenge (MISC 125). Now that Ministers have agreed the Report, the way is clear to provide guidance on both issues. I attach two notes to this end, which are not intended to give detailed background information on the issues, but simply to set out the essential information and the steps which Departments can take to lessen the risks of legal challenge.

--- 2. Sir Robert Armstrong believes that the guidance might best be issued from this office, under a letter along the lines of the attached. I should be grateful to know that you are content for me to proceed accordingly.

Tim Woolley

T A WOOLLEY

22 October 1986

DRAFT PRIVATE SECRETARY LETTER FROM T A WOOLLEY ESQ

In the last few years there has been a considerable increase in the extent to which Government decisions are challenged in the domestic courts, mostly by way of applications for judicial review. Similar challenges have also frequently been brought before the European Commission and Court of Human Rights (ECHR).

With a view to minimising the risks of successful challenges Ministers gave instructions for separate reviews by officials to be carried out on the domestic and on the ECHR aspects. Both reviews have now been completed, and Ministers have approved the action to be taken on them. Part of that action is that Departments should pay close
--- attention to the points set out in the two attached notes. Other steps are being taken in parallel with this letter, and it is not the purpose of the attached notes to provide detailed background information or analyses of the underlying issues. An account of the substance of the Report on challenges in the domestic courts and a summary leaflet based on it are shortly being sent to Departments for training and related purposes.

Sir Robert Armstrong would be grateful if Departments would now make arrangements to follow the guidance in the attached notes. This guidance includes some additions - which take immediate effect - to the list of requirements for papers submitted to Cabinet committees: the Guide to Legislative Procedure and the Cabinet Document Officers' Handbook will be amended in due course.

I am sending copies of this letter to the Private Secretaries to all members of the Cabinet, the Law Officers, the Minister of State, Privy Council Office and the Minister of State for Overseas Development.

REDUCING THE RISK OF LEGAL CHALLENGES

I CHALLENGES IN THE UK COURTS

Consultation

1. A ground for judicial review to which the judges appear to be paying particular attention is the lack, or alleged inadequacy, of consultation with those affected by the decision. The risk of challenge on this ground therefore needs to be carefully borne in mind when formulating policy. This does not mean that consultation should always precede a controversial decision; there are bound to be circumstances where consultation is not possible or desirable if a decision is to be implemented quickly and effectively. In deciding whether to consult, Departments should consider whether consultation is required by legislation and, if it is not, whether it has been undertaken in the past or whether there is a legitimate expectation of it. In deciding to proceed without full consultation, Ministers need to have had drawn to their attention any heightened risk of legal challenge that may result.

Preparation of Legislation

2. The risk of challenge to administrative action can be reduced if the legislation governing that action is expressed in the clearest possible language, even at the cost of drafting in terms that are presentationally or politically unattractive. The courts are reluctant to go against something which is clearly the express wish of Parliament and making decisions subject to Parliamentary procedure may therefore be an important safeguard. They will also be influenced in their decisions by such factors as the provision in legislation of avenues of appeal for those affected. Again, there are no hard and fast rules in these areas, but the possibility of reducing the risks of challenge in these

ways is a factor which Ministers will need to weigh when making decisions on the shape of legislation, and Departments should ensure that it is drawn to their attention.

Vetting of draft legislation by outside Counsel

3. Where there is a history of legal challenges being mounted in a particular area, there may be advantage in having draft legislation seen by an outside Counsel expert in that field. A Department wishing to follow that course should consult the draftsman and the Law Officers' Department or, in respect of Scotland, the Lord Advocate's Department.

Cabinet documents

4. Memoranda submitted to a Cabinet committee seeking policy decisions should draw attention to any perceived risks of legal challenge. Memoranda accompanying Bills submitted to Legislation Committee should draw attention to any steps taken to reduce the risk of legal challenge.

REDUCING THE RISKS OF LEGAL CHALLENGES

II THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

1. The United Kingdom has been a party to the European Convention on Human Rights (TS No 71 of 1953, Cmd 8969) since 1951 and is also a party to several of the Protocols to it. Since 1966 we have accepted the right of individuals claiming to be victims of a violation of the Convention by the United Kingdom to make direct application to the European Commission of Human Rights. We are obliged to give effect to judgments of the European Court of Human Rights and decisions of the Committee of Ministers concerning violations by the United Kingdom. Important changes in law and practice have been required as a result. The main rights and freedoms protected concern, briefly: life; torture and inhuman and degrading treatment or punishment; liberty and security (ie freedom from wrongful arrest and detention); fair trial; private and family life; home and correspondence; religion; expression and information; peaceful assembly and association; marriage; property; education; and free elections. Most of the rights permit certain exceptions. There is much case-law of the Commission and Court interpreting the Convention - often on the basis of its purposes rather than literally - and a consistently high level of applications and decisions concern the UK. The Convention has been held to apply in areas where it might not have been initially considered - e.g. school corporal punishment and aircraft noise. Questions on it can sometimes arise in most of the areas of law administered by Departments.

Preparation of legislation and administrative measures

2. It should be standard practice when preparing a policy initiative for officials in individual Departments, in consultation with their legal advisers, to consider the effect of existing (or expected) ECHR jurisprudence on any proposed legislative or administrative measure. Wherever possible, officials should at this stage alert any other departments likely to be affected by the initiative in a similar way. If Departments are in any doubt about the likely implications of the Convention in connection with any particular measure, they should seek ad hoc guidance from the Foreign and Commonwealth Office. This request for advice should always be copied to the Law Officers' Department, the Lord Advocate's Department, the Home Office, the Scottish Home and Health Department and the Northern Ireland Office.

Cabinet documents

3. Any memoranda submitted to a Cabinet committee or accompanying a Bill submitted to Legislation Committee, should include an assessment of the impact, if any, of the European Convention on Human Rights on the action proposed (much as Departments already do for European Community implications).

Settlement of cases

4. Where applications to the ECHR have been referred to the Government and there is a serious risk of an adverse finding by the Commission or Court, Departments should give early consideration to the possibility of friendly settlement if this seems likely to offer a less damaging outcome. The Convention expressly provides for settlement

to be considered after the Commission's decision on admissibility, but it is possible at any stage, including during proceedings before the Court. (In the nature of things, however, friendly settlement will not in practice be available where an application has been brought as a test case in order to get a ruling from the Court.) Before a friendly settlement is offered in Strasbourg, the responsible Department must ensure that other Departments which will be affected by the outcome of the case are given sufficient opportunity to comment.

Existing measures

5. Although it is not intended that Departments should conduct a systematic retrospective look at all existing measures, they should nevertheless consider whether action is needed on existing measures where it is clear that there is a serious risk of an adverse finding at Strasbourg which will affect them.

2

Prime Minister
CDD
14/7



FROM
NICHOLAS
BETHELL

TELEPHONE
01-402-6877

73 SUSSEX SQUARE
LONDON W2 2SS

The Rt Hon Mrs Margaret Thatcher MP
10 Downing Street
LONDON SW1

11 July 1986 R12

Dear Margaret,

W

I am very pleased to learn that at the European Council last week you agreed to the principle that the Twelve should issue a declaration setting out their policy on human rights and fundamental freedoms.

It would have been a great pity and a political embarrassment if such a statement, which enjoys particular support from the countries in southern Europe which have only recently achieved democracy, had been blocked by a British veto.

I feel sure that the small differences of opinion over the text of the statement will be ironed out in the next few days, enabling it to be promulgated by Geoffrey Howe very soon.

It has always seemed to me a pity that the term "human rights" has a vaguely left-wing flavour to it, that it smacks of an over-liberal "bleeding heart" attitude to politics. I see human rights, on the contrary, as an important plank in the Conservative platform, a guarantee that the individual's freedom should be more important than the powers of the state and subject only to just laws, approved by democratically elected assemblies.

The European Council declaration emphasises this point and I am extremely happy that it will soon be issued.

Yours ever,

Nicholas



CORPORAL PUNISHMENT

Corporal punishment was discussed at H this morning.

The House of Lords have voted by a majority of 2 to add a Clause to the current Education Bill which bans corporal punishment in schools. Ministers decided to tidy up the Clause at Committee Stage (it is currently defective) and then have a free vote on the principle at the Report Stage. They expect the vote to be carried so that corporal punishment will then be banned in British schools. Most members of H thought this was the only way forward.

There was no point reintroducing Sir Keith Joseph's compromise whereby parents individually decided whether their children should receive corporal punishment. The measure had looked ludicrous, and would not carry conviction.

If the Government whipped its supporters to eject the Lords proposal, we would encounter two major problems:

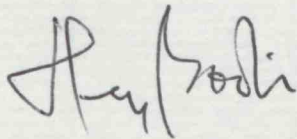
- i. A rumbling row with the European Court, with HMG legally in the wrong. (As usual, our respect for an international treaty which has not been incorporated in British legislation is regarded here as if it were binding statute law.)
- ii. The House of Lords might well try to reinstate the Clause when the Bill went back to them in the spill over Session this Autumn. There was a risk of a tussle which would jeopardise the entire current Education Bill.

Going for a free vote now with the expectation that the Lords amendment would stand would be a neat way of removing

a continuing grumbling issue without the Government having to take responsibility.

We are most unhappy that corporal punishment is being abolished and our supporters will find plenty to criticise. The way ahead is not, however, having a fight with the European Court of Human Rights, even though many might applaud. Such a course might allow corporal punishment in British law, but in the very schools where discipline has broken down, the staff would still refuse to use it. For this reason, we should adopt another course.

Another course is to ask Kenneth Baker to issue some new guidelines on discipline in schools. These should focus the minds of teachers and LEAs on the time and place for detention and other non-corporal school punishment. This should make it clear to our supporters that we have not forgotten the importance of school discipline. We cannot leave this in limbo.

A handwritten signature in dark ink, appearing to read 'Hartley Booth'. The signature is fluid and cursive, with the first name 'Hartley' and the last name 'Booth' clearly distinguishable.

HARTLEY BOOTH

PRIME MINISTER

H COMMITTEE: FRIDAY 6 JUNE

CORPORAL PUNISHMENT

An amendment to the Education Bill had been carried in the Lords on abolishing corporal punishment. This meant the Government had to confront the difficult question of how to tackle the question of corporal punishment, against the background of the ECHR judgement. H concluded that the Government could not simply oppose the Lords amendment in the face of the ECHR judgement, and the Lord President despaired of attempting once again to get through the compromise proposal which failed in the Lords last time round. H therefore decided that, subject to the Chief Whip's advice, there should be a free vote on the Lords amendment, accepting that it might well be upheld. The presentation of this would need thinking about carefully, particularly on what might be said about other sanctions to maintain discipline.

The minutes and a note from Hartley Booth are attached.

Martin Sawyer

mt

PP. MARK ADDISON
6 June 1986

CJ2ABJ

PART 1 ends:-

FCO to Home Office 15.5.86

PART 2 begins:-

MEA to PM 6.6.86



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