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NORTHERN IRELAND OFFICE
GREAT GEORGE STREET,
LONDON SW1P 3AJ

Deputy Under Secretary of State

Clive Whitmore Esq
10 Downing Street

18 May 1981

Dear Clive,

ECHR

I enclose a Note for this evening's 7.30 meeting with the Prime Minister. It has not yet been seen by my Secretary of State who is on his way back from his meeting with the Chief Constable and GOC. It seeks to provide the Prime Minister with the additional material for which she asked, and to assess the two courses open to the Government.

From a telephone call I have just received I would add that the very strong advice from the Chief Constable and the GOC is that in their considered view it would be far better, from the point of view of maintaining order in the province, to engage in the Article 28(b) procedure, even if we believe it will not lead to a settlement, than to let it be known that we are not prepared to participate because we see no future in it.

One last point: the Provisionals, we have learnt in the course of the day, now understand (as they did not over the weekend) that HMG does not intend to use the Article 28(b) procedure as a cover for giving in to their five demands. As a result, they are having second thoughts about taking part in the procedure. This is a further reason why HMG should not back out, since if we indicate our willingness to play our part (in the muted terms of the draft statement attached to the enclosed paper) this will leave them with the difficult PR problem.

I am copying this to Sir Robert Armstrong.

Yours sincerely,
John
J A MARSHALL

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European Commission of Human Rights and the Maze caseNote by officials

1. In 1978 four protesting prisoners in the Maze brought a wide range of complaints, some jointly, some individually, against HMG under the European Human Rights Convention.

2. In June 1980 most of these were rejected as inadmissible. Two complaints were adjourned. They were:

Article 8

".... The applicants finally complain of the restrictions on their correspondence as regards both incoming and outgoing mail and limitations on writing facilities."

Article 13

"They additionally claim that they have lacked and continue to lack an effective remedy before a national tribunal contrary to this provision."

3. These two complaints, under arrangements set out in Annex A, have, with HMG's concurrence, now been declared admissible. Under the provisions of the Convention four steps will follow in succession:

(i) Under Article 28 the Commission (a) will examine the complaints and ascertain the facts; and (b) it will place itself at the disposal of the parties with a view to securing a "friendly settlement". HMG has an obligation to facilitate (a); there is no corresponding obligation to facilitate the procedure at (b).

(ii) If the procedure at (i) does not lead to a conclusion satisfactory to both parties, the Commission proceeds to arrive at a Decision on the complaints.

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(iii) The Committee of Ministers considers the Decision and how it shall be implemented. If no agreed conclusion is reached, it is open to either HMG or the Committee of Ministers (but not the four plaintiffs) to refer the issues to the European Court of Human Rights.

(iv) The judgment of the Court is legally binding on the Government.

4. The present position is that the Commission is now entering upon the procedure at 3(i) above. HMG has no option but to furnish "all necessary facilities" to enable the examination under (a) to proceed; the immediate issue is: should HMG indicate a willingness to take part in the procedure under (b), or should it make it clear forthwith that it will not participate because it has nothing to offer?

5. Articles 8 and 13 are narrow in scope and would of themselves offer little opportunity for consideration of other issues in dispute at the Maze. But under the Article 28(b) procedure the Commission will be looking for a settlement on the basis of human rights as defined in the Convention, which permits rather more scope. The Commission would try to get at the underlying causes of the complaint, and would seek to identify any common ground between the two sides. It would be open to it, in the light of its contacts with the parties, to originate proposals of its own.

6. If a settlement is not agreed, the Commission's role reverts to the narrow judicial task of reaching a Decision on the outstanding issues, but in doing this it would operate within a very strict legal interpretation of the scope of the relevant Articles. The broad approach allowed under Article 28 would no longer be available.

7. The dilemma facing the Government is this: if they decline completely to play any part in the Article 28(b) procedure - as is their right - this is bound to become known and the Government will be exposed to very sharp criticism for its "inflexibility" (a charge already levelled at it over the deaths of two hunger strikers to date). It will be said to be action contrary to the spirit of the Convention. This criticism will be particularly severe in the Irish Republic, in the US, and overseas generally. It will be necessary - and difficult - to rebut the allegation that HMG has blocked up what to some observers will appear to be a reasonable and hopeful procedure - a way to an acceptable settlement. It would suit the PIRA book for the Government to be blamed for this, would encourage violence, and would adversely affect the morale of moderate Catholics. (The Secretary of State will bring an up-to-date assessment of this back from his meeting this afternoon with the GOC and Chief Constable). It is in HMG's interests to keep the ECHR involved. Its support on political status (and also on the question of prison clothing, and work) has been of immense value; even its criticisms of inflexibility afforded us an opportunity to make sensible changes. It might afford us further opportunities.

8. On the other hand, if the Government enters into the Article 28(b) procedure, it would become apparent after a time that, being unwilling to negotiate, they had nothing to offer (apart from improvements in the humane prison regime - for all conforming prisoners - which we have already made clear we stand ready to consider). The danger is that hopes will be raised which will later be dashed, and at the end of the day the press reaction could be as bad as if the Article 28(b) procedure had been rejected outright.

Over the weekend the representatives of the four plaintiffs indicated that they wished HMG's sincerity in this matter to be indicated in a public statement. A possible statement, robustly asserting the points which the Prime Minister this morning indicated that she would wish made, but stopping short of actually declining to play a minimal role ("facilitate the work of the Commission") is attached at Annex B.

10. If it were decided to refuse to operate under Article 28(b), then the Government's defence would have to be a re-iteration of its position on the five demands, and its readiness to consider a Decision by the Commission and to be taken to the Court if necessary.

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In 1978 four prisoners at the Maze complained to the European Commission of Human Rights. Their complaint was about ^{many} ~~a large number of~~ aspects of their treatment in prison. All but two points in the complaint were declared inadmissible by the Commission, in June 1980, as being either manifestly ill-founded or incompatible with the Convention.

The two points outstanding related to interference with prisoners' correspondence (Article 8) and the duty under the Convention (Article 13) to provide an effective remedy before a national authority for alleged violation of Convention rights. These two points were adjourned for later consideration. So far as Article 13 is concerned, the position we have hitherto taken is that the complaint is not only misconceived in substance but should also be rejected as inadmissible because it relates to alleged violations of the Convention which the Commission has already rejected.

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In response to suggestions that the Commission should play a ^spositive role in helping to defuse the situation, one of its Members floated with us the idea that we should concede admissibility on Article 13 in order to enable the Commission to continue its formal procedures under the Convention. Because of the disadvantages which such a course might have had in this and other cases, we rejected that proposal. The Commission then suggested a different approach in which the arguments which we would wish to urge on the admissibility point could be advanced, as substantive objections of law, when the Commission had completed its investigation of the substance of the case.

While it was recognised that this course would deprive us of the chance of continuing to argue that the whole case on Article 13 should be knocked out at this initial stage, the assessment was that this was not of major significance. Our arguments would be as valid and effective if deployed at the later stage as if they were separately deployed as arguments on admissibility. The

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Commission had already indicated that it would deal with admissibility considerations together with the merits, and our chance of separating ^{them} was therefore always questionable. Nor should we be setting a precedent which could be used to our disadvantage in other cases.

In the light of this assessment it was decided that there was no need on legal grounds to reject the Commission's later proposal if its acceptance would have political advantages. Following a decision that there were indeed such advantages, the Commission was notified that "Exceptionally, while the UK maintained its objections to the interpretation placed upon Article 13, read alone or together with other Articles, it does not insist that these issues be resolved at the admissibility stage." We were subsequently informed that the Commission formally declared the complaint on Article 13 admissible.

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STATEMENT BY HMG

During 1978, four of the protesting prisoners in the Maze brought certain complaints before the European Commissionⁱⁿ of Human Rights.

The protesters in the Maze are claiming "political status", a claim which finds expression in what are known as the "five demands".

Although the five demands as now formulated do not correspond precisely with the complaints made, their substance was covered by those complaints, and those complaints - save for the complaint relating to interference with correspondence under Article 8 which was adjourned - were considered by the Commission last year. In the Commission's Partial Decision of June 1980 they were rejected as inadmissible because they were either "manifestly ill-founded" or otherwise incompatible with the Convention. As regards prisoners' correspondence all conforming prisoners in fact get letters and parcels (and visits) equal to or even beyond what is demanded.

In addition to the Article 8 complaint referred to above, a complaint under Article 13 - about the availability of an "effective remedy before a national authority" *is necessary the violation of rights - under the Convention* - (which does not figure in the five demands) was also adjourned. The Commission is now proceeding, under the terms of the Convention, to examine the ~~substance of these two remaining complaints with the representatives of the parties,~~ and to put itself at the disposal of the parties "with a view to securing a friendly settlement on the basis of respect for human rights as defined in the Convention".

The Government will of course facilitate the work of the Commission *examining the complaints - evaluating the facts -* in its task under the Convention. However, it ~~stands firm~~ *remains* on its refusal to concede the five demands, and is prepared if necessary to ~~defend~~ *justify* its position before the Committee of Ministers or the European Court of Human Rights.

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