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M.L. SAUNDERS
LEGAL SECRETARY

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

BF || Pl. await comments from others. 23/6

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23 June 1986

Dear Tony,

ATTORNEY GENERAL'S REPLY TO MR RODGERS

Further to my letter of ~~16~~ June, enclosing a letter from Mr Rodgers to the Attorney General, I attach a draft reply which the Attorney has seen and which, subject to your views and those of other recipients, he proposes to send to Mr Rodgers.

The following considerations have caused the Attorney to conclude that a firm reply should be sent:

(i) Plainly Mr Rodgers's letter is written for the record and as to part is expressed to be.

(ii) Why it has been written is not so plain but it has been most carefully drafted.

(iii) Such a letter from one Attorney General to another is probably unprecedented. It is likely that it has been sent with the knowledge of Members of the Cabinet of the Republic (although when the Attorney saw Mr Dukes in Oslo last week, the latter claimed not to have any knowledge of it).

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(iv) Whilst it might occur to one to dismiss parts of the letter as so outrageous as to be intended merely to protect Mr Rodgers in his own political environment, such a course would be unwise and even dangerous because -

(a) the letter may well have been prepared with a view to official publication sometime by the Government of the Republic or it may be leaked;

(b) it is imperative that the observations made by Mr Rodgers about members of the Northern Ireland judiciary should be dealt with firmly and definitely.

The Attorney hopes that a firm reply to Mr Rodgers will not seriously affect the cooperation received from his Office on extradition cases and on the conclusion of the "check list" on warrant procedures. He is convinced, however, that a firm reply must be sent. I should be most grateful for your comments and those of other recipients on the draft reply and in particular on those passages in square brackets.

I am copying this letter to Tom Legg, John Steele, Charles Powell, Gerald Clark and Michael Stark.

Yours sincerely,

Michael Saunders.

M L SAUNDERS

FIRST DRAFT

John Rodgers Esq SC
Attorney General
Attorney General's Office
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Thank you for your letter of 11 June.

I am sorry that the first matter to which you refer, that of Brendan Burns, is one which gives rise to difficulty for you. In view of the particular difficulty which you mention concerning Detective Chief Inspector Neilly's affidavit I will enlarge on the position.

Burns in paragraph 12 of his affidavit of 28 May 1984 deposed that he was

> "astounded at having been arrested on the said warrants as aforesaid because I believe that neither the Military, Police or Administrative Authorities in the said Six County Area or in Britain itself are in possession of any generally acceptable legally admissible evidence such as forensic scientific evidence or visual identification evidence ... I am in the most real fear that a person popularly known by the term "Supergrass" (or perhaps several such Supergrasses) has or have emerged to offer to give false evidence against me ..."

The 15 warrants for the arrest of Burns arose out of three incidents. The first of these was a van bomb placed outside Warrenpoint RUC Station on 19 April 1981. This van had been stolen in the Republic of Ireland and the number plates on it were false. Examination of the rear number plate revealed one

palm and one finger impression of Burns. The second incident was an explosion at Newry on 19 May 1981 which caused the death of five soldiers. An estimated 600 lbs of explosive was detonated by means of a command wire connected to a battery pack consisting of five batteries and a bell push switch. The batteries were taped together. On one of these a fingerprint identified as that of Burns was found. The third incident was an explosion at Crossmaglen on 2 October 1982 which injured a soldier on foot patrol. Detonation of the explosives was by means of a command wire connected to a battery pack consisting of five batteries and a bell push switch. The batteries were taped together and on the middle one two fingerprints identified as those of Burns were found.

In his affidavit sworn on 21 December 1984 Detective Chief Inspector Neilly in paragraph 4 deposed that

> "The plaintiff in his affidavit has not sought to disclaim his involvement in or responsibility for the perpetration of the said offences and contrary to the averment contained in paragraph 12 of the said affidavit I say that there is forensic scientific evidence that the plaintiff was one of the persons responsible for the commission of the said offences."

This averment was a proper one and I think you will agree it was justified. To the knowledge of the officer, Burns was linked by forensic evidence with each incident. The question which subsequently arose however was whether in the light of decisions reached by the Courts in Northern Ireland in McGLINCHEY and MARTIN the evidence was sufficient to justify continuing to

seek the return of Burns to Northern Ireland to face trial.

In McGLINCHEY, the Lord Chief Justice at a pre-trial hearing ruled that fingerprint evidence proposed to be tendered by the Crown under the "similar fact" principle should not be adduced. Subsequently the remaining fingerprint evidence, upon which the trial Judge convicted on 24 December 1984, was held by the Court of Appeal on 9 October 1985 to be insufficient. In MARTIN, where a conviction was founded on fingerprint evidence adduced under the similar fact principle the Court of Appeal on 3 October 1985 held the evidence to be inadmissible, quashed the conviction and stated that it is the duty of the Crown to assist the administration of justice by refraining from relying on the doctrine of similar fact evidence except in cases to which the principle seems clearly to apply.

It was with these matters in mind that on re-examination of the evidence available against Burns the conclusion was reached that the similar fact principle could not be said clearly to apply and thus the case was not sufficiently strong to continue to seek Burns' return from the Republic.

That there were procedural errors in connection with the warrants issued for the arrest of Burns is highly regrettable. We are both aware of the difficulties in this field which our respective officials are endeavouring to identify and reduce if they cannot be entirely eliminated. / It should also not be forgotten that there were a number of unfortunate episodes in relation to the ~~appearance~~

the steps taken in the Republic to have Burns returned to Northern Ireland.

I hope that in the light of what I have written you will understand that not only was Detective Chief Inspector Neilly's affidavit a proper one but so was the decision which I took. Further, it was taken following what we both agreed would be the proper course to adopt in respect of terrorist extradition cases, namely that in the light of experience to date the evidence in all cases and potential cases should be carefully re-assessed. I had expected you to welcome my reassessment of the Burns case to ensure that we would not suffer the difficulties of another McGlinchey.

Finally, on Burns, I find it difficult to understand why the events of 4 December 1985 took you entirely by surprise. As I understand what occurred, an application for habeas corpus came on for hearing in Dublin on 22 November 1985 on grounds that the warrants were defective. The Court adjourned the application so that an application for certiorari to quash the warrants could be brought in Northern Ireland. The State Solicitor's Office informed the Crown Solicitor's Office of this development.

What you have written with regard to the second matter in your letter causes me rather more concern.

I find it impossible to reconcile your stated wish not to impugn the integrity of any members of the Northern Ireland judiciary or to

suggest any conscious bias on the part of any of its members with your observation that some members of the Northern Bench have "displayed some of the prejudices of their backgrounds" and that they have at times been "less than judicial and have faltered as Judges". I believe it to be unfortunate that you should link the argument for three man courts with criticisms of Judges such as you advance in your letter. I have had long experience of the Northern Ireland judiciary - starting back in 1972 when I was Solicitor General - and I have had throughout the whole of the time since then the greatest admiration for the judicial capacity and integrity of the Judges in Northern Ireland. I find your reference to Judges "permitting their background and perhaps their political inclination to influence their judgment" especially unacceptable. I reject these comments as wholly unfounded. [It saddens me when trust in and respect for each other's legal system and the integrity and impartiality of the judiciary are so important for a good and productive relationship between Attorneys General that you have seen fit to make these allegations.]

[You as a lawyer and Law Officer are, as you write, reluctant to undermine the position of Judges and in this connection I can only observe that it would be beneficial if others in responsible positions had a similar reluctance and refrained from doing so. Repeated public utterances by prominent persons inevitably mould and affect public perception, and repeated public criticism of the judicial system in Northern Ireland which is not justified must, as I know you are aware, undermine confidence in the administration of justice and the rule of law.]

Just as your letter gives me a full understanding of your position and difficulties I hope that this reply will clarify for you my own position and views.

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