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Await reply
OR

The Rt Hon Sir Patrick Mayhew QC MP
Attorney General
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15 September 1989

Dear Patrick.

BALLYNERRY INQUEST

Thank you for your very full and informative letter of 1 September which I have now seen on my return from leave. For the record perhaps I should say that I was entirely content with the way you proposed to handle the civil action against the Chief Constable, but this letter is concerned only with the inquest issues.

Since you wrote to me, I have been informed of a development of which I expect that you also are now aware, but which I record for the sake of copy recipients and because I think it may effect our decision on a related issue to which I will refer later in this letter. I have been told that 16 January 1990 has now been set as the date on which the House of Lords will hear our appeal against the judgment of the NI Court of Appeal in the case of Burns, Toman and McKerr. The issue there, as you will recall, is the compellability of witnesses suspected of causing a death.

I am very grateful to you for your advice about the Ballynerry inquest issues and for explaining so clearly the problems which will arise in relation to evidence from those who listened to the recording of the incident (the shooting of Michael Tighe and his companion). It is clearly essential that we should do all that is necessary both to safeguard the individuals concerned and to avoid the disclosure of evidence which would prejudice sensitive security matters. I am content that we should approach this on the basis that you suggest: namely that we should envisage that the witnesses will give oral evidence; that we should support an application for enhanced screening for security service witnesses through the use of a public interest immunity (PII) certificate; and that we should also submit certificates, which I accept it would be for me to sign, excluding evidence on matters relating to the operations of the Security Service.

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b

Although, as you helpfully bring out, we cannot be sure that this approach will be successful, I agree that it seems to offer the best chance of securing the necessary protection for both personnel and material. Nonetheless, your explanation of the problem has led me to look more widely at the political context these forthcoming inquests will help to create. What we will face, as I see it, is a prolonged period of controversy arising from these cases, when it will be said that the Government is attempting to shift the goal posts and to corrupt the judicial process in order to avoid the exposure of matters it finds embarrassing. We can expect sustained press interest and continuing criticism from the Irish as well as domestically. I realise of course that these issues were very much in colleagues' minds when the decision was taken to proceed with an Order in Council. However, given the importance of doing all we can to maintain confidence in the administration of justice in Northern Ireland, the considerations you have drawn to our attention have led me to wonder whether our approach can in any respect be modified to limit the damage, without of course compromising our essential security and other interests.

As things stand, H Committee's decision in July means that we should be introducing in the Autumn an Order-in-Council to overturn the decision of the Northern Ireland Court of Appeal so as to restore the long standing rule which prevented a person being compelled to give evidence at an inquest in Northern Ireland if he was suspected of having caused the death of the person concerned. In reaching its decision, H Committee took the view that the arguments for restoring the status quo in terms of protecting the safety and identity of security force personnel, of ensuring the security of sensitive operational information and of depriving terrorists and their sympathisers of the propaganda opportunity which the present state of the law could afford were overwhelming.

The thought last July was that the introduction of an Order in the Autumn would be followed by the abandonment of our appeal against the decision of the Court, and by the resumption of the inquests - including the Ballynerry one - with which your letter is concerned. As you point out, in the case of that inquest and, as I imagine, in others also, we would be issuing public interest immunity certificates which may well be challenged in the courts, with the matter being taken if necessary to the House of Lords. Your letter suggests, at least in relation to Security Service witnesses in the Ballynerry inquest, that our prospects of success in the Lords would be good; but you point out that, if we were to lose, we would have to consider the question of urgent legislation to protect essential Security Service interests.

As I see it, therefore, the prospect is that we will have a lengthy period of difficult litigation, and that this will be initiated by a highly controversial piece of legislation to prevent one group of witnesses from being compellable, perhaps culminating in emergency legislation to restrict the terms on which another group of witnesses might appear. This is not an attractive prospect.

C

When H Committee reached its decision to legislate to make suspects not compellable I am not myself sure how far colleagues were influenced by concerns about the personal ordeal which an appearance (sometimes, perhaps, a re-appearance) in court would involve, and how far by wider considerations such as the need to protect identity and to preserve the confidentiality of security information. The two latter considerations are, of course, likely to arise also in the case of non-suspect witnesses, as in the Ballynerry case; and I am struck by the extent to which the arrangements you describe in your letter to deal with Security Service witnesses in that case, who are not suspects, address very much the same kind of questions as would arise in the case of those suspected of causing the deaths. It may be that there are clear distinctions between the two sets of witnesses, perhaps because the argument justifying the use of PII certificates for procedural matters to protect witness identity is available only for Security Service witnesses, but is that really the case?

It may also be, of course, that H Committee's decision was principally influenced by the wish to avoid putting security force personnel, who had already survived criminal investigation, through the ordeal of further cross examination, albeit in proceedings where they could not be required to give self-incriminating replies. But, unless that is to be regarded as the over-riding consideration, I would suggest that the setting of a date for our appeal in the Burns case now puts a substantial question mark on the wisdom of proceeding according to the plan agreed last summer. That was based, at least, in part on the premise that the Appeal might not be heard until well into next year and that there would be further unjustifiable delay to already very delayed inquests. As it seems to me, you (or Nick Lyell) might find it very difficult to explain to the Commons why, some ten months after HMG lodged an appeal to the House of Lords on a point of law and when a date for that hearing had been set, the Government was choosing to introduce legislation to pre-empt that Appeal. In addition to the criticism that would undoubtedly be directed at the substance of the Order there would be also be need to respond to the argument that we were being discourteous to the House of Lords.

To my mind, therefore, the balance of advantage has now swung decisively in favour of deferring the introduction of any Order-in-Council at least until the outcome of the appeal is known. If our appeal is, as it may well be, unsuccessful we might then approach the inquests on the basis that we would attempt to secure the protection of suspect witnesses and their evidence through the use of public interest immunity certificates in the way described in your letter. If this approach did not succeed, whether for the suspect witnesses or for other witnesses like the listeners in the Ballynerry case, we would at least know the full extent of our problems; and as a last resort we could then seek to address them in 'emergency' legislation which, as you say, may in any case be needed. An approach on these lines will, of course, not itself be without difficulty, but it would, at least, prevent some of the controversy which, otherwise, would be bound to occur.

J

I am very conscious that I am now firmly into James Mackay's territory, because it is the Lord Chancellor who is responsible for Coroner's law in Northern Ireland and therefore for the proposed Order-in-Council. I am therefore sending him a copy of this letter. I would be very interested to learn whether you, he and other colleagues closely involved in earlier consideration of this issue see any attraction in the approach which I am now suggesting.

I am copying this letter to the Prime Minister, James Mackay, John Major, Douglas Hurd, Tom King, and to Patrick Walker and Sir Robin Butler.

Yours ever

Peter

PB

IRELAND: Situation PT27.