ATTORNEY GENERAL

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

John Rogers Esq. SC.,
Attorney General
Attorney General's Office
Dublin 2
Republic of Ireland

4 July 1986

Dear John.

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

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

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's 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 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

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 some of the remarks which you go on to make. I have had a long experience of the Northern Ireland Judiciary - starting 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, integrity and courage 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 the comments which you have made as wholly unfounded.

Our joint task has been to look for ways in which public confidence in the administration of justice and the rule of law in Northern Ireland can be enhanced. There are unfortunately many ways in which it can be, and on occasion has been, undermined. It should be no part of our contribution to do that. For this reason, I believe it to be particularly unfortunate that you should link the case you are seeking to make for three-man courts with the kind of criticisms of the Judiciary advanced in your letter. I believe that if it became generally known that you had made such comments, and I hope very much that it will not, there would be a major outcry in Northern Ireland which could only make implementation of the Agreement more difficult. I should perhaps also remind you that the acquittal rates in single judge courts are on par with, or even slightly above, those in jury courts in Northern Ireland. This is an additional reason why I find your imputation of political bias in the single judge courts unacceptable.

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

Yours ever. Michael.

CONFIDENTIAL

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

M.L. SAUNDERS
LEGAL SECRETARY

CDP
7/7.

A Brennan Esq. CB
Northern Ireland Office
Whitehall
London SW1A 2AZ

7 July 1986

Dear Tony,

AG'S REPLY TO MR ROGERS

I am enclosing a copy of the letter the Attorney General has sent to Mr Rogers.

You will see that the Attorney has included the redraft of the concluding passage sugessted by David Goodall, but has reinserted the sentence:

> "I find your reference to Judges 'permitting the background and perhaps their political inclination to influence their judgment' especially unacceptable".

The Attorney was aware of certain recent obiter dicta when he considered the draft. He considers however that these isolated and unfortunate remarks do not establish that the judgment of members of the judiciary has been influenced by their background and political inclination. The Attorney feels strongly that this particular allegation made by Mr Rogers should be expressly rebutted.

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

Yours sincerely,
Michael Saunders.

M L SAUNDERS

CONFIDENTIAL

CONFIDENTIAL

CCPC

Foreign and Commonwealth Office

London SW1A 2AH

2 July 1986

M L Saunders Esq
Attorney General's Dept
Royal Courts of Justice
London WC2A 2LL

CDP 2/7

Dear Saunders,

ATTORNEY-GENERAL'S REPLY TO MR ROGERS

1. Gerald Clark has shown me Mr Rogers's letter of 11 June to the Attorney-General together with your draft reply (enclosed with your letter of 23 June to Tony Brennan). I have also seen Tony Brennan's reply of 27 June and Richard Stoate's letter to you of 25 June.

2. I am not able to comment on the details of the Burns case, which seems to have been as much a factor in sparking off Mr Rogers' letter as the desire (perhaps on the part of his Cabinet colleagues) to modify the impression he gave at the IGC meeting on 9 May of having no criticisms of the present NI Judiciary. On the second point - Mr Rogers's imputations against the Judiciary - I fully agree that his letter requires a firm reply. If its contents were to leak, the effect on unionist opinion would be highly inflammatory and it would be extremely damaging if we had let it pass without comment.

3. Like Tony Brennan, however, I do not think it would be wise in responding to Mr Rogers's remarks to give the impression that we are unaware of, or unconcerned by, some of the obiter dicta which have occasionally been made by judges in Northern Ireland in recent years or to adopt too gladiatorial a tone in the Judiciary's defence. I think our aim should be to rebut the charges firmly but without using language which might stimulate a riposte. It seems to me that our aim should be to make Mr Rogers feel ashamed of himself rather than simply to make him angry. We need also to warn him of the very serious consequences which would follow in Northern Ireland were his comments to become public. I enclose for your consideration an illustrative redraft of pages 5 and 6 of your draft, which seeks to take account of these points.

4. I am copying this letter to Tom Legg, John Steele, Charles Powell, Tony Brennan and Michael Stark.

Yours sincerely

David Goodall

A D S Goodall

CONFIDENTIAL

REDRAFT OF CONCLUDING PASSAGE OF PROPOSED DRAFT LETTER FROM SIR MICHAEL HAVERS TO MR JOHN ROGERS

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 some of the remarks which you go on to make. I have had a long experience of the Northern Ireland Judiciary - starting 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, integrity and courage of the judges in Northern Ireland. I reject the comments which you have made as wholly unfounded.

Our joint task has been to look for ways in which public confidence in the administration of justice and the rule of law in Northern Ireland can be enhanced. There are unfortunately many ways in which it can be, and on occasion has been, undermined. It should be no part of our contribution to do that. For this reason, I believe it to be particularly unfortunate that you should link the case you are seeking to make for three-man courts with the kind of criticisms of the Judiciary advanced in your letter. I believe that if it became generally known that you had made such comments, and I hope very much that it will not, there would be a major outcry in Northern Ireland which could only make implementation of the Agreement more difficult. I should perhaps also remind you that the acquittal rates in single judge courts are on a par with, or even slightly above, those in jury courts in Northern Ireland. This is an additional reason why I find your imputation of political bias in the single judge courts unacceptable.

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

IRELAND

SITUATION

PT 20