

## PRIME MINISTER

## ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

The Northern Ireland Secretary's note attached (Flag A) concludes that we should declare our intention to introduce 3-judge courts (all judges drawn from Northern Ireland) for certain limited cases e.g. terrorist offences. He makes this recommendation on the merits of the case: particularly the growing criticism of single judge courts in 'super-grass' trials or those with a large number of defendants.

Mr. King acknowledges that there is also an Anglo-Irish dimension. The record of Sir Robert Armstrong's recent meeting with Mr. Nally (Flag B) suggests that the Irish will not be able to get ratification of the Convention on the Suppression of Terrorism through the Dail without some move by us on three-man courts. The Taoiseach said as much to you in June.

The Lord Chief Justice in Northern Ireland remains firmly opposed, and claims the support of other judges.

You will need an early meeting to consider this, with the Lord President, Lord Chancellor, Northern Ireland Secretary, Home Secretary, Foreign Secretary, Attorney-General and RTA.

Agree to a meeting?

C.D.P.

→ must see the  
LCJ about this

mf

(C.D. POWELL)

19 September 1986

SECRET

SECRET



CCP  
✓  
148

PRIME MINISTER

ADMINISTRATION OF JUSTICE IN NORTHERN IRELAND

1. I have been considering, 13 years after the introduction of the non-jury "Diplock" courts for terrorist offences in Northern Ireland, whether it is time to introduce changes.

2. These courts, with a single judge trying issues of both fact and law, were introduced as an emergency measure in response to the risks of perverse verdicts and intimidation of jurors. They are buttressed by an automatic right of appeal against a conviction by the single judge. Measured by objective standards, such as the acquittal rate compared with that for jury trials, the courts have provided impartial justice; and the reputation of the Northern Ireland judiciary deservedly stands high.

3. Nevertheless, with no possibility of a return to jury trials in prospect, the system is vulnerable to criticism both domestically and internationally. And criticism that a single judge is an inadequate substitute for a jury is strengthened by the so-called supergrass trials, those in which a large number of defendants together face charges on the evidence, often uncorroborated, of a former accomplice. A recent Court of Appeal decision (the Black case) which led to the acquittal of a number of defendants who had already served substantial sentences on the evidence of a supergrass has strengthened the case for change and made it more difficult to argue that the automatic right of appeal is a sufficient safeguard. While each of the separate elements can be readily justified - one

SECRET

SECRET

S E C R E T

SECRET



single judge, no jury, an uncorroborated prosecution witness (usually an accomplice) and a large number of defendants - the combination of all together is open to real criticism. I have been considering what might be the best approach to improving the acceptability of the system.

4. The initial focus of criticism of the system has been on the use of informers and the fact that as many as 30 defendants have appeared in the dock at the same time. However I am extremely loath to put any further hurdles in the way of the prosecuting authorities, given the tremendous difficulties that they face in getting witnesses into court against the background of intimidation that exists. The Irish approach had earlier been to propose mixed courts with a judge from one jurisdiction sitting with two judges from the other jurisdiction on terrorist cases. We have always made clear our objection to this approach and I believe that the Irish now accept this is not a realistic possibility. I have therefore been considering whether there might be grounds for meeting some of the concerns by moving to a system of 3-judge courts for a limited range of cases. They could be introduced for all contested scheduled (ie terrorist) offences, or for a more limited range of such cases, possibly those involving uncorroborated evidence where a substantial number of defendants are being tried together. My original intention was to propose that there should now be a more detailed study of this option with colleagues over the coming months. However we have now received an urgent message from the Irish Government about the introduction into the Dail of the legislation to enact the European Convention on the Suppression of Terrorism. I understand that this will now be brought forward on 10 October and, given their precarious position

SECRET

S E C R E T

S E C R E T

SECRET



in the Dail, the Irish Government believe that it will be essential if that legislation is to proceed, particularly in its present form with no reservation on the political aspect, that there should have been some movement on arrangements for the administration of justice in the North. They believe that the Hillsborough communique confirms the understanding that there would be such movement and that it was 'against that background' that it was the intention of the Irish Government to accede to the European Convention. If we are to give an answer to the Irish within their timescale, we must accelerate our consideration of these issues, and it is therefore necessary for me to put my proposals before you and colleagues immediately, without first discussing these further with the Lord Chancellor and the Law Officers, as I would have preferred.

5. My own judgment is that in the interests of achieving wider support for a system of justice in the North we should say that we are prepared in principle to introduce 3-judge courts in the first instance for certain scheduled offences. I believe that there are good arguments for this change in its own right. It is also undoubtedly true that it will significantly strengthen our hand both amongst the nationalist community in Northern Ireland, in the Republic, and in the United States that we do recognise the concerns over this issue; nor is this a measure which in recognising nationalist concerns is in any sense hostile to unionists since indeed there has been strong unionist and Alliance support for 3-judge courts in the past.

S E C R E T

SECRET

SECRET



6. Having formed my view and because of the time factor that has now arisen I thought it right to inform, in strict confidence, the Lord Chief Justice in Northern Ireland of my proposals. I made clear to him my understanding that he might wish to discuss the matter with the Lord Chancellor in view of his very strong reservations about such a proposal. The fact that our meeting was entirely courteous and indeed amicable does not leave me under any illusion of the strength of his reservations. He believes these are shared by the vast majority of the judges in Northern Ireland. He has since written to me confirming his opposition to 3-judge courts, even in a limited range of offences, while nonetheless recognising the problems posed by supergrass trials and the particular hatred in Ireland for informers who may be rewarded for their evidence.

7. The Lord Chief Justice drew attention to the implication that my proposals might be interpreted as a condemnation of what had gone before. I believe this objection can be met: our case would be that, whatever might have been fitting as an "emergency" measure, a new approach had become necessary now that it was clear that there was no prospect of restoring jury trial for terrorist offences in the foreseeable future. A change which acknowledged this reality need cast no reflection on the past performance of the courts, and there is no doubt that it would be seen as a response to genuine concerns about the way the system is working. Those concerns, as you know, made more difficult our task of improving extradition arrangements with the United States, and they are currently looming large in our efforts to extradite terrorists from Holland.

SECRET

S E C R E T

SECRET



8. The other main objection we have to meet is that plural courts are ill-suited to our adversarial system of trial at first instance. But, as the Baker report acknowledged, they are not unprecedented and the Irish can hold the precedent of their own special court before us. Clearly there are difficult legal and technical questions to answer before we could legislate for such a scheme; but I do not believe that they raise insuperable difficulties. In the context of the Anglo-Irish Conference, officials have already identified such questions as the number and status of the additional judges who would be needed; whether the judgments of 3 judges should be unanimous; the form which judgments should take; and whether, with a 3-judge court, the automatic right of appeal should be retained. My proposal is to announce that we are prepared in principle to introduce 3-judge courts for certain scheduled offences and that we shall be carrying out a detailed study (in which the co-operation of the judiciary would be essential) as to how this is best accomplished. I should want to consult with the Lord Chancellor and other colleagues about how such a study should be conducted. I believe that the proposals that I have made do justify consideration on their merits; I understand that there is no country in the western world or even in eastern Europe where serious offences are tried before a single judge if a jury is not present. The additional features of the supergrass trial added on to the original Diplock structure have undoubtedly damaged credibility and have been criticised from all sections of the community. These are issues that I believe we need to address, quite aside from the obvious implications that this issue has now assumed in our Anglo-Irish considerations.

S E C R E T

-5-

SECRET

SECRET  
SECRET



9. However I would not propose any change because of the Irish dimension. Indeed there is no certainty that the Irish legislation will go through whatever we do. I base my proposal on the merits of the case, but of course if we are prepared to make it, an early declaration of our intention will be invaluable in the Irish context. My proposal therefore is that we should announce that we are prepared in principle to introduce 3-judge courts in the first instance for certain scheduled offences: we should make this announcement some time in advance of the introduction of the legislation on the European Convention into the Dail on 10 October.

10. I am circulating early next week a paper setting out the relevant arguments in more detail and I hope it would then be possible to have a meeting to discuss my proposal.

11. I am copying this minute to the Lord President; the Lord Chancellor; the Foreign and Commonwealth Secretary; the Home Secretary; the Attorney General and Sir Robert Armstrong.

A handwritten signature in blue ink, consisting of the letters 'TK' in a stylized, cursive font.

TK

18 September 1986

SECRET

SP/JLD

-6-

SECRET



SECRET

010  
Ref. A086/2616

MR POWELL ✓

CDP  
19/9.  
Administration of Justice in Northern Ireland

The Secretary of State for Northern Ireland has sent me a copy of his minute of 18<sup>in box 102 P.</sup> September.

2. In the brief conversation which you and I had with him yesterday on the subject, the Secretary of State made it clear that he could not take sole responsibility for the consequences of deciding not to make any move on three-judge courts at this time, particularly in relation to the Irish Government's plans for introducing legislation in the Dail to ratify the European Convention on the Suppression of Terrorism (ECST). He would therefore like an early meeting to discuss the subject. That meeting will need to include not only the Foreign and Commonwealth Secretary and the Secretary of State for Northern Ireland but also the Lord President, the Home Secretary and the Attorney General (or the Solicitor General).

3. On the case for introducing three-judge courts, I would only add two points to what the Secretary of State for Northern Ireland has said:

(a) The Black case (to which the Secretary of State refers in his minute) can be seen as strengthening the case for having a three-judge court in supergrass trials, where there is no jury. Mr Justice Kelly not only accepted the evidence of the supergrass Black but went out of his way to praise his credibility. The Court of Appeal, presided over by Lord Chief Justice Lowry, took a very different view of Black's evidence and was critical of Mr Justice Kelly's acceptance of it. It is at least possible to suppose that,

if two other judges had been sitting with Mr Justice Kelly, he would not have been so led astray by Black's plausibility.

(b) The logic of the argument would be to extend three-judge courts to all non-jury trials ie to all trials in the Diplock courts. But it is not necessary to go that far: it would be possible to introduce three-judge courts only for supergrass trials, or only for the trial of a certain limited range of offences - for instance, murder and attempted murder. So there is some scope for putting a toe in the water rather than the whole foot.

4. There is no doubt about the signals which are coming from the Irish Government about the Taoiseach's need for some move on this, if he is able to get through the Dail without derogations or reservations the proposed legislation for the ratification of the ECST. The argument is that an announcement by the British Government to the effect that they were prepared to introduce three-judge courts would enable the Taoiseach to say that the extraditions which the ratification legislation would make possible would be to a system of justice which would be significantly improved and in which nationalists could have confidence.

5. Nor is there any doubt that the Taoiseach's political situation now is more difficult than it was a year ago.

6. As the Secretary of State implies, though there was no explicitly conditional relationship in the Hillsborough Communiqué between improvements in the administration of justice in Northern Ireland and the ratification of the ECST, the Irish Government in general and the Taoiseach in particular have always seen them as related, and that is the significance of the words "against that background" in the Hillsborough Communiqué.

SECRET

7. I do not think, therefore, that it would be wholly fair to think that what the Taoiseach is trying to do is to "up the ante" for introducing the ratification legislation. I have no doubt that he himself wishes to go ahead with it. But I should not be surprised if some of his colleagues are not particularly keen to go ahead (though they are committed by the Taoiseach), and would find it not unwelcome to be able to say that they would have liked to go ahead but were being prevented from doing so by the British Government's failure to live up to their undertaking to do something about improving nationalist confidence in the administration of justice in Northern Ireland.

RA

ROBERT ARMSTRONG

19 September 1986

