

File with DP 25/9.

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10 DOWNING STREET

From the Private Secretary

25 September, 1984

R -v- DOMINIC McGLINCHEY

The Prime Minister has noted the Attorney General's minute to the Secretary of State for Northern Ireland of 24 September.

The Prime Minister thinks that she may, at some later stage, need to warn Dr. FitzGerald of what may happen. I should be grateful if this point could be borne in mind.

I am sending a copy of this letter to Richard Stoate (Lord Chancellor's Office), Hugh Taylor (Home Office), Colin Budd (Foreign and Commonwealth Office) and to Graham Sandiford (Northern Ireland Office).

(C.D. Powell)

H. Steel, Esq., CMG OBE
Attorney General's Office.

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Prime Minister



A very unhappy story. Depending on the commitment of your colleagues, you may in due course want to warn Dr. Fitzgerald

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SECRETARY OF STATE FOR NORTHERN IRELAND

R -v- DOMINIC McGLINCHEY

C.D.P. 24/29

1. You will no doubt be generally aware of this case but I ought to warn you that we may be heading for a very difficult and embarrassing series of events in connection with it.

2. McGlinchey is a member of INLA (formerly of PIRA) and is one of the most dangerous terrorists in Northern Ireland. The RUC have for some time been seeking his arrest for various offences, including more than one murder, but he has evaded arrest in Northern Ireland and has taken refuge, whenever necessary, in the Republic of Ireland.

3. As you know, we do not have a formal extradition treaty with the Republic but rely instead on a system under which warrants issued in one country are backed by a Magistrate in the other and the fugitive criminal is then usually returned without further judicial formalities. The UK legislation authorising this is the Backing of Warrants (Republic of Ireland) Act 1965 and the Irish have corresponding legislation of their own. In both pieces of legislation, however, there is provision which requires the courts to refuse to permit a fugitive to be returned if (broadly speaking) the offence in question is a political offence. Until very recently, it was virtually impossible for us to secure the return of terrorists from the Republic to Northern Ireland or to Great Britain, since the Irish courts always upheld the claim that their offences were political offences. Successive Irish Governments have consistently refused to amend their law to exclude terrorist cases from the ambit of the "political offence" exception.

4. In 1982, however, McGlinchey was picked up by the Irish police on the strength of a warrant which had been sent down from Northern Ireland to be backed

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and which sought his arrest for the murder, in 1977, of an elderly woman (Mrs McMullen) in the course of what was clearly a PIRA attack. To our surprise and gratification; the Irish courts rejected the suggestion that this could be regarded as a political offence and, in a bold and innovative judgment, the Irish Chief Justice enunciated a new approach to that question. If that approach strikes root and develops, it may be difficult in future for terrorists on the run from the police in Northern Ireland or in Great Britain to find safe refuge in the Republic as they have previously been able to do and this will be achieved without the Irish Government having to amend their law. The judgment in the McGlinchey case has recently been followed and consolidated in another case: the terrorist in that case (Shannon) has now been returned to Northern Ireland to face trial for the murder of Sir Norman Stronge (the former Speaker of the Stormont Parliament) and his son. We plan to build on these two judgments to entrench the acceptance by the Irish courts that the "political offence" exception should not avail terrorists whoever their victims may be, i.e. even if they are policemen or soldiers. In this objective we can at present count on the active co-operation of at least some members of the present Irish Government; including the Attorney General. I must add that where the victim is a soldier or a politician we may find that the extension of the law stops:

5. As a result of the judgment of the Irish courts in McGlinchey's case, McGlinchey himself was in due course - and in rather strange circumstances which I need not go into for the purposes of this minute - handed over to the RUC. This was done despite the fact that he was wanted by the Irish police for various offences which he had committed in the Republic, including the attempted murder of one of them in the course of resisting arrest.

6. It is at this point, with McGlinchey firmly in our custody in Northern Ireland, that our troubles start. The evidence which we are able to adduce in the McMullen case, now more than 7 years old, is very weak. At one time we even feared that we should not be able to proceed with the case at all, but we have now decided that the evidence is at least good enough to justify going ahead with the proceedings for committal. Those proceedings are due to begin tomorrow. They may not succeed. But on balance we think that they will succeed and that McGlinchey will

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be committed for trial: We are much more doubtful whether, when he does come for trial, he will be convicted: there is even a risk that the trial Judge will order a "No Bill" at the outset of the trial on the grounds that the papers do not disclose a sufficient case to answer. There is therefore a real risk that either at the committal proceedings or, more probably, at the trial (which, if it does take place, will be held some time in the new year) McGlinchey will have to be released from custody on the McMullen murder charge.

7. As I have said, McGlinchey is also "wanted" by the RUC for a number of other offences; on some of which the evidence available to us is appreciably stronger than in the McMullen case. The RUC would dearly love to prosecute him for at least some of those offences. However, in the special circumstances in which he was returned to us, the Irish Government sought - and, with the agreement of your predecessor, I felt obliged to give - an undertaking that we would treat the case as if it were governed by the "specialty rule". This is the rule which normally forms part of extradition arrangements and which precludes the requesting State from prosecuting a returned fugitive criminal for any offence committed prior to his return (other than the offence in respect of which he was actually returned), at any rate until he has had an opportunity freely to leave the territory of the requesting State. We do not accept that the specialty rule is applicable to the backing-of-warrants arrangements between the Republic and ourselves but it was clear that, unless I gave an undertaking to observe it in respect of McGlinchey, we should do grave damage to our relations with the Republic in this field and should probably destroy for ever the chances of our building on the recent judgments of the Irish courts in the way I have described above. We also had to give an equivalent assurance in the Shannon case, though the circumstances there were somewhat different. Indeed, in the Shannon case the Irish Chief Justice expressed the view, in the course of his judgment, that "extradition proceeds on the assumption that the rule of specialty will operate": as I have said, that is not a view which we share, at any rate in relation to extradition by way of a backing-of-warrants system; but it is clearly the assumption on which the Irish courts and Government now approach these cases and I am resigned to having to give corresponding assurances in every case where we seek the return of a terrorist if we wish to continue to enjoy the co-operation of the Irish authorities. Among the cases in the pipeline

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on which we hope to have that co-operation is the case of another very dangerous terrorist (Burns) whose return the RUC are currently seeking and also cases involving certain persons whom the Metropolitan Police want in connection with the Hyde Park bombing and other terrorist offences committed in Great Britain.

8. Much as we should like to, we therefore cannot put McGlinchey on trial in Northern Ireland for any other offence if he has to be discharged as a result of the failure of the McMullen case. We have, however, agreed with the Irish authorities that it would be disastrous and intolerable that he should be allowed to go free. We have therefore arranged with them that, in those circumstances, he should be returned to the Republic to face trial there for the offences which he committed there before he was returned to us. To this end we have agreed with them that they should send up warrants, to be backed by a Magistrate in Northern Ireland; in respect of those offences and that these should be in our hands by the time of the committal proceedings. We can then be certain that he can be re-arrested and held in custody, pending his return to the Republic, as soon as he is discharged by the court in the McMullen case, whenever that may be.

9. All this, if it happens, will be embarrassing enough. Both we and the Irish Government will look foolish and there will be criticism from all sides, but on different grounds; of our inability to prove the charge against him after all the drama and publicity of his return and his long retention in custody. I have to tell you, however, that this is by no means the end of our troubles.

10. I think it very probable indeed that McGlinchey, knowing that we are unable to proceeding against him in Northern Ireland for anything else, will challenge the order for his return to the Republic in reliance on the "political offence" exception. That challenge will in due course come before the Court of Appeal in Northern Ireland. In April of this year, just after McGlinchey had been extradited from the Republic; I received a letter on this topic from the Lord Chief Justice of Northern Ireland, Lord Lowry: a copy of that letter, dated 2 April, was also sent to your predecessor and to the Lord Chancellor. In that letter he unmistakably warned us that in that situation (which he clearly saw as a possibility) it was almost certain that extradition would be refused by the judges in Northern Ireland and that

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he himself would refuse to endorse the new approach to the "political offence" exception that had been enunciated by the judges in the Republic. He went on to try to persuade us to avoid that outcome by making an order under s.1(4) of the Suppression of Terrorism Act 1978 (which would enable us to extradite terrorists to the Republic notwithstanding the "political offence" exception and despite the fact that the Republic had failed to accede to the European Convention on the Suppression of Terrorism). In my reply to him of 10 May I explained why that course was not open to us and I tried to deflect him from committing himself too firmly to the position which he had indicated he would take. His response, in his letter of 22 May, was not encouraging but I still entertained the hope that he might, after all, keep an open mind. But I now have to tell you that, when I met him a couple of weeks ago in Belfast, we had a very long, though informal, discussion on this topic and he left me in no doubt that that hope was not to be relied on. He is fully determined that, if the case comes before him in the way I have described above, he will unequivocally dissociate himself from the view of the law which the judges in the Republic have taken and will hold that, in the absence of legislative intervention, our law does not (and, by implication, Irish law should not) permit the return of a fugitive terrorist who discloses a "political motive" for his offence. I do not have to tell you how damaging this would be both in the Republic and Northern Ireland.

11. Whatever Lord Lowry's reasoning may be, it is a fact that a judgment by the Northern Ireland Court of Appeal upholding McGlinchey's challenge to the order for his return and dissenting, either expressly or by implication, from the recent judgments of the Irish courts will, if it happens, face us with a very grave situation. You are in a better position than I to assess its political dimensions but I think that there will be a reaction of public outrage both in this country and in the Republic that, after all our previous complaints about the unco-operative attitude of the Irish in this field and after what the Irish Government and courts have recently done to meet these complaints, our own courts could produce such a result. There may be a lack of logic in that reaction but that will not lessen its political impact. In my view, it will be virtually impossible thereafter for the Irish Government to co-operate with us in the extradition of terrorists to Northern Ireland or to Great Britain - even assuming that they would wish to do so - and I fear

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that we shall also find the ground cut from under our feet in our efforts to secure the extradition of Irish terrorists from the United States and other countries. There will no doubt be serious damage to Anglo/Irish relations over a wider field.

12. What, then, can be done to avert or alleviate these consequences? As soon as I had the first intimation of Lord Lowry's likely attitude, I procured an Opinion from very experienced Counsel on the prospects of getting any such decision by him overruled by the House of Lords. Their advice, which I endorse, is that I should have no difficulty in obtaining leave to appeal to the House of Lords and that the appeal would very probably succeed - though there can of course be no absolute guarantee of that. Counsel think, and again I agree, that the House of Lords are likely to express their concurrence in the new approach to the "political offence" exception adopted by the Irish judges and to dissent from any criticism of it that was made by Lord Lowry in the Northern Ireland courts: but how far they will think it necessary to go in this regard may depend on exactly how the issue arises in the proceedings in the Northern Ireland courts, which in turn will depend on the precise facts of the offences for which his return to the Republic is being sought. I should also point out that, even if the Northern Ireland Court of Appeal does not uphold McGlinchey's challenge, it is still quite possible that McGlinchey himself will appeal to the House of Lords. In that case, there is no reason to alter the assessment that the House of Lords will probably decide in our favour; but the chances of their expressly indicating their agreement with the Irish judges may be somewhat less. If, of course, Lord Lowry has not found it necessary to criticise the view of the law taken by the Irish judges, the silence of the House of Lords on that matter will not trouble us. But if, as I fear is likely, he has vented such criticism, although obiter and in the course of rejecting McGlinchey's challenge on other grounds, it will be very unfortunate indeed if the House of Lords refrain from dissociating themselves from it.

13. One way or another, therefore, I think that it is very probable that the House of Lords will in the end uphold the order for McGlinchey's return and I think that it is probable, but a little less so, that they will; in doing so, indicate

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their support for the view of the law expressed by the Irish judges in their recent judgments. But I doubt if this outcome will wholly undo the damage that will in the meantime have been caused by a judgment of the Court of Appeal of the kind that we have reason to fear; and, in any case, we shall still have to live with the situation created by that judgment until it is overturned.

14. I thought it right to warn you of this danger on the horizon. It if materialises, it is unlikely to do so before about the beginning of the new year, perhaps much later than that.

15. I am copying this minute to the Prime Minister, the Lord Chancellor, the Home Secretary and the Foreign and Commonwealth Secretary.

M.H.

24 September, 1984

LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE

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