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PRIME MINISTER

EXTRADITION OF JOHN EDWARD McNICHOLL

The Prime Minister may like to be aware that I have decided not to proceed with the extradition of John Edward McNicholl, currently a fugitive in the United States of America, who is fighting deportation proceedings and whom my predecessor had agreed that we should try to extradite. This note sets out the legal difficulties that the US authorities have recently identified and the current political sensitivities.

Background

2. McNicholl escaped from H M Prison Maze during the night of 4/5 May 1976 while on remand. The offences with which McNicholl had been charged arose firstly from the events of 26 July 1975. On that day, Constable Robert McPherson had been shot dead and Constable William Elliott wounded while investigating suspicious activity in Dungiven, County Londonderry. On the night of 16 February 1976, a party of soldiers arrested three men in a house at Brockabuoy, Garvagh, County Londonderry. On each of the men was found a quantity of ammunition. The soldiers also found two pistols, two electric detonators and two improvised pressure mat switches in the house. In a shed adjoining the house, police found a shotgun, a .22 rifle and magazine and a quantity of ammunition. Forensic examination subsequently revealed that the three pistols recovered were the three pistols used in the incident on 26 July 1975.

3. One of the men was identified as John Edward McNicholl. During interview by police McNicholl took full responsibility for the weapons and

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explosives. He denied involvement in the murder of Constable McPherson and the wounding of Constable Elliott. At an informal identification parade, Constable Elliott identified McNicholl as the man who had fallen when he (Constable Elliott) returned fire. Medical examination of McNicholl revealed that he had scars on the front and rear of his abdomen, which had the appearance of an entry and exit bullet wound. McNicholl was charged with the murder of Constable McPherson and the attempted murder of Constable Elliott, but escaped from the Maze prison before being brought to trial.

Possible prosecution of the offences

4. The DPP (NI) issued a "Further Direction" on 10 February 1994 in which he stated that he did not regard Sergeant Elliott's identification evidence as sufficiently cogent to warrant an application for McNicholl's extradition on the murder and attempted murder charges. My predecessor therefore agreed that HMG should seek McNicholl's extradition only for the firearms and explosives offences arising from the events of 16 February 1976.

Extraditability of the offences under the "Main Treaty" and the "Supplementary Treaty" with the USA

5. In order to preclude a fugitive from avoiding extradition by claiming that his offence was "political", it is necessary to establish that the offence for which he is sought is covered by or caught by the Supplementary Treaty with the USA. However, the US Justice Department has recently advised us that it considers that the language of Article 1 of the Supplementary Treaty precludes us from relying on it in McNicholl's case, since the bombs and the guns were not intercepted on the way to their targets, and the bombs apparently were not primed. Instead, it believes that HMG's request for McNicholl's extradition would be considered under the original Treaty, under

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which they think his political offence defence would be insurmountable under US Law.

6. The element of a violent political disturbance, such as a war, revolution, or rebellion, is a threshold requirement in most US court decisions. The UK sought the extradition of several IRA fugitives in the 1970s and 1980s. In all but one case, extradition was denied on political offence grounds. In each case the court agreed that there was a violent political disturbance in Northern Ireland that sufficed to constitute a civil war, insurrection, revolution or rebellion. Given that line of authority, as well as the recent immigration decision regarding Brian Pearson, the Justice Department considers that there is little to no likelihood that we would succeed in this case. Thus, we would be put in a position of either stipulating that there was a political disturbance or facing a public airing yet again, in excruciating detail, of purported past oppression of nationalists by the British and the struggle for a united Ireland.

The Latest Political Difficulties

7. There is a further complication. Our embassy in Washington reports that the US Administration have given certain assurances to Sinn Fein about the current Irish deportation cases (of which there are nine ongoing at present). The cases appear to have been "administratively closed." In other words, the cases would not be formally withdrawn, but nor would they be prosecuted. The idea is that if the IRA cease-fire broke down, or if circumstances change for any other reason, the cases might be revived. The embassy reports that if the Americans intend to drop their deportation cases, our conversion of the McNicholl case into an extradition could be perceived

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as vindictive. This would certainly provoke a campaign against us in the US which would be taken up enthusiastically on the Hill.

Conclusion

8. I have considered carefully whether, in the light of our recent advice on the legal difficulties and on the current political sensitivities, we should proceed with this extradition request. I have decided that we should not. I recognise that by not proceeding we may be sending a signal that there are circumstances in which we will not try to extradite suspects who have been charged with serious terrorist offences and whose whereabouts are known. However, given the view of the Justice Department that we would be likely to lose, and the fact that the DPP (NI) considers that the evidence on the murder and attempted murder charges is not sufficient to justify a prosecution, I do not think that we should pursue the case. We will of course be free to re-visit the question of McNicholl's extradition in the future if circumstances change.

9. I am copying this to Robin Cook, Jack Straw and John Morris.

A handwritten signature in blue ink, appearing to read 'Marjorie Mowlam', written over the printed name.

MARJORIE MOWLAM

21 August 1997

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