



Northern Ireland Office
Stormont Castle
Belfast BT4 3ST

cc PB
AC

John Morris QC MP
Attorney General
9 Buckingham Gate
LONDON
SW1E 9JP

File
Jan
31/7.

28 July 1997

Dear John,

**NORTHERN IRELAND EMERGENCY LEGISLATION: THE SCHEDULED OFFENCES -
CERTIFYING IN VERSUS CERTIFYING OUT**

Following your letter of 14 May to the Prime Minister, I have noted your objections in principle to the use of your office in a procedure of certifying in. Therefore I have been considering compromise proposals that would achieve the desired result while changing the presumption in favour of jury trial, but would not involve your office having to operate in an adversarial way.

I have considered a range of options; my preferred one is to change the system to one of certifying in, give the decision-making power to Crown Court Judges, and at the same time provide a "test" which would appear on the face of the Act and which would be used to determine whether or not an offence should be certified in. I see clear advantages in following such a course. It would allow the Government, while re-enacting legislation which it has opposed in the past, to make a significant change in favour of rendering the presumption in all cases to be ordinary treatment. Also, it would leave your office out of the certifying in equation. I would not expect the change to increase the number of cases being dealt with in Diplock Courts. Indeed, it might reduce the number of such cases; and the appearance on the face of the Act of a test for determining whether an offence should be certified in would help counter Judges' objections to becoming involved in what might be seen as executive decision-making, which they would consider detrimental to their



independence. I appreciate that the Judges will wish to avoid being perceived as supportive of the prosecution, so I hope very much that they would consider the test would provide sufficient safeguard; but as this is something which we shall need to explore with the Judges, I am writing simultaneously to the Lord Chief Justice, Sir Robert Carswell, with a copy to the Lord Chancellor, seeking views.

I imagine the Judges may also raise practical and logistical objections and we shall have to be ready to listen to these. I very much hope that we can secure their co-operation otherwise we shall be faced with the prospect of imposing the proposed new system on an unwilling judiciary. I am aware also that the new procedures would have to be drafted very carefully to minimise the risk of challenge through judicial review; and, in order to ensure that all terrorist cases were dealt with before Diplock Courts and treated in accordance with the special arrangements for preliminary inquiries, bail etc, which apply under sections 2 to 4 of the EPA in the case of scheduled offences, the decision to certify in would have to be taken before such special arrangements started to apply.

I see the proposed new system operating as follows:

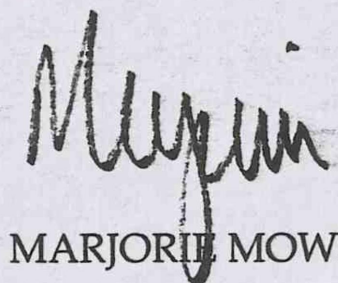
As at present there would be a list of offences. Each offence listed would have the potential to be a scheduled offence. It would be treated as such only if a Crown Court Judge determined in the individual case that the test was satisfied. I envisage that the test would be written in very simple terms; for example: "[the deciding authority] will certify an offence as a scheduled offence if he is satisfied in the particular case that it was committed in connection with or in pursuance of terrorism". Of the 70 or so offences which comprise the current list of scheduled offences, about half are capable of being certified out. Assuming the list of scheduled offences stands as at present there is, in theory, more work involved in certifying in than in certifying out, although the end result might be a marginal reduction in



the number of cases being dealt with before Diplock Courts. As for the impact in terms of the speed of processing cases, it is possible that the process of certifying in with confidence, because it amounts to imposing a burden and not relieving one, might in practice demand rather greater analysis and care than the present system. While on the one hand this could have the effect of slowing things up, on the other hand if the ceasefires hold, we shall see a downturn in the number of terrorist offences being committed, and the decision-making process with respect to certifying will be considerably simplified.

I shall welcome your views on the viability of this compromise proposal; I shall, of course, be happy to discuss it with you if you think that would be useful.

I am sending copies of this letter to the Prime Minister, Members of IN Committee, the Lord Chancellor, the Secretary of State for Scotland, the President of the Council, the Chief Whip, the Captain of the Gentlemen at Arms, and to Sir Robin Butler.


MARJORIE MOWLAM