2020/17/21

S19325E

British Prevention of Terrorism Act 1974

15/5/90 - 25/9/90

S19325E

START of file

SEEN BY TAOISEACH

Fax

To: D/FA
Anglo-Irish

From: Embassy of Ireland
28, route d'Arlon
Luxembourg

For: Mr. R. Murphy

From: Amb.

Mr McCarthy
(on return)
hrk
28.9.90

Mr Chubb
Mr Thompson
27/9

Our Fax No: 458820

Pages to follow: 6

Date: 25.09.90

Remarks: Please copy Mr. D. Bogle.

c.c. D Nally
AG's Office (Mr. Hamilton)
Sec. D/Justice
Joint Secretary
A/Sec Gallagher

XEROX TELECOPIER 295 ; 25- 9-90; 3:49 PM; 458820 → 764505 ; # 1

IONADAÍ NA hEIREANN
HAIRLE NA hEORPA
RASBOURG
FHRAINC

LE REPRÉSENTANT PERMANENT
D'IRLANDE
CONSEIL DE L'EUROPE
STRASBOURG
FRANCE.

207/90 COE 12

25th September 1990

Mr Damien Boyle
Department of Foreign Affairs

The following is my report on the consideration of the case of Brogan and Others at the 444th meeting of the Committee of Ministers' Deputies held in Strasbourg on 24th September 1990.

The discussion was opened by the UK who said that they hoped for a speedy conclusion. The tragic tale of terror continued - 12 bombing and shooting attacks since the case was last discussed in June involving one killed and 24 injured. Forty people were killed so far this year in NI alone. The UK government sees no alternative to maintaining this particular legislation as part of the emergency legislation reviewed annually by parliament. Following the decree of the Court of Human Rights the government had examined the possibility of introducing legislation to supervise the detentions but this was not feasible. The derogation was in place only for so long as circumstances required. It is a limited derogation which is subject to test by the Commission or Court as to its admissability. The government has done what is reasonable. It has acknowledged the judgement of the Court but has difficulty in deciding how this judgement could be put into effect at the present time. Therefore it strongly supported the UK draft resolution before the Committee.

France considered the UK position reasonable and would support it. Denmark enquired if it could be confirmed that the validity of the derogation was on a list of cases to be tested by the Commission and on receipt of this confirmation declared its support for the UK but on condition that the testing of the validity be written into the Spanish amendment. Netherlands supported the UK but proposed its own amendment, "concluded" instead of "exercised" in the final paragraph before the Appendix. Spain also supported the UK.

Switzerland maintained its position as indicated at the June meeting, namely it supported the Secretariat draft resolution.

At that stage I intervened to say that even with the proposed amendments we wished to maintain our objection to both texts as stated at the June meeting. Ireland's position was that we did not consider notice of derogation as constituting an execution of the Court's judgement, nor could we support a text which provided for a discontinuance of its examination by the Committee of Ministers.We would have wished for continuing supervision of the case by the Committee of Ministers.

Portugal declared its support for the UK as did Austria, Greece (with the NL amendement), Germany and Luxembourg.

Belgium favoured the preferred Secretariat proposal, namely an interim resolution, especially now that the validity of the derogation was being tested.

Turkey supported the UK, followed by Italy and Sweden, the latter without the NL amendement.

Cont./2.

XEROX TELECOPIER 295 : 26- 9-90; 3:50 PM; 458820 → 764506 : # 2

The UK then said that if it would help finalising the case it could accept the Danish amendement along the lines of "the validity of the derogation was included in cases pending for hearing by the Commission".

The Director of Human Rights made his intervention at that stage. He disagreed with the UK. He was concerned that the system of the Convention of Human Rights would lose credibility. This was the first time that a government had entered a derogation after the judgement of the Court was delivered. The impression should not be given that derogation was an execution . We should beware of a declining acceptance of the Court's judgement. What if the Court ruled that the UK derogation was invalid? Would not the UK resolution and the Committee of Ministers then look foolish? If the Court rules that the derogation was valid, its validity could be legally effective only from the date of the Court's decision, which could also cause difficulties. As to the two new amendments, he had no difficulty with Denmark's; he could not understand the necessity nor the meaning of Netherland's. He repeated his preference for an interim rather than a final resolution.

A procedural wrangle then developed which can best be summarised in the following voting sequence (figures are For, Against, Abstain):

Danish amendment to Spanish text: 13-0-7
Netherlands amendment to UK text: 10-2-8
Not carried (Sweden, Ireland against)

UK resolution (excluding NL amend): 9-1-7
Not carried - minimum of 12 required, Ireland voted against, 4 of the 13 declarations in favour must have been impressed by the Director.

Secretariat resolution incl. Spanish amendment, indicative vote only: 15-1-5
(Ireland abstained)

At that stage the UK intervened to say
(a) if the Secretariat resolution was adopted the UK would wish to have a statement included in the report to the effect that the resolution did not mean that the UK government had not abided by the decision of the Court (the Secretariat had no objection to that) and
(b) he would like an adjournment to the afternoon to check with his authorities wether the UK could accept the Danish amendment in the Secretariat draft resolution.

On resumption, Denmark withdrew its amendment and the final vote on the Secretariat resolution including the Spanish amendment was 14-0-5 and this was adopted. Ireland abstained as did Spain, Sweden, Greece and one other not positively identified. The UK voted for the resolution. A copy of the decision is attached.

In the course of the meeting I spoke privately to the Secretary of the Committee of Ministers about the Amnesty International approach and left with him a copy of the fax. He had not heard of any similar approach to other delegations and was surprised at its accuracy. (The Director had mentionned in his intervention, in passing, an article on the case, equally well informed, in a Dutch legal magazine). The Secretary confirmed to me that the proceedings of the Committee of Ministers (unlike obviously those of the Court) were confidential and that nothing was released to the press until a case was concluded, and then only a summary - no details such as voting figures. He agreed there was a leak but not by the Secretariat, he felt.

Liam Rigney

Liam Rigney,
Permanent Representative.

XEROX TELECOPIER 295 : 26- 9-90; 3:50 PM;

A444D29.11
[11]

444th meeting (DH) - Sept. 1990

Item 29

29.

JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE BROGAN AND OTHERS CASE Application of Article 54 of the European Convention on Human Rights (Concl(90)442/44f)

1 Decision

2 The Deputies adopted Resolution DH (90)... concerning the judgments
3 of the European Court of Human Rights of 29 November 1988 and of
4 30 May 1989 in the Brogan and Others case, as it appears at Appendix
5 ... to these Conclusions.

APPENDIX 1
(item 29)

RESOLUTION DH (90) ..

CONCERNING THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS OF 29 NOVEMBER 1988 AND 30 MAY 1989 IN THE BROGAN AND OTHERS CASE

(adopted by the Committee of Ministers on .....
at the .... meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgments of the European Court of Human Rights in the Brogan and others case delivered on 29 November 1988 and 30 May 1989 and transmitted the same days to the Committee of Ministers;

Recalling that the case originated in four applications against the United Kingdom lodged with the European Commission of Human Rights on 18 October 1984, 22 October 1984, 22 November 1984 and 8 February 1985 under Article 25 of the Convention by Mr Terence Brogan, Mr. Dermot Coyle, Mr. William McFadden and Mr.Michael Tracey, British nationals, who complained of their arrest and detention under Section 12 of the Prevention of Terrorism (Temporary provisions) Act 1984;

Recalling that the case was brought before the Court by the Commission on 15 July 1987 and by the Government of the United Kingdom and Northern Ireland on 3 August 1987;

Whereas in its judgment of 29 November 1988 the Court held:

- by sixteen votes to three that there had been no violation of Article 5, paragraph 1, of the Convention;
- by twelve votes to seven that there had been a violation of Article 5, paragraph 3, of the Convention in respect of all four applicants;
- unanimously that there had been no violation of Article 5, paragraph 4, of the Convention
- by thirteen votes to six that there had been a violation of Article 5, paragraph 5, in respect of all four applicants;
- unanimously that it was not necessary also to consider the case under Article 13 of the Convention;

Whereas in its judgment of 30 May 1989 the Court held unanimously that the principal judgment in itself constituted sufficient just satisfaction for the purposes of Article 50 of the Convention;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 54 of the Convention;

Having invited the Goverment of the United Kingdom to inform it of the measures which had been taken following the judgment of 29 November 1988, having regard to its obligation under Article 53 of the Convention to abide by it;

Whereas, during the examination of the case by the Committee of Ministers, the Government of the United Kingdom gave the Committee information about the measures taken in consequence of the judgment, which information appears in the Appendix to this Resolution;

Whereas in the present case it is not for the Committee of Ministers to pronounce on the validity of a derogation entered according to Article 15 of the European Convention on Human Rights;

Decides, after having taken note of the information supplied by the Government of the United Kingdom, to discontinue its examination of the present case.

Appendix to Resolution DH (90) ..

Information provided by the Government of the United Kingdom during the examination of the Brogan and others case before the Committee of Ministers

The Government of the United Kingdom informed the Committee of Ministers that, notwithstanding careful consideration of possible alternatives, it had not been possible to identify a procedure which could satisfy the requirements of Article 5, paragraph 3, of the Convention on the issue of the review of detention of terrorist suspects by a judge or other officer authorised by law.

In consequence, and in the context of the continued threat to the United Kingdom posed by terrorism connected with the affairs of Northern Ireland, the Government of the United Kingdom has concluded that the derogation notified on 23 December 1988 and 23 March 1989 that was entered according to the possibility afforded by Article 15 of the Convention to any High Contracting Party in time of war or other public emergency threatening the life of the nation must remain in place for as long as circumstances require. The arrest and detention powers granted to the police and the Secretary of State under the former Section 12 of the Prevention of Terrorism (Temporary provisions) Act 1984 (now Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989) will therefore remain.

The Government of the United Kingdom does not consider that any action is required as a result of the finding of a violation by the Court of Article 5, paragraph 5, of the Convention. It is the Government's view that, provided the national law complies with the State's obligations under Article 5, paragraphs 1 to 4, (if necessary as modified by a derogation), no question of compensation arises. Article 5, paragraph 5, does not require in itself that paragraphs 1 to 4 of Article 5 be incorporated into domestic law.

Secretary,
Papers re Brogan case
attached as discussed.

With the Compliments

of the

Secretary

Department of Foreign Affairs

20/9/90

Telex Message to Dermot Gallagher, c/o Embassy Washington
From R. Murphy, Anglo-Irish Section
20.9.90

Brogan Case

Text of statement by Ireland at Council of Europe meeting on 20 June follows. This includes the Director's statement which you also wanted.

I have spoken to Ambassador Rigney again about likely voting pattern on Monday. Those known to favour the British Resolution are:

Turkey, FRG, France, Italy, Spain, Malta, Luxembourg.

Sweden is also likely to support Britain. Switzerland is the only country to have declared a preference for the Secretariat Resolution. Amb. Rigney's view is that the people on the fence are likely to vote with the majority and he feels that it is very likely that we will be the only country voting against the British Resolution.

He made two further points:

1. The results of the vote would not be published on Monday and might not emerge until the final report on the case was issued in 6 months time;

2. He gave as his view that, since we have made our voting intention plain in our 20 June statement, we are not in a good position to change our voting much, if at all.

I am copying relevant papers as discussed to Mr. Nally, sec. D/Justice and A.G's Office.

R. Murphy
Taoiseach agreed to X.
DFA approval
Brogan 21/9.

Taoiseach,
This is submitted, please, for
X confirmation of the intention - if that is your wish - to vote against the British resolution on Monday, in the light of what has happened since June and the number of countries likely to support Britain.
21/9/90

C130
IMMEDIATE
20TH SEPTEMBER 1990

TO WASHINGTON FROM ANGLO-IRISH
FOR A/SEC GALLAGHER FROM R MURPHY

MMMSFGKB

BROGAN CASE

THERE IS A COUNCIL OF EUROPE MEETING ON MONDAY 24 SEPTEMBER AT WHICH THE BROGAN CASE WILL BE FURTHER DISCUSSED (THE CASE WHERE THE 7-DAY DETENTION PERIOD UNDER THE PTA WAS FOUND TO BE IN BREACH OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS). AMB. RIGNEY BELIEVES IT IS VERY LIKELY THAT A VOTE WILL BE TAKEN ON MONDAY ON THE 2 RESOLTUIONS BEFORE THEM - THE BRITISH RESOLUTION AND THE SECRETARIAT ONE.

(AS YOU WILL RECALL, THE BRITISH RESPONDED TO THE COURT JUDGEMENT AGAINST THEM BY ENTERING A DEROGATION IN RESPECT OF ITS OBLIGATIONS UNDER THE CONVENTION WHERE NORTHERN TERRORISM IS CONCERNED. WHAT IS AT ISSUE IN THE TWO RRESOLUTIONS IS THE USPERVISORY FUNCTIONS OF THE COUNCIL OF EUROPE IN PURSUIT OF THE DECISION IN THIS CASE. THE BRITISH RESOLUTION MAINTAINS THAT, AS A RESULT OF THEIR DEROGATION AND INFORMATION THEY HAVE SUPPLIED ABOUT THE SITUATION, THE COUNCIL HAS EXERCISED ITS SUPERVISORY FUNCTION AND NO FURTHER SUPERVISION IS REQUIRED BY THEM. THE SECRETARIAT RESOLUTION WOULD HAVE THE EFFECT OF DISCONTINUING THE COUNCIL'S EXAMINATION BUT WOULD LEAVE OPEN THE POSSIBILITY OF THE COUNCIL CONSIDERING THE CASE IN THE FUTURE. NETIERH RESOLUTION IS SATISFACTOR Y FROM OUR POINT OF VIEW.)

OUR POSITION ON THE TWO RESOLUTIONS WAS CONSIDERED IN DETAIL EARLIER THIS YEAR AND THE MINISTER INSTRUCTED THAT IRELAND SHULD VOTE AGAINST THE BRITISH RESOLUTION AND ABSTAIN ON THE SECRETARIAT ONE. NO VOTE WAS TAKEN AT THE MEETING ON 20/21 JUNE BUT OUR PERMREP MADE A STATEMENT IN WHICH HE SET OUT OUR POSITION AND STATED OUR VOTING INTENTION AS SET OUT ABOVE. IT EMERGED FROM THAT MEETING THAT THERE WAS CONSIDERABLE SUPPORT FOR THE BRITISH RESOLUTION. THE ONLY OTHER SIGNIFICANT DEVELOPMENT WAS A DRAFT AMENDMENT BY SPAIN WHEREBY THE FOLLOWING WOULD BE ADDED:
''WHEREAS IN THE PRESENT CASE IT IS NOT FOR THE COMMITTEE OF MINISTERS TO PRONOUNCE ON THE VALIDITY OF A DEROGATION ENTERED ACCORDING TO ARTICLE 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.''

THIS AMENDMENT HAS BEEN ACCEPTED BY THE DIRECTOR OF HUMAN RIGHTS AS BEING LEGALLY CORRECT AND HAS BEEN ADDED TO BOTH RESOLUTIONS. AMB. RIGNEY FEELS, AND I AGREE, THAT IT MAKES NO DIFFERENCE TO THE RESOLUTIONS FROM OUR POINT OF VIEW SINCE IT ADDS NOTHING TO RESOLVING THE QUESTION OF WHETHER DEROGATION CONSTITUTES COMPLIANCE WITH A DECISION BY THE COURT OF HUMAN RIGHTS. TO BE DOUBLY SURE, I HAVE ASKED THE AG'S OFFICE TO CHECK THAT THE SPANISH AMENDMENT DOES NOT ALTER OUR CASE.

AMB. RIGNEY FEELS THAT DISCUSSION WILL BE CONCLUDED ON 24 SEPTEMBER AND THAT THERE WILL BE A VOTE ON THE TWO RESOLUTIONS WITH THE BRITISH ONE LIKELY TO WIN ACCEPTANCE. HE IS SURPRISED THAT THE DIRECTOR HAS NOT PUT UP A GREATER FIGHT ON THIS BUT SAYS IT APPEARS THAT THE DIRECTOR WILL ACCEPT WHATEVER DECISION THE COMMITTEE COMES UP WITH. HE PROPOSES TO VOTE AS EARLIER INSTRUCTED ON THE TWO RESOLUTIONS AND TO MAKE A BRIEF STATEMENT REPEATING OUR OBJECTIONS TO BOTH TEXTS. I AGREE THAT THIS IS THE BEST COURSE OF ACTION.

JKPQNDO⊕
93720E ESTR EI

STATEMENT 7 June 1990

Mr. Chairman,

1. I should like to inform you of the position of the Government of Ireland with regard to the two Draft Resolutions which are before us for consideration. Let me say immediately that, apart from the significance of the specific issues, my Government consider the general principles enshrined in the Convention to be of central importance to any consideration of the two Draft Resolutions. In the circumstances, I am afraid that we do not consider either Draft Resolution to meet the needs of this sensitive and important situation.

2. Notice of derogation under Article 15 of the European Convention on Human Rights does not in our view constitute execution of the judgment of the European Court of Human Rights in the case of Brogan and Others. In our view, the Committee of Ministers is obliged under Article 54 of the European Convention on Human Rights to supervise the execution of the judgement of the European Court of Human Rights in this case. I am sure that other delegations will also have carefully noted the clear view of the Director of Human Rights on this point. The Director has said :

> "In the Secretariat's view, the notice of derogation entered by the United Kingdom authorities under Art 15 of the Convention cannot possibly be regarded as an 'execution' of the judgement within the meaning of Art 54 of the Convention; on the contrary, it is an attempt to avoid the consequences of this judgement and the finding of violation in future cases of the same kind."

3. I don't wish to open a debate on substantive issues but I would like to inform my colleagues that the Government of Ireland take the view, and have so informed the British authorities, that the 7 days maximum period of detention under the Prevention of Terrorism Act is not sustainable and

that the judgement of the European Court of Human Rights in the case of Brogan and Others should be complied with, by way of either providing a judicial method of supervising extended detentions, or by way of amendment to the Prevention of Terrorism Act to bring it into line with the terms of the judgement of the European Court of Human Rights.

4. I would also like to touch upon the opening of the Council of Europe to Central and Eastern Europe and to the likelihood that before long the European Convention on Human Rights may have additional High Contracting Parties from that part of Europe. I think that we are all agreed, and this has indeed been stated at political level many times in recent months, that there is no room for a lowering of standards under the European Convention on Human Rights with the advent of additional High Contracting Parties from Central and Eastern Europe. For that reason and in order not to create any precedents which might be regretted at some future date, I think that we need to reflect very carefully on any decision which we take with regard to the adoption of a final Resolution in accordance with Article 54 of the European Convention on Human Rights in relation to the case of Brogan and Others.

5. While recognising the effort of the Secretariat to draft a Resolution which is logically and legally proper, the Government of Ireland have considerable difficulty in supporting a text which provides for a discontinuance of its examination of the case by the Committee of Ministers. We would have wished for continued supervision in this case by the Committee of Ministers.

6. If called upon to vote upon the two Draft Resolutions, the Government of Ireland will abstain in the case of the draft resolution prepared by the Secretariat. We will vote against the draft resolution as amended by the United Kingdom.

PSM,

Vote in Council of Europe on the Brogan Case

1. We are almost certain to be faced with a vote in the Council of Europe on the 11th June on two resolutions (from the British and the Council Secretariat respectively) relating to the Brogan case - i.e. the case where the British seven day detention period (under the Prevention of Terrorism Act) was found to be in breach of the European Convention on Human Rights.

2. The British responded to the judgement of the Court in the Brogan case by issuing a derogation in respect of its obligations under the Convention where Northern terrorism was concerned.

3. The issue for consideration now relates to the (practical) implications of the supervisory functions given to the Council of Europe in pursuit of the decision in this case. (Article 54 of the European Convention states that the judgement of the Court shall be transmitted to the Committee of Ministers "who shall supervise its execution").

British Resolution

4. The British in their resolution argue that, as a result of their derogation and the information they have supplied about the situation, the Council can be said to have exercised its supervisory role as required by Article 54; further supervision by the Council was, therefore, no longer required.

5. In opposition to the British position, the Director of Human Rights of the Council (whose assessment must carry considerable weight) takes the view that the notice of derogation cannot be regarded as an "execution" of the Court's judgement but is in fact an "attempt to avoid the consequences of this judgement". In this regard, the

adoption of the British resolution could be interpreted (in the Director's view) as meaning that "any State found in violation of the Convention by the Court could avoid execution of the judgement by derogation from its obligations under the Convention".

Secretariat Resolution

6. The effect of the Secretariat resolution would be "to discontinue its (i.e. the Council's) examination" of the case. The formula preferred by the Secretariat would have meant the Council considering the case at some stage in the future; however, in the light of the fact that this would be a non-runner with the majority of Member States, they opted for a fudged formula which, while removing the case from the Court, would not go as far as stating that the supervisory obligations under Article 54 have been met (as is claimed in the British resolution).

Suggested Approach

7. In view of the unsatisfactory nature of both resolutions, it is recommended that we abstain on both of them (while a vote against the British text would be justified, it is likely to win widespread support and, therefore, an abstention might better meet the reality of the situation). While we support the Secretariat's concerns, its draft resolution - which would discontinue Council of Europe consideration of the case - is also unsatisfactory from our viewpoint and a vote in favour might well give rise to presentational problems.

8. The papers on the case are across (including a more detailed steering note from Mr. Collins and, on top, a proposed speaking note for Ambassador Rigney).

9. We have asked Ambassador Rigney for an up-date of the likely voting support for the two resolutions.

Dermot Gallagher
6 June, 1990.

cc: AG; Mr. Nally; PSS; Mr. Mathews; Mr. Brosnan; Mr. Collins

Mr McCarthy
3.7.90

Note

Re Brogan case

The Brogan case was considered again in the Council of Europe on 20-21 June. See the attached report which has now been received from Ambassador Rigney. There was no voting on the occasion but there will be further consideration of this item on 24 September.

M Collins
28.6

cc PSM, AG, PSS, Mr Nally, Amb London, A/Sec Gallagher, Legal Adviser, Mr Mathews, Mr Brosnan, Joint Secretary.

Council of Europe Committee of Ministers' Deputies - 20/21 June 1990.

Item 44f - The Brogan Case

UK repeated their conviction that their proposal was the only one a eptable to them; that this was cleared at the highest possible level; that this was not in breach of the Convention as the validity of the derogation would be tested by the Commission and probably also by the Court and that a derogation was not in breach of the Convention. UK then went on to list and detail recent outrages in

the UK and Europe - 4th. 14th. 16th. 27th May. 1st. 2nd. 12th. 14th June - none of which had taken place in N.I..
The following delegations made short or very short statements supporting UK, nothing more:

Turkey	Spain
FRG	Luxembourg
France	Malta
Italy	

At that stage I intervened with the complete agreed statement. the text of which I subsequently gave to the Secretariat.

Switzerland followed saying they preferred the Secretariat proposal if the Director was satisfied with it.

Sweden concluded the statements indicating they did not agree with the Director's proposal and if a vote was to be taken they would support the UK.

The Director then replied, making the following points:

- he was impressed by the statements but he was concerned only with the legal implications, not the political nor the emotional factors
- he still maintained that derogation under Article 15 was not an execution of the Court's judgement
- in any event, the Committee of Ministers was not empowered to pronounce on validity of a derogation under Article 15
- there had as yet been no execution of judgement and it was wrong for the UK version to say so
- he repeated his preference for an interim execution which he had originally proposed to the UK but which had been rejected.

The Secretariat began making arrangements for a vote but Spain proposed an amendment taking up the Director's third point above and including it in the UK version. Belgium supported this and the UK said they would like to see it in writing. The item was adjourned to the next day.

On resumption, the Director said that the amendment (text of which is enclosed) was legally correct and could be inserted in both proposals. He still expressed his preference for an interim resolution and would regard any of the other solutions as second best.

The case was then adjourned to 24th September to enable capitals to be consulted.

In my view, the amendment makes no differences as far as we are concerned, as the offending following paragraph in the UK proposal still remains. I was indeed surprised that the Director did not take a stronger stand or at least make a reference to this and it now seems that the amended UK version may be agreed in September.

I would propose that on 24th September I repeat briefly our objections to both texts, stating that even with the amendment the UK text [illegible] as an execution of the judgement of

A442N44F.AMEND
[62]

442nd meeting - June 1990

Item 44f

Case of Brogan and others

PROPOSAL OF THE SPANISH DELEGATION

In the text of the Draft Resolution presented by the authorities of the United Kingdom, add before the paragraph preceding the Appendix to the Resolution, a paragraph reading as follows:

> "Whereas in the present case it is not for the Committee of Ministers to pronounce on the validity of a derogation entered according to Article 15 of the European Convention on Human Rights."

Note:

Re Brogan Case

I received a message from Amb Rigney to say that at the request of Malta consideration in the Council of Europe of the Brogan case has been deferred until 20 June. I have asked for a report on any views that the Ambassador may have gleaned from other delegations.

M Collins
12.6

cc PSM, Mr Nally, PSS, AG, Mr Mathews, Mr Gallagher, Mr Brosnan

No 19

Mr McCarthy
Mr Mathews
11.6.90
1116

AN ROINN GNÓTHAÍ EACHTRACHA
DEPARTMENT OF FOREIGN AFFAIRS

BAILE ÁTHA CLIATH 2
DUBLIN 2

Re Brogan Case

Attached is the text of the draft statement as revised following consultations with the Minister to be made at the Council of Europe on 11 June.

M Collins
8 June I990

c.c. AG, Mr Nally, PSS, Mr Mathews, Mr Brosnan

DRAFT STATEMENT

Mr. Chairman,

1. I should like to inform you of the position of the Government of Ireland with regard to the two Draft Resolutions which are before us for consideration. Let me say immediately that, apart from the significance of the specific issues, my Government consider the general principles enshrined in the Convention to be of central importance to any consideration of the two Draft Resolutions. In the circumstances, I am afraid that we do not consider either Draft Resolution to meet the needs of this sensitive and important situation.

2. Notice of derogation under Article 15 of the European Convention on Human Rights does not in our view constitute execution of the judgment of the European Court of Human Rights in the case of Brogan and Others. In our view, the Committee of Ministers is obliged under Article 54 of the European Convention on Human Rights to supervise the execution of the judgement of the European Court of Human Rights in this case. I am sure that other delegations will also have carefully noted the clear view of the Director of Human Rights on this point. The Director has said :

> "In the Secretariat's view, the notice of derogation entered by the United Kingdom authorities under Art 15 of the Convention cannot possibly be regarded as an 'execution' of the judgement within the meaning of Art 54 of the Convention; on the contrary, it is an attempt to avoid the consequences of this judgement and the finding of violation in future cases of the same kind."

3. I don't wish to open a debate on substantive issues but I would like to inform my colleagues that the Government of Ireland take the view, and have so informed the British authorities, that the 7 days maximum period of detention under the Prevention of Terrorism Act is not sustainable and

that the judgement of the European Court of Human Rights in the case of Brogan and Others should be complied with, by way of either providing a judicial method of supervising extended detentions, or by way of amendment to the Prevention of Terrorism Act to bring it into line with the terms of the judgement of the European Court of Human Rights.

4. I would also like to touch upon the opening of the Council of Europe to Central and Eastern Europe and to the likelihood that before long the European Convention on Human Rights may have additional High Contracting Parties from that part of Europe. I think that we are all agreed, and this has indeed been stated at political level many times in recent months, that there is no room for a lowering of standards under the European Convention on Human Rights with the advent of additional High Contracting Parties from Central and Eastern Europe. For that reason and in order not to create any precedents which might be regretted at some future date, I think that we need to reflect very carefully on any decision which we take with regard to the adoption of a final Resolution in accordance with Article 54 of the European Convention on Human Rights in relation to the case of Brogan and Others.

5. While recognising the effort of the Secretariat to draft a Resolution which is logically and legally proper, the Government of Ireland have considerable difficulty in supporting a text which provides for a discontinuance of its examination of the case by the Committee of Ministers. We would have wished for continued supervision in this case by the Committee of Ministers.

6. If called upon to vote upon the two Draft Resolutions, the Government of Ireland will abstain in the case of the draft resolution prepared by the Secretariat. We will vote against the draft resolution as amended by the United Kingdom.

Mr. Chairman,

1. I should like to inform you of the position of the Government of Ireland with regard to the two Draft Resolutions which are before us for consideration. Let me say immediately that, apart from the significance of the specific issues, my Government consider the general principles enshrined in the Convention to be of central importance to any consideration of the two Draft Resolutions. In the circumstances, I am afraid that we do not consider either Draft Resolution to meet the needs of this sensitive and important situation.

2. Notice of derogation under Article 15 of the European Convention on Human Rights does not in our view constitute execution of the judgment of the European Court of Human Rights in the case of Brogan and Others. In our view, the Committee of Ministers is obliged under Article 54 of the European Convention on Human Rights to supervise the execution of the judgement of the European Court of Human Rights in this case.

3. I don't wish to open a debate on substantive issues but I would like to inform my colleagues that the Government of Ireland have always taken the view, and have so informed the British authorities, that the 7 days maximum period of detention under the Prevention of Terrorism Act is not sustainable and that the judgement of the European Court of Human Rights in the case of Brogan and Others should be complied with, by way of either providing a judicial method of supervising extended detentions, or by way of amendment to the Prevention of Terrorism Act to bring it into line with the terms of the judgement of the European Court of Human Rights.

4. I would also like to touch upon the opening of the Council of Europe to Central and Eastern Europe and to the likelihood that before long the European Convention on Human Rights may have additional High Contracting Parties from that part of Europe. I think that we are all agreed, and this has indeed been stated at political level many times in recent months, that there is no room for a lowering of standards under the European Convention on Human Rights with the advent of additional High Contracting Parties from Central and Eastern Europe. For that reason and in order not to create any precedents which might be regretted at some future date, I think that we need to reflect very carefully on any decision which we take with regard to the adoption of a final Resolution in accordance with Article 54 of the European Convention on Human Rights in relation to the case of Brogan and Others.

5. While recognising the effort of the Secretariat to draft a Resolution which is logically and legally proper, the Government of Ireland have considerable difficulty in supporting a text which provides for a discontinuance of its examination of the case by the Committee of Ministers. We would have wished for continued supervision in this case by the Committee of Ministers. If called upon to vote upon the two Draft Resolutions, the Government of Ireland will therefore abstain in both cases.

Re Brogan Case

1. We are likely to be called upon to vote on 11 June 1990 on two draft resolutions before the Council of Europe regarding the Brogan case. In the Brogan case Britain was found to be in breach of the European Convention on Human Rights because of the provision in the PTA allowing for 7 day detention. The British response to the judgment was to issue a derogation in respect of its obligations under the Convention with respect to NI terrorism.

2. The two Resolutions come respectively from the British and the Secretariat of the Council. The recommendation below is that we abstain on both drafts and make an explanation of vote. What the British want the Council to agree via their draft is that by the derogation they have made and the information that they have provided, the Council of Europe has exercised its supervisory functions under Art 54 of the Convention and further supervision by the Council is no longer necessary in this case. (Art 54 of the Convention provides that the judgment of the Court shall be transmitted to the Committee of Ministers 'who shall supervise its execution'). In effect the result would seem to suggest a clean bill of health in relation to the British derogation (an impression of 'business as usual' in a case which is anything but usual) and allow them to continue without more ado from the Council of Europe to detain for 7 days persons on Northern Ireland related terrorism. This from our point of view, as well as from the point of view of the Secretariat of the Council of Europe, is not satisfactory.

3. It is our view, which we have frequently expressed to the British, that they should bring the maximum period of permissable detention under the PTA down to 4 days. We cannot but agree with the Director of Human Rights of the Council of Europe (whose views must carry considerable weight as the 'conscience' of the Convention) that the notice of derogation cannot possibly be regarded as an 'execution' of the judgment, as the British wish to suggest, but that it is an 'attempt to avoid the consequences of this judgment and the finding of violation in future cases of the same kind'. He points out that there has been no execution whatsoever and that the relevant legislation remains in force. If the British text was adopted this could be interpreted in the Director's view as meaning that 'any state found in violation of the Convention by the Court could avoid execution of the judgment by derogation from its obligations under the Convention'. Legally and politically we would support this point of view. It is our citizens who tend, uniquely, to be affected by this measure.

4. Notwithstanding the strong views of the Director of Human Rights, it appears to be the case that Britain is likely to receive widespread support from among members of the Council of Europe for its position and its draft may well be easily carried. No doubt this support will be bolstered in the aftermath of the wave of recent IRA actions in Europe, which will garner extra sympathy for the British. In view of the concern and sensitivity surrounding these events, it is suggested that an abstention

rather than a negative vote on the British draft is the most appropriate in the circumstances.

5. The second resolution is from the Council Secretariat. They would have wished for an 'interim' resolution which would have resulted in the Council coming back to consider the case at some stage in the future. This would be our preferred position also but in view of the fact that this approach appears to have been a non-runner with other Member States, the Secretariat have produced a draft which will result in a decision to 'discontinue its (the Council's) examination' of the case. This formula, which is being used for the first time by the Council, is regarded by them as the only 'logical and legally proper solution'. In particular it does not state that the obligations of supervision under Art 54 have been discharged. It does, however, as in the case of the British draft, remove the case from the Council. In the Council's view this is a preferable course than the British draft which they describe as 'misleading and legally improper'.

6. We fully support the Secretariat's concerns and would wish in normal circumstances to support their draft (which may not otherwise get much backing). However, it is clear that their resolution is not altogether satisfactory from our point of view either and in particular gives rise to presentational problems. We would prefer continued Council of Europe supervision in the case. We are not happy at its removal from the agenda. Again, it is primarily our citizens who are affected. While we might be able to accept that the proposal 'to discontinue' examination of the case is indeed the only one open to them, we are nonetheless likely to find ourselves in an invidious position domestically explaining why we were voting in favour of such discontinuance. We must presume that these matters will all reach the public arena at some stage. The safest course in the circumstances would seem to be to <u>abstain in this case also</u> thus preserving the purity of our position. In an explanation of vote we would therefore generally lament the unsatisfactory nature of both resolutions (with a particular emphasis of course on the British text).

MC.

Anglo Irish Division
5 June 1990

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS
MINISTERS' DEPUTIES

CONSEIL DE L'EUROPE

NOTES ON THE AGENDA

RESTRICTED

30 April 1990 No. 7825

ITEM : 439/10 A

REFERENCE DOCUMENTS:

- Concl(90)433/11
- Letters JJ2163 C and JJ2212 C dated respectively 28 December 1988 and 29 March 1989

JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE BROGAN AND OTHERS CASE (29 November 1988 and 30 May 1989)

Application of Article 54 of the European Convention on Human Rights

The Deputies have considered this case at their 428th (September 1989, item 32), 431st (December 1989, item 52 f) and 433rd (February 1990, item 11) meetings.

At the 428th meeting, the Representative of the United Kingdom declared that a period of reflexion and consultation was necessary to find if possible a satisfactory judicial process allowing for a judge or other officer to review and, if appropriate, to authorise an extension of detention. He informed the Committee of Ministers that in order to protect its position, the United Kingdom had decided by notes verbales addressed to the Secretary General on 23 December 1988 and 23 March 1989 to enter a derogation under Article 15 of the Convention.

The Director of Human Rights recalled that the Court had found a violation not only of Article 5, paragraph 3, but also of Article 5, paragraph 5, of the Convention.

At the 431st meeting, the Representative of the United Kingdom declared that it had not been possible to identify a satisfactory procedure including a judicial element for reviewing and authorising extensions of detention of terrorist suspects and that therefore the derogation entered under Article 15 of the Convention would remain in force for as long as circumstances required. He then suggested that the Committee of Ministers adopt a Resolution in this case.

The Director of Human Rights recalled that the derogation in question had been entered after the date of the Court's judgment and expressed doubts as to the question whether it could be argued that the said derogation amounted to an execution of the Court's judgment within the meaning of Articles 53 and 54 of the Convention.

At the 433rd meeting, the Representative of the United Kingdom stated that his authorities considered that they had acted in a way which took account of the Court's judgment since they had notified a derogation under Article 15 only after careful studies of the others alternatives. He recalled that the Committee of Ministers was not competent to examine the validity of the said derogation which was the task of the Commission and ultimately of the Court. In addition it was not for the Committee of Ministers to say whether or not the maintenance of the derogation was justified. Article 15, paragraph 3, of the Convention placed only an obligation on his Government to keep the Secretary General fully informed of the measures taken and the reasons therefore.

The Director of Human Rights declared that legally speaking a derogation could not constitute execution of a judgment of the Court. Indeed the derogation had done nothing to eliminate the root of the Convention violation found by the Court. On the contrary the purpose of this derogation is to avoid findings of violations in similar cases in the future. Such derogation could not have retroactive effect. In addition the situations concerned by Article 15 are emergency situations and therefore in principle temporary situations. Therefore the Secretariat would prefer the solution of an Interim Resolution which would enable the Committee to resume consideration of the Brogan case when the situation would permit the lifting by the United Kingdom of its derogation.

The Deputies agreed to resume consideration of this item at the present meeting on the basis of a draft Final Resolution to be prepared by the Secretariat.

Following this instruction the Secretariat prepared a draft Resolution which was sent to the Representative of the United Kingdom. By letter of 6 April 1990, the Representative of the United Kingdom forwarded the amendments that his authorites wished to make.

After integration of the amendments acceptable for the Secretariat, the Director of Human Rights and the Representative of the United Kingdom agreed, taking into account the drafting disagreements that remained, to submit to the Committee of Ministers two draft Resolutions, one prepared by the Secretariat (Appendix 1), the other as amended by the authorities of the United Kingdom (Appendix 2), the variations being underlined in the latter.

Action

The Deputies are invited to resume consideration of the judgments of the European Court of Human Rights in the Brogan and others case, on the basis of the Rules concerning the application of Article 54 of the Convention.

APPENDIX 1

DRAFT RESOLUTION prepared by the Secretariat

RESOLUTION DH (90) ..

**CONCERNING THE JUDGMENTS
OF THE EUROPEAN COURT OF HUMAN RIGHTS
OF 29 November 1988 AND 30 May 1989
IN THE BROGAN AND OTHERS CASE**

(adopted by the Committee of Ministers on .....
at the .... meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgments of the European Court of Human Rights in the Brogan and others case delivered on 29 November 1988 and 30 May 1989 and transmitted the same days to the Committee of Ministers;

Recalling that the case originated in four applications against the United Kingdom lodged with the European Commission of Human Rights on 18 October 1984, 22 October 1984, 22 November 1984 and 8 February 1985 under Article 25 of the Convention by Mr Terence Brogan, Mr. Dermot Coyle, Mr. William McFadden and Mr.Michael Tracey, British nationals, who complained of their arrest and detention under Section 12 of the Prevention of Terrorism (Temporary provisions) Act 1984;

Recalling that the case was brought before the Court by the Commission on 15 July 1987 and by the Government of the United Kingdom and Northern Ireland on 3 August 1987;

Whereas in its judgment of 29 November 1988 the Court held:

- by sixteen votes to three that there had been no violation of Article 5, paragraph 1, of the Convention;

- by twelve votes to seven that there had been a violation of Article 5, paragraph 3, of the Convention in respect of all four applicants;

- unanimously that there had been no violation of Article 5, paragraph 4, of the Convention;

- by thirteen votes to six that there had been a violation of Article 5, paragraph 5, in respect of all four applicants;

- unanimously that it was not necessary also to consider the case under Article 13 of the Convention;

Whereas in its judgment of 30 May 1989 the Court held unanimously that the principal judgment in itself constituted sufficient just satisfaction for the purposes of Article 50 of the Convention;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 54 of the Convention;

Having invited the Goverment of the United Kingdom to inform it of the measures which had been taken following the judgment of 29 November 1988, having regard to its obligation under Article 53 of the Convention to abide by it;

Whereas, during the examination of the case by the Committee of Ministers, the Government of the United Kingdom gave the Committee information about the measures taken in consequence of the judgment, which information appears in the Appendix to this Resolution,

Decides, after having taken note of the information supplied by the Government of the United Kingdom, to discontinue its examination of the present case.

Appendix to Resolution DH (90) ..

Information provided by the Government of the United Kingdom during the examination of the Brogan and others case before the Committee of Ministers

The Government of the United Kingdom informed the Committee of Ministers that, notwithstanding careful consideration of possible alternatives, it had not been possible to identify a procedure which could satisfy the requirements of Article 5, paragraph 3, of the Convention on the issue of the review of detention of terrorist suspects by a judge or other officer authorised by law.

In consequence, and in the context of the continued threat to the United Kingdom posed by terrorism connected with the affairs of Northern Ireland, the Government of the United Kingdom has concluded that the derogation notified on 23 December 1988 and 23 March 1989 that was entered according to the possibility afforded by Article 15 of the Convention to any High Contracting Party in time of war or other public emergency threatening the life of the nation must remain in place for as long as circumstances require. The arrest and detention powers granted to the police and the Secretary of State under the former Section 12 of the Prevention of Terrorism (Temporary provisions) Act 1984 (now Section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989) will therefore remain.

The Government of the United Kingdom does not consider that any action is required as a result of the finding of a violation by the Court of Article 5, paragraph 5, of the Convention. It is the Government's view that, provided the national law complies with the State's obligations under Article 5, paragraphs 1 to 4, (if necessary as modified by a derogation), no question of compensation arises. Article 5, paragraph 5, does not require in itself that paragraphs 1 to 4 of Article 5 be incorporated into domestic law.

APPENDIX 2

DRAFT RESOLUTION
as amended by the authorities of the United Kingdom

RESOLUTION DH (90) ..

**CONCERNING THE JUDGMENTS
OF THE EUROPEAN COURT OF HUMAN RIGHTS
OF 29 NOVEMBER 1988 AND 30 MAY 1989
IN THE BROGAN AND OTHERS CASE**

(adopted by the Committee of Ministers on .....
at the .... meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgments of the European Court of Human Rights in the Brogan and others case delivered on 29 November 1988 and 30 May 1989 and transmitted the same days to the Committee of Ministers;

Recalling that the case originated in four applications against the United Kingdom lodged with the European Commission of Human Rights on 18 October 1984, 22 October 1984, 22 November 1984 and 8 February 1985 under Article 25 of the Convention by Mr Terence Brogan, Mr. Dermot Coyle, Mr. William McFadden and Mr.Michael Tracey, British nationals, who complained of their arrest and detention under Section 12 of the Prevention of Terrorism (Temporary provisions) Act 1984;

Recalling that the case was brought before the Court by the Commission on 15 July 1987 and by the Government of the United Kingdom and Northern Ireland on 3 August 1987;

Whereas in its judgment of 29 November 1988 the Court held:

- by sixteen votes to three that there had been no violation of Article 5, paragraph 1, of the Convention;

- by twelve votes to seven that there had been a violation of Article 5, paragraph 3, of the Convention in respect of all four applicants;

- unanimously that there had been no violation of Article 5, paragraph 4, of the Convention;

- by thirteen votes to six that there had been a violation of Article 5, paragraph 5, in respect of all four applicants;

- unanimously that it was not necessary also to consider the case under Article 13 of the Convention;

Whereas in its judgment of 30 May 1989 the Court held unanimously that the principal judgment in itself constituted sufficient just satisfaction for the purposes of Article 50 of the Convention;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 54 of the Convention;

Having invited the Goverment of the United Kingdom to inform it of the measures which had been taken following the judgment of 29 November 1988, having regard to its obligation under Article 53 of the Convention to abide by it;

Whereas, during the examination of the case by the Committee of Ministers, the Government of the United Kingdom gave the Committee information about the measures taken in consequence of the judgment, which information appears in the Appendix to this Resolution,

Declares, after having taken note of the information supplied by the Government of the United Kingdom, that it has exercised its functions under Article 54 of the Convention in this case.

Appendix to Resolution DH (90) ..

Information provided by the Government of the United Kingdom during the examination of the Brogan and others case before the Committee of Ministers

The Government of the United Kingdom informed the Committee of Ministers that, notwithstanding careful consideration of possible alternatives, it had not been possible to identify a procedure which could satisfy the requirements of Article 5, paragraph 3, of the Convention on the issue of the review of detention of terrorist suspects by a judge or other officer authorised by law.

In consequence, and in the context of the continued threat to the United Kingdom posed by terrorism connected with the affairs of Northern Ireland, the Government of the United Kingdom have concluded that the derogation notified on 23 December 1988 and 23 March 1989 under Article 15 of the Convention must remain in place for as long as circumstances require. The derogation is limited to the powers under the Prevention of Terrorism (Temporary Provisions) Act 1989 to detain for up to 7 days those suspected of involvement in the commission, preparation or instigation of acts of terrorism connected with the affairs of Northern Ireland.

The Government of the United Kingdom does not consider that any action is required as a result of the finding of a violation by the Court of Article 5, paragraph 5, of the Convention. It is the Government's view that, provided the national law complies with the States's obligations under Article 5, paragraphs 1 to 4 (if necessary as modified by a derogation), no question of compensation arises. Article 5, paragraph 5, does not require in itself that paragraphs 1 to 4 of Article 5 be incorporated into domestic law.

[BROGANSTAT.439]

STATEMENT BY MR. LEUPRECHT

Case of Brogan and others

Article 54 of the Convention stipulates that "the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution". Article 53 provides that the High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

There are two types of "execution" in the meaning of the Convention: The first concerns execution relating to the individual applicant e.g. payment of money awarded by the Court under Article 50. In this case no just satisfaction was awarded by the Court.

The second type concerns so called "general measures". The constant practice of the Committee of Ministers has been to take note of such measures under Article 54 of the Convention. Their aim is to remove the root of the violation found and thus avoid similar findings of violations in the future. The defendant State changes its legislation or practice in order to put it in conformity with its obligations under the Convention as interpreted by the Court.

The statements made by the Representative of the United Kingdom before this Committee show quite clearly that the United Kingdom authorities were well aware of the necessity to change the legislation in question in the Brogan case, in order to comply with the obligations of the United Kingdom under the Convention. It was only after careful examination of possible alternatives that the British authorities concluded that it had not been possible to identify a procedure which could comply with the requirements of Article 5 para. 3 of the Convention as interpreted by the Committee.

In the Secretariat's view, the notice of derogation entered by the United United Kingdom authorities under Article 15 of the Convention cannot possibly be regarded as an "execution" of the judgement within the meaning of Article 54 of the Convention; on the contrary, it is an attempt to avoid the consequences of this judgement and the finding of violation in future cases of the same kind. In the case of Brogan and others there has been no execution whatsoever. The relevant legislation remains in force. This is the reason why the Secretariat would have preferred an interim Resolution in which the Committee of Ministers would have taken note of the information supplied by the United Kingdom and adjourned the case until the derogation - which is by its very nature a temporary measure - was withdrawn by the United Kingdom or in the alternative the Court or the Committee of Ministers (acting under Article 32) had taken a stand on the validity of the declaration under Article 15, if a similar case were to be brought before one of these bodies in the future.

Obviously, in the absence of a case brought before it under Article 32 of the Convention, the Committee of Ministers is not in a position to decide upon the validity of the notices of derogation entered under Article 15 of the Convention. It is, however, the Committee of Ministers' duty under Article 54 of the Convention to supervise the execution of the judgment of the Court which in the instant case clearly implied that legislation allowing for 7 days of police detention as applied to the four applicants was in breach of Article 5 para. 3 of the Convention.

Therefore, if the solution of an interim Resolution is not accepted, in the Secretariat's opinion the only logical and legally proper solution is for the Committee of Ministers to decide to discontinue its examination of the Brogan case, after having taken note of the information supplied by the United Kingdom. Choosing the usual formula according to which the Committee of Ministers has exercised its functions under Article 54 in a case where in fact there has been no execution of the judgement would appear to be misleading and legally improper. A case which in the very words of the United Kingdom Representative is "without precedent" cannot possibly be dealt with in the same way as a normal case in which the judgement of the Court has been executed. Indeed, it would not be correct to give the impression of "business as usual" in a case which is absolutely (and fortunately) unusual. Such a course of action would give rise to justified criticism. If the Committee of Ministers adopted the amendment proposed by the United Kingdom, this could be interpreted as meaning that any state found in violation of the Convention by the Court could avoid execution of the judgment by derogating from its obligations under the Convention.

The situation in the present case cannot possibly be compared with that of Belilos v. Switzerland. In the latter case, as is stated in Resolution DH (89) 24 of the Committee of Ministers, the Canton of Vaud amended its Act on municipal sentences and consequently there has been an execution of the Court's judgement in the form of general measures.

The Secretariat's concern is to maintain the credibility of the Convention system and that of the Committee of Ministers, which exercises under Article 54 an important legal function.

Ms Collins -

I think see Ms Smyth's note under which identifies the considerations which must be taken into account when preparing our position for the forthcoming meeting.

Essentially the matter is as much, if not more, political than legal but we must bear in mind the consequences from a legal viewpoint of the precedent which will be created in this case

I endorse Ms. Smyth's approach.

LEGAL ADVISER

23/5/90.

Legal Adviser

Case of Brogan and Others

In connection with the attached papers relating to the judgment of the European Court of Human Rights in the Case of Brogan and Others, which is to be considered further by the Ministers' Deputies of the Council of Europe at their meeting on 11 June 1990, I would like to make the following remarks:

1. There would appear to be some misunderstanding in Anglo-Irish Section with regard to the judgment of the European Court of Human Rights in the Norris Case which is to be considered by the Ministers' Deputies, for the fourth time, on 11 June 1990. This consideration will not involve a Draft Resolution: such a Draft Resolution will arise only when Ireland has implemented the judgment of the European Court of Human Rights by way of legislative change. Until such change is brought about Ireland will be required to explain to the Ministers' Deputies at regular six-monthly intervals as to the progress which is being made in amending the relevant laws.

   It is now more than 18 months since the Norris judgment was handed down by the European Court of Human Rights and the question of legislative change is still under consideration by the Department of Justice and the Report of the Law Reform Commission on Child Sexual Abuse, which is expected to deal with the implications of the Norris judgment, is awaited. This delay is somewhat in contrast with the aftermath of the judgment of the European Court of Human Rights in the Dudgeon Case, where following the judgment in this case of 22 October 1981 and on the initiative of the British Government, an Order in Council, entitled the Homosexual Offences (Northern Ireland) Order 1982, was made and came into force on 9 December 1982.

   On 11 June 1990 we will be seeking the understanding and tolerance of the other representatives of the member States of the Council of Europe for a further postponement of consideration of the Norris judgment until November/December 1990. In a perfect world it would have been better to have had resolved the Norris issue which is outstanding before intervening in the matter of the Case of Brogan and Others: but, that is not to say that the Norris issue should affect the question of intervening in the Case of Brogan and Others.

2. This morning I spoke with Ms Caroline Ravaud of the Directorate of Human Rights at the Council of Europe in Strasbourg. Ms Ravaud works with the Director of Human Rights, Dr Peter Leuprecht, and she is responsible for the preparation of the Draft Resolutions for the meetings of the Committee of Ministers (Ministers' Deputies).

Ms Ravaud provided me with the following most up-to-date information relating to the Case of Brogan and Others:

- from recent contacts with the British Permanent Representative to the Council of Europe, Mr Colin McLean, it would appear that the British Government are insistent that the two Draft Resolutions be put to the Ministers' Deputies on 11 June 1990 and that they be voted upon. (It is my understanding that the normal Rules of Procedure of the Ministers' Deputies will apply to these proposed votes and Council of Europe Section, which services the meetings of the Ministers' Deputies, will be able to advise as to the relevant majority which will be required for a Draft Resolution to be adopted as a Resolution).
- The Secretariat (read the Director of Human Rights) is not happy with the Secretariat draft but, of course, he finds it more satisfactory to the British draft. The Director of Human Rights has suggested in the past that an Interim Resolution might be adopted until such time as the Article 15 derogation is lifted (it is only supposed to be a temporary measure) or until the status of the Article 15 derogation has been found to be valid or invalid by the Strasbourg organs.
- It would appear that démarches have been made by the British authorities in many of the capitals of Council of Europe member States in connection with the Case of Brogan and Others and it would seem that the British point of view has been favourably received and that this factor may have brought about the instruction to the Secretariat at a recent meeting of the Ministers' Deputies that a final, and not an interim, Resolution should be drafted for consideration by the Ministers' Deputies so that consideration of this case might be brought to a conclusion.
- The reference "to discontinue its examination of the present case" which appears in the final paragraph of the Secretariat Draft Resolution is unique and is being used for the first time and the implication is that the matter of the supervision of the judgment in the Case of Brogan and Others will not be considered at any future date by the Ministers' Deputies.

. The European Commission of Human Rights are seised of a number of applications at present which touch upon the issues in the Case of Brogan and Others. These applications fall into two categories: (i) those which are exactly like the Case of Brogan and Others and which refer to the period before the Article 15 derogation was notified by the British Government to the Secretary General of the Council of Europe, and (ii) those which postdate the notice of derogation and which raise the question as to whether or not the notice of derogation complies with Article 15. If the usual practice is followed by the Commission it is bound to be some time before the Commission produce their Report in these cases giving as their opinion whether the European Convention on Human Rights has been violated or not and, possibly in appropriate, clarifying the status of the notice of derogation before the matter is ultimately dealt with by the Ministers' Deputies or by the European Court of Human Rights.

3. I think that it is true to say that the system of supervision which the Committee of Ministers has been given by Article 54 of the European Convention on Human Rights, in relation to the judgments of the European Court of Human Rights, has been seen to work heretofore because member States have been found willing to change their legislative norms in appropriate cases. This change has not always been brought about unilaterally by the member State concerned and from time to time has been prompted by the gentle prodding which is given by the Director of Human Rights during the examination of judgments by the Ministers' Deputies. It is not usual for other member States to intervene in any critical manner with regard to another respondent State; in general the dialogue has been carried out between the respondent State and the Secretariat (Director of Human Rights) in the presence, of course, of representatives of the other member States present at the meetings of the Ministers' Deputies.

4. In the light of all the circumstances about which I am aware at present in connection with the judgment in the Case of Brogan and Others, I attach a draft statement which might be considered for use by the Permanent Representative or Deputy Permanent Representative on 11 June 1990.

Peter E SMYTH
Legal Division

23 May 1990

Legal Adviser,

To see pl. Mr Dillon's note below about the Resolution on the BROGAN case due before the the Council of Europe on 11 June. We would be inclined to support the Secretariat draft for the reason outlined in Mr Dillon's note (p3). However, before advising the Perm Rep we would be glad to know whether this is likely to be compatible with whatever instructions you will be giving in the Norris case, a resolution in respect of which will also be considered on the same day.

M Collins
22.5

Mr Collins,

Brogan case

Ambassador Rigney has sought instructions on the position he is to adopt when the Council of Europe Committee of Ministers' Deputies considers a draft resolution on the Brogan case on 11 June next. The attached papers refer.

The four applicants in this case had been arrested under the PTA and held in custody for periods of between 4 days and 6 hours and 6 days and 16 1/2 hours. The Court of Human Rights held that even the shortest period of 4 days and 6 hours was in breach of the requirement under Article 5.3 of the Convention on Human Rights to bring a person arrested promptly before a judge or other person authorised by law to exercise judicial power. The Court also held that there had been a breach of Article 5.5 which provides that everyone ~~which~~ has been a victim of a breach of the provisions of Article 5 shall have a right of compensation. The British Government is under an obligation to comply with the terms of the Court's judgment. In this case the Court decided that the application of the Convention's principles was sufficient compensation and refused to award monetary compensation. Consequently, Britain's compliance with the terms of the judgment means that it should take the necessary steps to ensure that there is no conflict between the PTA and the Convention.

To date the British response to the judgment has been to issue a derogation in respect of its obligations under the Convention with respect to Northern Ireland terrorism only. Consequently, persons arrested under suspicion of involvement in Northern Ireland terrorism may be detained for up to 7 days while those arrested on suspicion of involvement in international terrorism may be detained for up to 4 days. The British Government has said that they would have preferred to have found a means for complying with the judgment by means of judicial authority for extended detention but this proved not possible; hence the derogation.

Under Article 54 of the Convention, the Committee of Ministers is charged with the duty of supervising the execution of the judgment.

The Director of Human Rights of the Council of Europe is of the view that the British Government's position [ie derogation] does not respond to the requirement to execute the Court's judgement. The Secretariat has therefore proposed a draft resolution for the Committee of Ministers' Deputies [ie Ambassadors] which appears to take account of British difficulties in that it says that the Committee, after having taken note of the information provided by the UK Government, decided to discontinue its examination of the present case. The British Government, on the other hand, clearly anxious to close off the subject, has proposed that the Committee declare, after having taken note of the information provided by the UK Government, that it has exercised its functions under Article 54 of the Convention in this case. The British representative has said that his Government could not live with the Secretariat's proposal.

In addition, in an appendix to the draft resolution, the Secretariat has proposed that the information provided by the UK Government include a general reference to the terms of Article 15 of the Convention [derogation] and to the PTA. The British Government would prefer a reference to Article 15 simpliciter and an explanation that the derogation applies only to the exercise of the PTA powers of detention in respect of a person suspected of involvement in Northern Ireland terrorism. The British representative has said that the British Government could live with the Secretariat's formulation.

<u>Our position</u>

Our position as expressed in bi-lateral discussions with the British has been that they should reduce the maximum period of permissable detention under the PTA to at most 5 days. Now that the Court has given its judgment in this case, it would appear [there is no guidance from the Courts on this matter] that the maximum period of detention should be 4 days.

We have advanced the view, most recently in the context of presenting our views to the reviewer of the PTA, Lord Coville, that the maximum period of detention under the PTA should be brought into line with the maximum period of detention allowable under the law relation to non-terrorist offences [Police and Criminal Evidence Act 1984] which is 96 hours, ie 4 days.

It is recommended that the draft proposed by the Secretariat should be supported. It represents the views of the Director of Human Rights who could be regarded as the keeper of our conscience in these matters and the Secretariat's formulation at least leaves the matter open as regards the Committee's function in the matter. That said, we would have preferred that the draft resolution urge/require the British Government either to amend the PTA or to provide for judicial supervision of extended detentions.

Consequently, by way of a statement of our position, we could say that we have always taken the view that the 7 days maximum period of detention under the PTA was not sustainable and that we would prefer that the Court's judgment be complied with by way of either providing a judicial method of supervising extended detentions or by way of amendment of the PTA to bring it in line with the terms of the judgment. In the circumstances, however, we are prepared to support the Secretariat's draft. We could not support the amendments proposed by the British Government.

The views of Legal Division should be sought on the foregoing. I understand that there may be a tactical difficulty in that the Committee will also consider on the same day a draft resolution on the Norris case where the Government have yet to show that the necessary action has been taken to comply with the Court's judgment in that case. This does not, however, in my view affect the substance of our position on the Brogan case.

J.D.

J Dillon

21/5/90.

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Pages to follow: 2

Remarks: Please note further briefing required for next Monday on the deferred item 20d - Relations with Central & Eastern Europe.
Also, I presume no further progress on signing either of the Protocols.
For 11th June DH meeting, please note briefing will be necessary on the Norris & Brogan cases.

Date: 16.05.90

BAILE ÁTHA CLIATH
CHAIRLE NA hÉIREANN
STRASBOURG
AN FHRAINC

LE REPRÉSENTANT PERMANENT
D'IRLANDE
CONSEIL DE L'EUROPE
STRASBOURG
FRANCE

91/90 COE 1

15 May 1990

Mr. Damien Boyle,
Department of Foreign Affairs.

The following is my report on the 439th meeting of the Ministers' Deputies held in Strasbourg on 14th May 1990. A copy of the agenda is enclosed for ease of reference.

Adoption of the Agenda:

Items 18 and 20d were deferred, the former at the request of Norway who wished to have the matter of fee increases referred to the Budgetary Committee - by fax if necessary and the latter at the request of France and Sweden who felt that political matters should be referred to capitals and not sprung on the Committee at short notice. Item 20d will be on next week's agenda again so any comments we might wish to make should be provided urgently. Austria asked that the E/W Refugee Conference be added to the agenda. Switzerland wished to have representation in the CSCE discussed and the UK requested information on the Human Rights Colloquy in Scandanavia.

Item 2 - USSR and CAHLR.

Deferred, with a request for clarification as to what work was still required to be done in this committee which it was understood is nearing the end of its mandate.

Human Rights Items

Item 3, postponed despite protest by Cyprus.
Item 4, adopted
Item 5, violation agreed 20-0-0. Adjourned.
Item 6, compensation paid by Sweden, deferred to September
Items 7,8: adopted
Item 9, postponed six months
Item 10, (the Brogan Case), postponed to June - see further report below.
Item 11, (also UK), payments made 5th April. Scottish case law amended. Deferred to September to ensure compliance with judgement.
Item 12, adopted
Items 13, 14, and 15, adjourned for six months
Item 16, compensation paid by Austria. Deferred.
Item 17, election of Portuguese. List not yet available. Adjourned to next week.
Item 19, next DH meeting on 11th June seems to include the Norris case. If so, appropriate briefing will be required in good time.
Item 20a, 20b, and 20c, postponed to await legal amendments in NL (20a) and France.

Cont.,/2.

The Brogan case

Basically, the UK and the Director of Human Rights are still diagonally opposed in their interpretations of the present situation. The Director is sticking to the legal interpretation of what the function of the Committee of Ministers now should be, viz. to supervise the execution of the Court's judgement. If the UK persists in not amending their domestic legislation as required by the Court it would in view of the Director be an attempt to avoid the judgement of the Court. The Director's compromise is to introduce an interim resolution to deal with what after all is temporary legislation by the UK's own definition. If this is not acceptable the Director would suggest that examination of the case be discontinued in order to avoid giving the impression of "business as usual" with the offending legislation still in place despite the Court's judgement.

The UK disagrees that there is any slight on the Court on its part. It has a serious difficulty of correctly balancing the interests of the Court and the security of the people of the UK. The terrorism involved has already accounted for more than 3,000 deaths and hundreds of thousands of injuries. The derogation the UK had notified under Article 15 of the Convention will be put to the test by the Commission and perhaps also by the Court. The UK proposes therefore that an opportunity be afforded to have the alternative draft resolution examined in Capitals and to adjourn the item until 11th June. This was accepted. The UK explained that of the two differences (underlined) in both drafts they could live with Director's version of the second but could not accept the first. There may be a vote on this on 11th June and a statement on our part would then be advisable by way explanation of our vote or abstension, as the case may be.

Additional items on the agenda:

Item 20(e), East-West Migration

Austria asked that arrangements for the Conference be speeded up. A copy of the decision adopted is enclosed. The question of whether or not to invite the USSR will be discussed at next week's meeting.

Item 20 (f), representation in the CSCE

Deferred until next week but not before some delegations, notably Switzerland, aired the well-worn topic of independent representation for the Council of Europe (as was arranged for the OECD in Bonn) despite the decision adopted by the Council of Ministers last week. The SecGen in her intervention accepted that independent representation was unlikely to be agreed but the Secretariat was making approaches through the embassies of the Vice-Presidency (Spain) to seek agreement of the 35 members to the inclusion of Council of Europe representatives with its Presidency or Vice-Presidency and to have this displayed on the name-plate.

Cont.,/3.

Item 20 (g), Scandanavian Colloquy on Human Rights.

The Director of Human Rights provided information on the forthcoming colloquy which is the seventh of such colloquies held every five years. This will be the first occasion on which Central and Eastern European states will be represented. The main theme of the Colloquy will be the Rights of Human Beings deprived of Liberty.

Finally, the tour de table on signing the Conventions on Bankruptcy and the 5th Protocol, on 5th and 18th June respectively, produced two signatories ready for these dates for the first and one plus three possibles for the latter. A further tour will be taken next week.

Liam Rigney

Liam Rigney,
Permanent Representative.

END of file