16/2/1998

QUERIST: THE ATTORNEY GENERAL

RE: JUSTICIABILITY OF POSSIBLE EXCLUSION OF SINN FEIN FROM THE MULTI-PARTY TALKS

OPINION OF COUNSEL

Introduction

1. In the wake of two recent murders in Northern Ireland the issue has now arisen as to whether Sinn Fein should be excluded from the All-Party Talks on the ground that they have "demonstrably dishonoured" the Mitchell principles. It is believed in official circles that the murders are attributable to an illegal organisation styling itself the "Irish Republican Army" and that this organisation is itself inextricably associated with Sinn Fein.

2. At the time of writing a proposal has been tabled by the British Government pursuant to Rule 29 of the Rules of Procedure to have Sinn Fein excluded from the All-Party Talks on the ground that that party has "demonstrably dishonoured" the Mitchell principles. It has been suggested by Sinn Fein that should this occur that they may seek a judicial review or some other form of legal remedy in order to context this decision. In this opinion we now address the question of whether the Irish courts would regard this matter as presenting a justiciable issue.

The justiciability requirements: general principles

3. The question as to whether any particular proceedings presents a non-justiciable controversy is something which has been but rarely addressed in the Irish courts and then only in unusual cases. Thus, in *Macken v. An Taoiseach, (The Irish Times*, May 26, 1984) Lynch J. appeared to hold that the question of whether a visiting US President could bring nuclear weapons into this State

did not present a justiciable controversy. Although the judgment in this case was ex tempore and imperfectly reported, the gist of this decision appears to turn on the fact that the Government is perfectly free to conduct the foreign affairs power by inviting such foreign dignitaries as it sees fit. More to the point, perhaps, in *O'Malley v. An Ceann Comhairle* (March 1997) the Supreme Court held that judicial review would not lie (save in the most exceptional and extraordinary cases) in respect of decisions of the Ceann Comhairle on the ground that this was inextricably bound up with the right of the Dail and the entire Oireachtas to run its own affairs. It was also interesting is that this decision was arrived at even though there had been prima facie evidence that the Ceann Comhairle had infringed the Dail's own standing orders in the manner in which he had altered the contents of a parliamentary question. In the present case, a similar argument can be made in respect of a decision to exclude a participant from these negotiations: it something so bound up with the stuff of political debate that it would be inappropriate for the courts to interfere.

4. Finally, in *McKenna v. An Taoiseach (No.2)* [1995] 2 IR 10 Keane J. held that the question of whether the Government had acted unconstitutionally in spending public moneys on one side of a referendum campaign did not present a justiciable question, but he was reversed on this issue by the Supreme Court who saw the question differently in terms of the principles of fairness and democracy contained in the Constitution. Unfortunately, the Supreme Court did not discuss the justiciability issue as such, save that it clearly regarded the manner in which the Executive disbursed public funds as a justiciable one. Interestingly, however, in that case Keane J. cited with the approval the classic statement of Brennan J. in *Baker v. Carr* 369 US 186 (1962) where he had said (at 217):

> "Prominent on the surface of any case held to involve a political question is found to a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made: or the

potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Application of these principles to the present case

5. A number of considerations are relevant in this context. In the first place, the Government is here engaged in the discharge of the foreign affairs power conferred by Article 28.4.1 of the Constitution and thus, a high degree of judicial deference is appropriate. Secondly, sight must not be lost of the fact that the All-Party talks essentially amount to a *political* agreement and arrangements regarding the talks process which were never designed to create legally, justiciable rights. This is not only evident from the tenor of the talks process itself, but derives some support from Rule 2 which prescribes that:

> "The conduct and outcome of these negotiations is exclusively a matter for those involved in the negotiations."

This suggests that the parties to the negotiations themselves recognised they were committing themselves to political discussions which excluded any possibility of outside interference by, e.g., recourse to the courts.

6. Moreover, the courts cannot in effect compel the Government to negotiate with a party with which it no longer wishes to talk to. This applies *a fortiori* to any foreign government and to other political parties. Furthermore, it is difficult to see how the Irish courts would ever make binding orders against parties which are not subject to its jurisdiction.

7. If one then applies the *Baker v. Carr* criteria, it may be said that this decision involves not only "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department" (in this instance, the conduct of the foreign affairs powers by the Executive), but also a lack of "judicially discoverable and manageable standards" for resolving this question. The question of whether a party has "demonstrably dishonoured" the Mitchell Principles would seem to be an issue pre-eminently for political debate and not appropriate for legal resolution. Of course, the potential embarrassment for this State by "multifarious pronouncements" by different branches of the State on this particular question is obvious. In this regard, the difficulties faced in naming the appropriate defendants in any such action - would it also, e.g.,

include the British Government, the Talks Chairmen, the other political parties etc. - suggest that this dispute is inapt for judicial resolution.

The arguments in favour of justiciability

8. The strongest argument in favour of the justiciability of any such exclusion lies in the fact that the Northern Ireland (Entry to Negotiations etc.) Act 1996 created a legal framework for the entry into talks process. While this is a strictly a matter of Northern Irish law (on which we do not purport to advise), a plausible argument can be made to the effect that the tenor of that Act suggests participation in the talks on the part of the appropriately nominated representatives is a matter of legal right. This seems to emerge from s.2(3):

> "The Secretary of State shall refrain from inviting nominations from the nominating representatives of a party, and shall exclude delegates already nominated from entering into negotiations if and for as long as he considers that requirements set out in paragraphs 8 and 9 of the Command Paper 3232 are not met in relation to that party."

Paragraphs 8 and 9 of the Command Paper invoke the Mitchell Principles.

9. The underlined words appears to erect legal standards for exclusion, so that, in Northern Ireland at least, it might be plausibly argued that the Secretary of State's decision could be judicially reviewed on the ground that she could not reasonably have formed the conclusion that Sinn Fein did not meet the Mitchell principles. (We also draw attention to the fact that the statutory language refers to entering into negotiations, so that, strictly speaking, this sub-section may have now relevance once the negotiations have started.) This is far and away the strongest argument in favour of the justiciability of any such exclusion decision.

Conclusions

10. The relative paucity of the authorities on this point, coupled with the striking novelty of any action of this kind makes it difficult to offer any firm predictions as to how the Irish courts would approach the justiciability argument. However, in our view, it is quite unlikely that the courts would regard this matter as justiciable for the reasons set out above. While a plausible

case can be made to the contrary based on the 1996 Northern Ireland Act, the Irish courts would probably respond by saying that the does not affect the non-justiciability of the decision by reference to Irish law. Furthermore, they are probably likely to take the view that insofar as that Act confers any legal rights, it does so in the context of the law of Northern Ireland, so that any application for judicial review would have to be made in the Northern Irish courts.

We can advise further if required.

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