OTRs – PRE-CONVICTTON PARDONS?

Summary

We need to agree the implications of Gareth Williams' letter of 11 December advising on a proposal from the Irish Attorney General that we could use the Royal Prerogative to grant pre-conviction pardons in the outstanding OTR cases. Gareth's advice is that: since this is a common law power it cannot have become extinct by mere disuse, even though pre-conviction pardons have been obsolete for a very long time (probably since the 19th century); but an attempt to revive the power would run a substantial risk of successful challenge in the courts and would constitute a very high risk strategy.

2. There are some deep and difficult issues here – more for Jack and Gareth than me – about the use of the Royal Prerogative and the relationship between the Executive, Parliament and the judiciary. My provisional conclusion is that the danger of defeat in the courts and accusations of circumventing Parliament militate against proceeding in the way the Irish Government has proposed. If, ultimately, we were left with only a tiny handful of cases we might just revisit the balance of argument as between the legislative and prerogative routes. But for now our working assumption should remain, as Gareth has consistently advised, that any policy decision to grant amnesty to all remaining pre-Good Friday Agreement Irish terrorist cases should be achieved by legislation.
Detail

3. Of the 41 cases on the Sinn Féin list, three have been resolved and we hope by the end of next week to be able to inform them that five further cases (one pre-conviction and four involving sentenced fugitives) have been resolved. That will leave 13 fugitives who are wanted for trial and 20 who have outstanding portions of their sentence to serve (and may also be liable to prosecution for escape related charges). In 11 of the 13 cases the prosecuting authorities have concluded their review and decided that the evidence still warrants prosecution; in the remaining two cases the review is not yet completed. In the other 20 cases we cannot finally determine whether the fugitives can be allowed to return to Northern Ireland and benefit from early release arrangements until the DPP has completed his review of the escape related offences. The Sinn Féin list is not necessarily definitive; other dormant cases undoubtedly exist, particularly from the early years of the troubles.

4. What all this means is that we are faced with a small, but not negligible, number of cases which, because of the serious nature of the charges – including attempted murder – the prosecuting authorities will feel unable to write off until and unless witnesses and other evidence cease to be available and reliable. Until the review of the Maze and Crumlin Road escapists is completed we shall not know whether the number of cases remains in the 20s and 30s or is almost down to single figures. But either way we are confronted with what looks like an irreducible core.

5. Gareth's consistent advice up to now has been that if we want, as a matter of policy, to write these and any other similar cases off we should legislate for an amnesty. Quentin Thomas will have completed by Christmas
his study of options for achieving that and you have already seen a progress report. The Irish Attorney General’s meeting with Gareth on 29 November opened up the prospect of a non-legislative approach.

6. Having taken Counsel’s advice on the dossier handed over by Michael McDowell, Gareth has concluded that, as a matter of law, the use of the Royal Prerogative to grant pre-conviction pardons probably still exists. But to revive the practice (after probably more than a century of disuse) would be highly contentious and run a substantial risk of successful challenge in the courts. As well as reviewing the policy the courts might decide to order disclosure of relevant background papers on individual cases, including the ministerial correspondence on Rita O’Hare. So, as Gareth puts it, it would be a very high risk strategy.

7. It would be for the Home Secretary or for me to advise Her Majesty on use of the prerogative in each individual case depending whether the outstanding charges were for offences committed in Northern Ireland or in England and Wales. The wider policy issue over the use of the prerogative is also primarily for Jack. My understanding is that in modern times the tendency has been to narrow the range of circumstances in which the prerogative is used. There is also an abiding concern to avoid drawing Her Majesty into matters of public contention. More generally — and Gareth may have views on this given his wider responsibilities — an executive decision to inhibit certain prosecutions, without the involvement of the prosecution, the judiciary or the legislature touches on difficult constitutional issues and conventions.

8. Subject to Jack’s and Gareth’s views, my judgement is that if we decide to create an amnesty we should do so in a straightforward way by taking the
necessary legislation through Parliament. It is not an attractive route but it avoids the substantial risk of defeat in the courts, with all the embarrassment which that would create, as well as accusations of arrogance for proceeding without normal parliamentary cover. If, at some point in the future, we were left with only a tiny handful of cases we might just reassess whether the prerogative route could be a way of closing the final chapter. But we are some way from that.

9. Officials have already signalled to their Irish opposite numbers that Mr McDowell’s proposal is unlikely to provide a way forward. If you and colleagues agree, we shall hold to that line, though Gareth may want to consider whether a personal response from him to his opposite number is needed.

10. Copy of this minute goes to Jack Straw, Gareth Williams and to Sir Richard Wilson.

PETER MANDELSON
19 December 2000