CONFIDENTIAL

bc. Mr. Owen SH

10 DOWNING STREET

From the Private Secretary

24 July 1984

Dear Henry,

European Convention on Human Rights: Shipbuilding and Aircraft Industry Cases and Leasehold Reform Act Case

The Prime Minister has seen the Attorney General's letter of 20 July to the Secretary of State for Trade and Industry. She agrees that the change in the basis of our defence would be better for the conduct of the case and would be more consistent with the Government's philosophy. She much prefers to base the case not on a denial of the Government's obligation to pay compensation but on acceptance of that obligation plus assertion that the compensation actually paid was adequate.

I am copying this letter to Callum McCarthy (Department of Trade and Industry), John Ballard (Department of the Environment), David Peretz (H M Treasury), Len Appleyard (Foreign and Commonwealth Office) and Richard Hatfield (Cabinet Office).

Yours sincerely

Andrew Turnbull

Andrew Turnbull

Henry Steel, Esq., CMG, OBE

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10 DOWNING STREET

Prime Minister (1)

The Attorney General wishes to change the basis of our defence in the European Court case on Shipbuilding and Aircraft Industry nationalisation. Instead of arguing that the Government has no obligation to pay compensation he would prefer to argue, as the Commission have done, that there is an obligation to compensate, but that the amount paid was within the range which could be considered reasonable. The AG believes that the disadvantage of changing our stance is outweighed by adopting a stance which is consistent with Government philosophy.

Agree? Mrs Thatcher AT

Yes mh. 23/7

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ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

ATTORNEY GENERAL

01-405 7641 Extn 3201

20 July 1984

The Rt Hon Norman Tebbit MP
Secretary of State for Trade and Industry
1 Victoria Street
LONDON S W 1

Dear Secretary of State,

EUROPEAN CONVENTION ON HUMAN RIGHTS : SHIPBUILDING AND AIRCRAFT INDUSTRY CASES AND LEASEHOLD REFORM ACT CASE

As you know, the European Commission of Human Rights, having in effect found in our favour on the Nationalisation Cases, has referred its Report to the European Court of Human Rights. The Court has set 31 October as the time limit for the submission of our Memorial. The Leasehold Reform Act Case, in which the Commission has also found in our favour on substantially the same grounds, has now also been referred to the Court. The Court has not yet fixed a time for the submission of our Memorial in that case but it is very probable that the two sets of cases will in due course be taken together by the Court as they were by the Commission. In any event, we clearly have to run the same arguments in both proceedings. Although, therefore, the matters which I am putting to you and to other colleagues in this letter are discussed, for convenience of exposition, in terms of the Nationalisation Cases only, the decisions which we take on them will necessarily apply to the Leasehold Reform Act Case as well.

The principal issue in the proceedings before the Commission was whether the Convention imposed on us any obligation to pay compensation for the nationalisation of the Applicants' property and, if so, whether the compensation actually paid satisfied that obligation. The case

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against us as put forward by the Applicants was that such an obligation derived from the reference in the relevant provision of the Convention to "the general principles of international law" and that the test of the sufficiency of the compensation was therefore the international law test of "prompt, adequate and effective". We denied that the general principles of international law did apply in cases of this kind and therefore that the Convention itself imposed any obligation on us to pay compensation, though we were careful at all times not to argue that it would ever be justifiable to nationalise property without compensation. In the event, the Commission, while upholding our arguments on the case advanced by the Applicants (i.e. on their contention that we were bound by an obligation deriving from the general principles of international law), held that the Convention did impose an obligation to pay compensation but that this had a different derivation. The Commission concluded that "... a right to compensation for the taking of property is inherent in Article 1 in so far as the payment of compensation may be necessary to preserve the appropriate relationship of proportionality between the interference with the individual's rights and the 'public interest'." When, however, the Commission turned to the question whether the compensation which had actually been paid in these cases was sufficient to satisfy this obligation, they again found in our favour. Their conclusion on this point was expressed as follows: "Having regard to the wide margin of appreciation left to States in this area, a violation of Article 1 could only be held to arise from absence or inadequacy of compensation if it were clearly established that there was a real and substantial disproportion between the burden imposed on the individual and what could reasonably be considered justifiable in the light of the public interest objectives

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being pursued by the national authorities".

It is against this background that we now have to decide, urgently, what line we are going to adopt on this particular issue in our case before the Court and therefore in our written Memorial. In ordinary circumstances, the natural course would be to repeat the arguments which we advanced before the Commission and therefore maintain that the Convention imposed no obligation upon us at all to pay compensation in these cases. Our hope would be either that the Court would find our arguments on that point more persuasive than the Commission did or that they would, so to speak, do no more than put us back to the same position as the Commission reached, i.e. they would reject our denial of any obligation at all deriving from the Convention but endorse the Commission's view of the nature and limited scope of that obligation and also endorse the Commission's assessment that we had in practice discharged it. If we did adopt this course, we should avoid the embarrassment of having to explain a change of posture on this major (and, as it turned out, very controversial) issue in the proceedings - a change that would probably be represented as having been induced solely by the criticism that was levelled at us by some of the Government's own supporters during the course of the proceedings before the Commission and when the Commission's Report was published.

Nevertheless, I myself would favour making such a change of posture. I would favour explicitly abandoning our denial of any obligation under the Convention to pay compensation and adopting as our own the interpretation of the Convention which the Commission itself enunciated. I see a number of advantages in this which seem to me to outweigh the embarrassment of explaining why we have now come

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to a different view of the law from the one we strongly argued for at the earlier stage of the case.

The first advantage is, so to speak, a matter of forensic tactics. If, whatever arguments we use, we can persuade the Court in the end to accept the same conclusion as the Commission, we shall have attained our major objective, i.e. an authoritative finding that we are not in breach of our international obligations and that we are not bound to pay any more compensation. My assessment is that this objective will be more easily achieved if we ourselves espouse the Commission's arguments, since I judge that the Court will regard them as producing a reasonable and attractive interpretation of the Convention and we shall therefore have a more sympathetic hearing on the other aspects of the case. There is also the consideration that we shall find ourselves arguing before the Court in harmony with the Commission's representatives rather than in opposition to them. It is the Applicants who will then be isolated.

The second advantage is that the change of posture will make the Government less vulnerable to the painful and politically damaging (although unfair) criticism from our own supporters which we have recently encountered. That criticism has been to the effect that it is surprising to find a Conservative Government and a Conservative Attorney General contending that it is legitimate, at least so far as the Convention is concerned, for a State to seize the property of its own nationals without paying compensation. So long as there are respectable arguments which I can put forward in good conscience for that purpose - and the arguments which we advanced before the Commission were perfectly respectable - I am prepared to defend whatever policy position my colleagues think it right to adopt,

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but I have to say that I personally would welcome not having to argue any longer that there is no obligation under the Convention to pay compensation for nationalised property in cases of this kind.

The third advantage is that the interpretation put forward by the Commission helps to steer the jurisprudence of the Convention on this particular issue in a direction which seems to me to be positively beneficial from the point of view of its further development and it does so in a way which does not unduly prejudice the canons of interpretation (e.g. reliance on the intentions of the original contracting parties and on the travaux preparatoires) which we favour in other cases. In more concrete terms, the Commission's interpretation of the relevant provision, though arguably not entirely in accord with the intention of the parties when it was adopted, does make better sense of it, or at least produces a more attractive result, than the interpretation originally intended.

Finally - and this is linked with both the second and third advantages - the Commission's interpretation, if it becomes the authoritative interpretation, will help to establish the Convention as an effective safeguard against any attempt by a future Socialist Government in this country to nationalise or re-nationalise property without paying any compensation at all. That is an objective to which we all attach importance (and so will our supporters outside Government) and I think that it can be achieved in this case, if the Court does endorse the Commission's findings, without our having to pay the price of the United Kingdom being once again found to have violated its Convention obligations or of the Government having to meet the financial demands of the Applicants with all the consequences that flow from that.

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ATTORNEY GENERAL

I therefore hope that you and the other recipients of this letter will agree that we should adopt the change of posture that I have suggested. I am very anxious that work on the Memorial should be pursued as fast as possible - indeed, this is essential if we are to meet the timetable set by the Court - and I should therefore like to give our Counsel their Instructions (I hope in the sense I have suggested) in time for them to start work in the very near future: if possible as soon as the present law term closes at the end of this month. In order that this time-table can be adhered to, I should be grateful for your very early concurrence.

I am copying this letter to the Prime Minister, the Secretary of State for the Environment, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong.

Yours sincerely,

Henry Stark

for

MICHAEL HAVERS

(Approved by the Attorney General and signed on his behalf)