SCOTTISH CRIMINAL CASES REVIEW COMMISSION

STATEMENT OF REASONS UNDER SECTION 194D (4) OF THE

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

To: 1. The Principal Clerk of Justiciary
Justiciary Office
Lawnmarket
Edinburgh
EH1 1RQ

2. Abdelbaset Ali Mohmed Al Megrahi
55725
HM Prison Gateside
Greenock
PA16 9AH

3. Elish Angiolini QC
The Lord Advocate
Crown Office
25 Chambers Street
Edinburgh
EH1 1LA

4. Mr Anthony Kelly
Taylor & Kelly Solicitors
3 Main Street
Coatbridge
ML5 3AJ

5. Mr Norman McFadyen CBE
Crown Agent
Crown Office
25 Chambers Street
Edinburgh
EH1 1LA

In the exercise of its functions under Part XA of the Criminal Procedure (Scotland) Act 1995 ("the Act") as inserted by section 25 of the Crime and Punishment (Scotland) Act 1997, the Scottish Criminal Cases Review Commission ("the Commission") has considered the application of Abdelbaset Ali Mohmed Al Megrahi ("the applicant") for review of his Conviction.

Having considered all the material issues, the Commission has decided to refer the applicant's case to the High Court in terms of section 194B of the 1995 Act.

The documents accompanying this statement of reasons are listed in the indexes attached to each of the appendices.

Details of Conviction

Name of convicted person:	Abdelbaset Ali Mohmed Al Megrahi
Offence:	Murder
Court:	The High Court of Justiciary sitting at Kamp van Zeist in the Netherlands
Date of conviction:	31 January 2001
Sentence:	Life imprisonment with a minimum term of 27 years (currently subject to appeal)

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GLOSSARY

The following references are used in the statement of reasons.

MATERIAL	REFERENCE
Police statements	Reference is often made to the HOLMES reference for police statements. This comprises a number (which is unique to the witness in question) prefixed by an "S" signifying "statement". Where more than one statement was taken from a witness, the number is followed by a letter e.g. Anthony Gauci's first statement is S4677, his second is S4677A, his third is S4677B etc.
Police documents	Reference is often made to the HOLMES reference for police documents. This comprises a number (applied sequentially to the documents as they are registered) prefixed by a "D" signifying "document" eg D1234
Police productions	The police used numerous prefixes for productions. The most frequent references in the statement of reasons are to items of property found at the crash site. These comprise a two letter prefix "P" for property and the letter signifying the search sector in which the item was found e.g. PI/221 is 221st item of property found in sector I.
Crown productions	Abbreviated in the statement of reasons as "CP" followed by the number of the production at trial eg CP 181
Applicant's defence productions	Abbreviated as "DP" followed by the number of the production at trial eg DP 7
Transcript of trial	References to the evidence at trial are to the day followed by the page number of the transcript e.g. 31/4725 is the 31st day of the trial, at page 4725.

In the following pages are a list of some of the abbreviations and other terms used in the statement of reasons. Although these terms are defined throughout the statement of reasons, it was considered helpful to list them here.

List of Abbreviations and Other Terms

TERM	DESCRIPTION
AAIB	Air Accidents Investigation Branch
ABH	The firm in which the applicant and Badri Hassan were principals, which rented an office from MEBO
Act, the/ 1995	Criminal Procedure (Scotland) Act 1995 as amended
ADWOC	The Libyan state oil company
Autumn Leaves	Code-name for raids carried out by the BKA on a PFLP-GC cell in West Germany in October 1988
AVE 4041	The baggage container in the hold of PA103 in which the suitcase containing the bomb was situated
BKA	Bundeskriminalamt, the police force of Germany and formerly of West Germany
CAD	Central Ammunition Depot, Longtown, where fragments of aircraft were taken initially
CIA	Central Intelligence Agency (United States)
CP	Crown production
CSS	Centre for Strategic Studies (Libya)
D&G	Dumfries and Galloway Constabulary
DEA	Drugs Enforcement Agency (United States)
Dexstar	Name given to the police property store at Lockerbie, which was situated in a warehouse owned by a company named Dexstar
DGSE	Direction Générale de la Sécurité Extérieure, the General Directorate of External Security, France's external intelligence agency

DIA	Defense Intelligence Agency (United States)
DP	Defence production
DST	Direction de la Surveillance du Territoire, the Directorate of Territorial Surveillance, France's domestic Security Service
Dstl	Defence Science and Technology Laboratory, agency of the Ministry of Defence of which RARDE was a forerunner
ESDA	Electrostatic Detection Apparatus, used to detect indented writing
ESO	External Security Organisation i.e. Libyan intelligence services, also referred to in the statement of reasons as the JSO
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation (United States)
FCO	Foreign and Commonwealth Office
FEL	Forensic Explosives Laboratory, Fort Halstead, Kent (part of RARDE, now Dstl)
FIA	Forensic Investigative Associates, a firm of private investigators instructed on behalf of the applicant by Eversheds
FSANI	Forensic Science Agency of Northern Ireland
FSS	Forensic Science Service
GCHQ	Government Communications Headquarters (UK)
HOLMES	Home Office Large Major Enquiry System, the police database
IED	Improvised explosive device
IRA	Irish Republican Army
IRGC	Iranian Revolutionary Guard Corps
JIG	Joint Intelligence Group, liaison between police enquiry and intelligence agencies

JSO	Jamahariya Security Organisation i.e. Libyan intelligence services, also referred to as ESO
KM180	Air Malta flight KM180 from Luqa airport, Malta to Frankfurt on 21 December 1988, said to have carried the primary suitcase
KM231	Air Malta flight KM231 from Tripoli airport, Libya to Luqa airport, Malta on 20 December 1988, on which the applicant and the co-accused travelled, the applicant using his coded passport
LAA	Libyan Arab Airlines
LED	Light emitting diode
LICC	Lockerbie Incident Control Centre
LN147	Libyan Arab Airlines flight LN147 from Luqa airport, Malta to Tripoli airport, Libya on 21 December 1988, on which the applicant travelled while using his coded passport
LPS form (also form 2)	The form completed for requesting forensic science laboratory examination (see Crown production number 288)
MEBO	Meister et Bollier AG, the Swiss manufacturer of MST-13 timers
MFA	Maltese Football Association
MST-13	The designation given by MEBO to an electronic timing device it manufactured, a fragment from one of which was discovered at the crash site
NPES	No particular explosive sign
PA103	Pan American World Airways flight 103 from London Heathrow to New York on 21 December 1988
PA103A	Pan American World Airways flight 103A from Frankfurt to London Heathrow on 21 December 1988
PBS	Public Services Broadcasting, Malta – the only Maltese television channel broadcasting in 1988 (when it was known as TVM)

PETN	A chemical constituent of Semtex plastic explosive
PFLP-GC	Popular Front for the Liberation of Palestine – General Command, named in the notice of incrimination
PLO	Palestinian Liberation Organisation
Primary suitcase	Term given to the suitcase concluded to have contained the bomb
POFP	"Property other than found property", a register used by the police in England to record items that are not simply lost property
PPSF	Palestinian Popular Struggle Front, named in the notice of incrimination
RAI	Radio Televisione Italiana, the state owned broadcasting authority for Italy
RARDE	Royal Armaments Research and Development Establishment, of which the Forensic Explosives Laboratory formed part
RCR	Radio cassette recorder
RDX	A chemical constituent of Semtex plastic explosive
RT-SF16	The model of Toshiba RCR concluded to have contained the bomb which destroyed PA103
SHHD	Scottish Home and Health Department
SIO	Senior Investigating Officer
SI store	Special interest store, part of the Dexstar property store where items were stored for submission to forensic scientists
TVM	The only Maltese television channel broadcasting in 1988 (subsequently renamed PBS)
USG	United States Government
VSC	Video Spectral Comparator, used to compare inks

Note about police witnesses

Given the length of the police investigation and the duration of the trial the ranks of individual police officers often changed. For example, William Williamson was a Detective Inspector during the enquiry, was a Chief Inspector at the time he gave evidence at trial, and was retired when interviewed by the Commission. Generally where a rank is specified in the statement of reasons it is the rank at the time of the events being described, rather than the present rank. Hence the same individual may be referred to by different ranks at different points in the statement of reasons.

Note about witnesses of Arab descent

Naming conventions in Arabic differ from those in English. For this reason, except where specified, references to Arabic names do not include a title. Where a single name is used to identify an individual, generally the full name is first designed (e.g. Abdul Majid Giaka ("Majid")).

CHAPTER 1
INTRODUCTION

General

1.1 On 23 September 2003, the Commission received an application on behalf of Abdelbaset Ali Mohmed Al Megrahi ("the applicant") in which he sought review of his conviction for murder.

1.2 Given the size and complexity of the case the Board of the Commission decided to allocate the case to an enquiry team consisting of a senior legal officer and two legal officers. An additional legal officer was later drafted into the team to work on the case on a part time basis. Throughout the course of the review, the enquiry team regularly reported its findings to the Board, whose decision this statement of reasons represents.

1.3 The Commission's enquiries were wide-ranging, encompassing not only those issues raised on behalf of the applicant, but also certain other aspects of the case considered potentially significant. Details of these enquiries are given throughout chapters 5 to 27. So far as the procedures at Heathrow, Frankfurt and Luqa airports are concerned, the application contained very limited submissions. Because of this and the substantial attention given to these matters at both trial and appeal, the Commission did not undertake specific enquiries into this aspect of the case. During the course of its review, the Commission came across nothing which might cast doubt on the evidence led by the Crown in this connection.

1.4 To some extent, the form of this statement of reasons differs from that normally issued by the Commission. In particular, given that the court and the parties have ready access to the transcript of the proceedings it was not considered necessary to include summaries of the Crown and defence cases. Instead, in order to provide a context for what follows, summaries of the trial court's judgment and the appeal court's opinion are given in chapters 2 and 3 respectively. In addition, given the wide ranging nature of the submissions received and enquiries conducted, it was considered

appropriate to provide general details of these in a separate chapter of the statement of reasons (chapter 4).

Background to the conviction

Pan Am flight 103 ("PA103")

1.5 At 7.03pm on Wednesday 21 December 1988, shortly after taking off from Heathrow airport, PA103 was flying at an altitude of 31,000 feet en route to John F Kennedy airport, New York, when an explosion caused the aircraft to disintegrate and fall out of the sky. 243 passengers and 16 crew on board were killed. The victims came from 21 countries, the vast majority being from the United States.

1.6 The resulting debris was spread over a very wide area in Scotland and the North of England, but principally it landed in and around the town of Lockerbie causing the deaths of a further 11 people. In all 270 people were killed in the disaster.

1.7 A massive police operation was mounted to recover the bodies of the victims and as much of the debris as possible. The local police force, Dumfries and Galloway Constabulary ("D&G"), was assisted in the search operation by numerous officers from other forces in Scotland and England, as well as by military personnel and members of voluntary organisations.

Fatal Accident Inquiry

1.8 On 1 October 1990 a fatal accident inquiry was conducted by Sheriff Principal John Mowat QC. In his findings in fact, Sheriff Principal Mowat found that a Samsonite suitcase ("the primary suitcase") containing a Toshiba radio cassette recorder loaded with a Semtex-type plastic explosive had been placed on board Pan Am flight 103A ("PA103A") from Frankfurt to London Heathrow before being transferred to PA103; that the suitcase had probably arrived at Frankfurt on another airline and been transferred to PA103A without being identified as an unaccompanied bag; that the baggage had not been reconciled with passengers travelling on PA103, nor had it been x-rayed at Heathrow; and that the cause of all the deaths was the

detonation of the explosive device in luggage container AVE 4041 which had been situated on the left side of the forward hold of the aircraft.

1.9 Sheriff Principal Mowat concluded that the primary cause of the deaths was a criminal act of murder.

The police investigation

1.10 It had been concluded very soon after the disaster that the likely cause had been the detonation of an improvised explosive device. From the date of the explosion and throughout the course of 1989-1991, an extensive international police investigation was carried out, principally involving the British and American investigating authorities, but also including the police forces of the former Federal Republic of Germany ("the BKA") and of Malta.

1.11 Initially, suspicion fell upon Palestinian terrorist groups, in particular the Popular Front for the Liberation of Palestine – General Command ("PFLP-GC"). However, in 1990 developments in the investigation turned its focus to Libya, and on 13 November 1991 a warrant was granted by a sheriff at Dumfries for the arrest of the applicant and Al Amin Khalifa Fhimah ("the co-accused"), both Libyan nationals. On the following day the Lord Advocate issued an indictment setting out the charges against the two accused. Simultaneously, as a result of a federal grand jury investigation, the US Attorney General published an indictment in substantially similar terms to that issued by the Scottish authorities.

1.12 Following publication of the indictments, the UK and the US sought the handover of the two accused for trial, and throughout 1992 and 1993 the UN Security Council issued a number of resolutions calling upon Libya to do so. It also imposed extensive economic sanctions against that country. Libya denied any involvement in the crime.

Proposals for trial in the Netherlands

1.13 In 1998 the governments of the UK and the US wrote to the Secretary General of the UN indicating that they were prepared to arrange a trial of the two accused before a Scottish court sitting in the Netherlands. The trial, it was proposed, would follow Scots law and procedure in every respect except that the jury would be replaced by a panel of three judges. Following Libya's consent to the initiative, an agreement was entered into between the UK and the Netherlands to put it into effect. On the same date, the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998 came into force in the UK, regulating such matters as the constitution of the trial and appeal courts.

1.14 Lords Sutherland, Coulsfield and MacLean were appointed to form the panel of judges. Lord Abernethy was appointed as an additional judge to assume the functions of any member of the panel who died during the proceedings or was absent for a prolonged period. He was not required to carry out that function. The location of the court was chosen as Kamp van Zeist in the Netherlands.

1.15 On 5 April 1999, the applicant and the co-accused travelled to the Netherlands where they were arrested by Scottish police officers. On 14 April 1999 they were fully committed for trial, and were detained at premises within the court precincts. The indictment was served upon them on 29 October 1999.

The trial

1.16 Preliminary pleas to the competency and relevancy of the charges were raised by both accused and argued on their behalf by counsel at a hearing on 7 December 1999. On 8 December, Lord Sutherland, sitting alone, held the charges to be both competent and relevant (see *HMA v Al Megrahi (No 1)* 2000 SCCR 177). Leave to appeal the decision was granted but no appeal was taken.

1.17 The trial commenced on 3 May 2000, and the cases for both accused closed on 8 January 2001. Neither the applicant nor the co-accused gave evidence.

Following submissions by the parties on 18 January 2001 the diet was adjourned to allow the judges to deliberate upon their verdicts.

1.18 There were originally three alternative charges libelled on the indictment: (1) conspiracy to murder; (2) murder and (3) contravention of sections 2(1) and 5 of the Aviation Security Act 1982. However, on 10 January 2001, the advocate depute's motion to delete charges (1) and (3), and to amend charge (2), was granted by the court. Consequently, by the end of the trial both accused faced only a single charge of murder in the following terms:

"(2) You ABDELBASET ALI MOHMED AL MEGRAHI being a member of the Libyan Intelligence Services and in particular being the head of security of Libyan Arab Airlines and thereafter Director of the Centre for Strategic Studies, Tripoli, Libya and you AL AMIN KHALIFA FHIMAH being the Station Manager and formerly the Station Manager of Libyan Arab Airlines in Malta and having, while acting in concert with others, formed a criminal purpose to destroy a civil passenger aircraft and murder the occupants in furtherance of the purposes of the said Libyan Intelligence Services and having between 1 January 1985 and 21 December 1988, both dates inclusive, within the offices of Libyan Arab Airlines at Luqa Airport, Malta and elsewhere in Malta in your possession and under your control quantities of high performance plastic explosive and airline luggage tags, while acting in concert together and with others

[sub-paragraph (a) was deleted on the motion of the advocate depute]

(b) you ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH did between 20 November and 20 December 1988, both dates inclusive, at the premises occupied by the firm of MEBO AG at the Novapark Hotel, Zurich Switzerland, at the premises occupied by you ABDELBASET ALI MOHMED AL MEGRAHI and by the said Libyan Intelligence Services, in Tripoli aforesaid, and elsewhere in Switzerland and Libya, through the hands of Ezzadin Hinshiri and Badri Hassan both also members of the Libyan Intelligence Services, order and attempt to obtain delivery from the said firm of MEBO AG of forty timers capable

of detonating explosive devices and of a type previously supplied by the said firm of MEGO AG to member of the Libyan Intelligence Services;

(c) you ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH did between 1 and 21 December 1988, both dates inclusive, at Luqa Airport, Malta without authority remove therefrom airline luggage tags;

(d) you ABDELBASET ALI MOHMED AL MEGRAHI did on 7 December 1988 in the shop premises known as Mary's House at Tower Road, Sliema, Malta purchase a quantity of clothing and an umbrella;

(e) you ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH did on 20 December 1988 at Luqa Airport, Malta enter Malta while you ABDELBASET ALI MOHMED AL MEGRAHI were using a passport in the false name of Ahmed Khalifa Abdusamad and you ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH did there and then cause a suitcase to be introduced to Malta;

(f) you ABDELBASET ALI MOHMED AL MEGRAHI did on 20 and 21 December 1988 reside at the Holiday Inn Tigne Street, Sliema, aforesaid under the false identity of Ahmed Khalifa Abdusamad;

(g) you ABDELBASET ALI MOHMED AL MEGRAHI and AL AMIN KHALIFA FHIMAH did on 21 December 1988 at Luqa Airport, aforesaid place or cause to be placed on board an aircraft of Air Malta flight KM180 to Frankfurt am Main Airport, Federal Republic of Germany said suitcase, or a similar suitcase, containing said clothing and umbrella and an improvised explosive device containing high performance plastic explosive concealed within a Toshiba RT SF 16 "Bombeat" radio cassette recorder and programmed to be detonated by one of said electronic timers, having tagged or caused such suitcase to be tagged so as to be carried by aircraft from Frankfurt am Main Airport aforesaid via London, Heathrow Airport to New York, John F Kennedy Airport, United States of America; and

(h) you ABDELBASET ALI MOHMED AL MEGRAHI did on 21 December 1988 depart from Malta and travel from there to Tripoli, Libya using a passport in the false name of Ahmed Khalifa Abdusamad, while travelling with said Mohammed Abouagela Masud also a member of the Libyan Intelligence Services;

and such suitcase was thus carried to Frankfurt am Main Airport aforesaid and there placed on board an aircraft of Pan American World Airways flight PA103 and carried to London, Heathrow Airport aforesaid and there, in turn, placed on board an aircraft of Pan American World Airways flight PA103 to New York, John F Kennedy Airport aforesaid;

and said improvised explosive device detonated and exploded on board said aircraft flight PA103 while in flight near to Lockerbie, Scotland whereby the aircraft was destroyed and the wreckage crashed to the ground and the 259 passengers and crew named in Schedule 1 hereof and the 11 residents of Lockerbie aforesaid named in Schedule 2 hereof were killed and you did murder them;

and it will be shown that between 1 January 1985 and 21 December 1988, both dates inclusive, in Tripoli, Libya, at Dakar Airport, Senegal, in Malta and elsewhere the said Libyan Intelligence Services were in possession of said electronic timers, quantities of high performance plastic explosive, detonators and other components of improvised explosive devices and Toshiba RT SF 16 "Bombeat" radio cassette recorders, all for issue to and use by their members, including Mohammed El Marzouk and Mansour Omran Ammar Saber."

1.19 The court returned its verdict on 31 January 2001. It unanimously found the co-accused not guilty. The verdict in relation to the applicant was recorded in the minutes of trial in the following terms (see also the transcript of proceedings on day 86 of the trial):

"The Court Unanimously found the Accused Abdelbaset Ali Mohmed Al Megrahi GUILTY on the Second Alternative Charge but that under deletion of the words 'and you Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifah [sic] *Fhimah*

did there and then cause a suitcase to be introduced to Malta' in lines 4 to 6 of subhead (e) of said charge and under deletion of the words 'said suitcase, or' in line 4 of subhead (g) and under deletion of the word 'similar' in line [4] of said subhead (g)".

1.20 Copies of the indictment and the minutes of trial are contained in the appendix. The Commission notes that in a number of respects the charge as amended by the court is inconsistent with the reasons the court gave for its verdicts in the judgment. Where such inconsistencies arose, the Commission relied upon the terms of the terms of the judgment.

1.21 The court sentenced the applicant to life imprisonment, backdated to 5 April 1999, and recommended that he serve a minimum period of 20 years before he could be considered for release on licence.

Post-trial developments

Appeal

1.22 The applicant lodged grounds of appeal against conviction on 11 June 2001 and leave to appeal was granted on 23 August 2001. The proceedings took place at Kamp van Zeist between 23 January and 14 February 2002, and the opinion of the court, rejecting the appeal, was issued on 14 March 2002.

Application to the European Court of Human Rights

1.23 On 12 September 2002 the applicant's defence team lodged an application (number 33955/02) with the European Court of Human Rights in which they argued that the applicant's right to a fair trial had been infringed by, *inter alia*, prejudicial pre-trial publicity. On 11 February 2003 the court ruled the application inadmissible on the basis that the applicant had failed to exhaust domestic remedies by raising these issues in the domestic forum.

Diplomatic developments

1.24 On 15 August 2003, Libya delivered a letter regarding the Lockerbie bombing to a meeting of the UN Security Council. The letter contained the following passages:

> *"... the remaining issues relating to fulfilment of all Security Council resolutions resulting from the Lockerbie incident have been resolved...*
>
> *... Libya as a sovereign state:*
>
> - *Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan AM 103, and accepts responsibility for the actions of its officials;*
>
> - *Has cooperated with the Scottish investigating authorities before and during the trial and pledges to cooperate in good faith with any further requests for information in connection with the Pan Am 103 investigation. Such cooperation would be extended in good faith through the usual channels;*
>
> - *Has arranged for the payment of appropriate compensation..."*

1.25 On 12 September 2003, the UN passed a resolution lifting all UN sanctions against Libya.

"Punishment part" hearing

1.26 At a hearing at the High Court in Glasgow on 24 November 2003 under the Convention Rights (Compliance) (Scotland) Act 2001, the punishment part of the applicant's sentence was set at 27 years, again backdated to 5 April 1999. On 18 December 2003 the Lord Advocate appealed against the sentence as being unduly lenient. On 31 May 2004, the applicant lodged an appeal against the length of the

punishment part on the ground that it was excessive. These appeals remain outstanding.

CHAPTER 2
THE TRIAL COURT'S JUDGMENT

Introduction

2.1 One of the requirements of the Order in Council which established the Scottish court in the Netherlands was that in the event of a verdict of guilty, the court should issue a written judgment stating its reasons for the conviction. Accordingly, after announcing the verdict of guilty in relation to the applicant Lord Sutherland delivered the court's judgment, which comprises ninety numbered paragraphs. It is contained in the appendix, and what follows is a summary.

2.2 The judgment stated that it was not disputed at the trial that the explosion of a device within the aircraft caused the disaster and that the person or persons responsible for its deliberate introduction would be guilty of murder. The issue for the trial court was whether one or both of the accused were responsible, actor or art and part, for doing so.

The cause of the explosion

2.3 After the explosion there was a massive ground search and the evidence discovered was pieced together and examined by the relevant specialists. The aircraft was reconstructed, so far as possible, and the damage to one area in particular showed that an explosive device had been detonated within the fuselage. There was also unusual damage to one of the luggage containers, AVE 4041, and the court was satisfied that this, and other evidence, proved that the explosion had occurred within that container. There were traces of the chemicals PETN and RDX, used in the manufacture of plastic explosives, including Semtex, present on two sections of AVE 4041.

2.4 In addition, items of clothing and luggage showing signs of explosive damage were recovered during the ground search. These items, amongst many others, were submitted for detailed examination at the Forensic Explosives Laboratory at the

Royal Armaments Research and Development Establishment ("RARDE") by the forensic scientists Dr Hayes and Mr Feraday. The trial court was satisfied that the scientific evidence established that the explosive device had been contained in a Toshiba RT-SF16 BomBeat radio cassette player which had in turn been in a brown hardshell Samsonite suitcase of the 26" Silhouette 4000 range ("the primary suitcase").

The clothing in the primary suitcase

2.5 According to the judgment, the scientific evidence identified twelve items of clothing and an umbrella which had been within the primary suitcase. Four of these items were identifiable by labels as having been of Yorkie, Slalom, Primark and Puccini brands. In August 1989 police officers visited Malta to trace the source of these items, and on 1 September 1989, after a visit to Yorkie Clothing, they went to Mary's House, Sliema, a shop run by the Gauci family. Anthony Gauci was a partner in the business. In evidence, Mr Gauci recalled a sale about a fortnight before Christmas 1988, although he could not remember the exact date. The purchaser was a Libyan man, who bought an assortment of clothing which Mr Gauci could recall. He described these items, which included two pairs of Yorkie trousers and various other items which corresponded to fragments found at the crash site. The order number 1705 on one of the fragments of Yorkie trousers showed by reference to the corresponding delivery note that it had been delivered to Mary's House on 18 November 1988.

2.6 The court said that although it might seem surprising that he was able to remember this particular sale in such detail some nine months afterwards, according to Mr Gauci the purchaser appeared to take little interest in the items he was buying. The court also said that, having regard to the exact match between so many of the items purchased and the fragments recovered after the explosion, it was satisfied that the items of clothing in the primary suitcase were the ones described by Mr Gauci as having been purchased in Mary's House. There are further details of Mr Gauci's evidence below.

The timer fragment

2.7 The recovery of a fragment of green coloured circuit board PT/35(b) led to the identification of the timer used to trigger the device. The timer was an MST-13 timer manufactured by a Swiss firm called MEBO. Dr Hayes gave evidence that he found PT/35(b) on 12 May 1989 within a remnant of the Slalom shirt PI/995. The next reference to the item was in a memorandum by Mr Feraday to CI Williamson on 15 September 1989 in which he enclosed a Polaroid photograph of it and asked for assistance in trying to identify it. Earlier, on 13 January 1989, DC Gilchrist and DC McColm had found PI/995 during line searches in an area near Newcastleton. The word "debris" on the police identification label attached to PI/995 had been written on top of the word "cloth". The court said that there was no satisfactory explanation as to why this was done, and that DC Gilchrist's attempts to explain it were "at worst evasive and at best confusing." However, despite this and other alleged irregularities surrounding the finding and examination of the piece of green circuit board (which are dealt with in detail in chapters 7 and 8 below), the court did not doubt its provenance.

2.8 The trial court summarised its findings in fact up to that point at paragraph 15, as follows:

> *"The evidence which we have considered up to this stage satisfies us beyond reasonable doubt that the cause of the disaster was the explosion of an improvised explosive device, that that device was contained within a Toshiba radio cassette player in a brown Samsonite suitcase along with various items of clothing, that that clothing had been purchased in Mary's House, Sliema, Malta, and that the initiation of the explosion was triggered by the use of an MST-13 timer."*

The route taken by the primary suitcase

2.9 The court considered the origin of the primary suitcase and the ways in which it could have found its way into baggage container AVE 4041.

2.10 The Crown case was that the primary suitcase was first carried on an Air Malta flight KM180 from Luqa airport in Malta to Frankfurt, that at Frankfurt it was

transferred to flight PA103A, a feeder flight for PA103, which carried it to London Heathrow airport, where it was transferred to PA103. The court examined in detail the evidence of the procedures at the airports through which the primary suitcase was alleged to have passed and considered the various ways in which it could have been introduced onto PA103. It considered the evidence that the suitcase could have been loaded at Luqa onto flight KM180 as "interline" baggage tagged to travel from Frankfurt to Heathrow on flight PA103A and then on PA103 at Heathrow. It also considered the evidence that the suitcase could have been loaded on to PA103A at Frankfurt and the evidence that it could have been loaded directly into luggage container AVE 4041 at Heathrow.

2.11 The court's view was that, in examining the evidence about Frankfurt airport in isolation, there was no reason to doubt the inference which arose from that evidence that an unaccompanied bag had been transferred from KM180 to PA103A. In considering the evidence of procedures at Luqa airport the court noted that, if an unaccompanied bag had indeed travelled on KM180, the method by which this was done was not established. The Crown's failure to point to any specific route by which the primary suitcase could have been loaded onto KM180 was described by the court as a "major difficulty for the Crown case" which had to be considered along with the other circumstantial evidence.

The involvement of the accused

2.12 In the court's view there were three important witnesses in establishing the applicant's involvement in the plot: Abdul Majid, Edwin Bollier and Anthony Gauci.

Abdul Majid ("Majid")

2.13 The court said that it could accept Majid's evidence only in relation to his description of the organisation of the Jamahariya Security Organisation ("JSO") (i.e. the Libyan security service, later named the External Security Organisation), and the personnel involved there (Ezzadin Hinshiri, Said Rashid, Nassr Ashur and the applicant). In particular, the court accepted that Majid had joined the JSO in 1984 and was appointed as assistant to the station manager of Libyan Arab Airlines

("LAA") at Luqa airport in December 1985. It also accepted his evidence that the co-accused was the station manager for LAA at Luqa from 1985 until about October 1988, and that the applicant was head of the airline security section of the JSO until January 1987 when he moved to the strategic studies institute.

2.14 The court rejected the remainder of Majid's evidence as incredible and unreliable.

Edwin Bollier

2.15 Edwin Bollier and Erwin Meister were partners in the Swiss firm MEBO which manufactured MST-13 timers. The court considered Mr Bollier at times to be an untruthful and at other times an unreliable witness but accepted parts of his evidence which were supported by another acceptable source of evidence or which were not challenged and appeared to be accepted by the defence.

2.16 The court accepted Mr Bollier's evidence that he supplied twenty samples of MST-13 timers to Libya in three batches in 1985 and 1986, and that he attended bomb tests in Libya in 1986 or 1987 when such timers were used. It also accepted his evidence that MEBO rented an office in its Zurich premises some time in 1988 to the firm ABH of which the applicant and an individual named Badri Hassan were the principals and that they had explained to Mr Bollier that they might be interested in taking a share in MEBO or in having business dealings with MEBO.

2.17 The court also accepted Mr Bollier's evidence that two prototype MST-13 timers were delivered to the East German Security Forces ("Stasi") in 1985. The court could not exclude the possibility that more than two such timers were supplied to the Stasi. Nor could it exclude the possibility that other MST-13 timers might have been made by MEBO and supplied to other parties. Despite the evidence of a former Stasi officer who said he had destroyed the MST-13 timers MEBO had supplied, the court was unable to rule out the possibility that the timers supplied to the Stasi left their possession, although it noted that there was no positive evidence of this and no positive evidence of the MST-13 timers having been supplied to the Popular Front for

the Liberation of Palestine – General Command ("PFLP-GC", one of the organisations listed in the notice of incrimination referred to below).

2.18 The court also referred to two MST-13 timers obtained by the authorities in Togo, one of which was provided to the US authorities in 1986 and which was compared to the fragment PT/35(b) in 1990 and found to be similar. Another timer had also been found in a briefcase on a passenger aircraft in Dakar airport, Senegal on 20 February 1988 along with explosives and armaments. Three individuals were taken into custody from the aircraft, one of whom was a member of the JSO, but in the court's view the evidence did not establish any link between those individuals and the items found.

Anthony Gauci

2.19 The court referred to the fact that Mr Gauci had picked out the applicant at an identification parade saying: "Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number five". Mr Gauci also identified the applicant in court, saying, "He is the man on this side. He resembles him a lot". He had consistently described the purchaser of the clothing as a Libyan.

2.20 The identifications were criticised on the ground that photographs of the accused had featured in the media over the years and so it was argued that purported identifications ten years after the incident were of little if any value. The court said that, before assessing the quality and value of these identifications, it was important to look at the history, and referred to evidence of a number of occasions on which Mr Gauci had been shown photographs including of one of the incriminees, Mohammed Abo Talb ("Talb"). The court then described the evidence that on 15 February 1991 Mr Gauci picked out the applicant on a card of twelve photographs. The court referred to Mr Gauci's statement that the photograph "… is similar to the man who bought the clothing… He would perhaps have to look about 10 years or more older, and he would look like the man who bought the clothes" and that the applicant's photograph was "the only one really similar to the man who bought the clothing, if he

was a bit older, other than the one my brother showed me [i.e. a newspaper photograph of Talb]."

2.21 The other important area of Mr Gauci's evidence concerned the date of the purchase. Mr Gauci had said that the date of purchase must have been about a fortnight before Christmas. He was asked whether the street Christmas decorations were up at the time of the purchase, but his evidence on that matter was unclear. He gave evidence that the sale happened "midweek", by which he meant Wednesday. He also said that the purchase took place at a time when his brother, Paul Gauci, was out of the shop because he was at home watching football on television. It was agreed that there were televised football matches on 23 November and 7 December 1988. He described the weather at the time of the purchase as not raining heavily but simply dripping. There was evidence from a Major Mifsud of the Meteorological Office at Luqa airport which indicated that the weather on 23 November fitted better with Mr Gauci's evidence than did the weather on 7 December.

2.22 The court considered that Mr Gauci was an entirely credible witness, and said that on two matters he was entirely reliable: the details of clothing he had sold; and his evidence that the purchaser was Libyan. The court accepted, however, that there were problems with his identification of the applicant.

2.23 The court was satisfied with Mr Gauci's recollection, which it said he had maintained throughout, that his brother was watching football on the material date. According to the court, that narrowed the range of possible purchase dates to 23 November or 7 December. The court said there was no doubt that the weather on 23 November would have been wholly consistent with a light shower between 6.30pm and 7pm. The possibility that there was a brief light shower on 7 December was not however ruled out by the evidence of Major Mifsud. While Major Mifsud's evidence was clear about the position at Luqa, he did not rule out the possibility of a light shower at Sliema. Mr Gauci's recollection of the weather was that "it started dripping – not raining heavily" or that there was a "drizzle", and it appeared only to last for the time that the purchaser was away from the shop to get a taxi, and the taxi was not far away. The court said that the position about the Christmas decorations was unclear, but it would seem to be consistent with Mr Gauci's rather confused recollection that

the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that the purchase was about two weeks before Christmas. The court was unimpressed with the suggestion that Mr Gauci should have been able to fix the date of purchase by reference to there having been a public holiday in Malta on 8 December 1988. Even if there was some validity in that the court said that the suggestion lost any value when it was never put to Mr Gauci for his comments. The court said at the end of paragraph 67 that having carefully considered all the factors relating to this aspect it concluded that the date of purchase was Wednesday 7 December.

2.24 As regards the identification evidence, the court accepted that Mr Gauci's initial description to the police (including that the purchaser was six feet or more in height and about 50) would not in a number of respects fit the applicant, who was 5'8" and 36 in December 1988. Even although Mr Gauci testified to not having experience of height or age, the court accepted that there was a "substantial discrepancy". However, the court said that from his general demeanour and his approach, it reached the view that when he picked out the applicant at the identification parade and in court it was because he genuinely felt that he was correct that the applicant had a close resemblance to the purchaser. The court accepted that Mr Gauci had not made an absolutely positive identification, but considered that having regard to the lapse of time it would have been surprising if he had been able to do so. The court said that it had not overlooked the difficulties in relation to the description of height and age. Nevertheless, the court was satisfied that Mr Gauci's identification so far as it went was reliable and "should be treated as a highly important element in the case."

The special defences of incrimination

2.25 Both accused lodged special defences of incrimination in which they incriminated Talb and other members of the Palestinian Popular Struggle Front ("PPSF"), and members of the PFLP-GC.

2.26 The court determined that there was no evidence that a PFLP-GC cell operating in West Germany in 1988 had the materials necessary to manufacture an

explosive device of the type which destroyed PA103. This was despite the evidence that after the arrest of a number of PFLP-GC members in Frankfurt and Neuss on 26 October 1988 during a West German Federal police ("BKA") operation code-named "Autumn Leaves", bomb making equipment (eg improvised explosive devices consisting of single speaker Toshiba radio cassette players, explosives, detonators, timers and barometric pressure devices) and airline timetables and tags were discovered. In particular, the court said that there was no evidence that the cell had an MST-13 timer. Whilst the court noted that a small quantity of such timers was supplied by MEBO to the Stasi, in its view there was no evidence to suggest that any of them had found their way into the hands of organisations such as the PFLP-GC. The court was satisfied that an MST-13 timer alone triggered the explosive device which destroyed PA103, and that neither an ice-cube timer nor any barometric device (such as those used by the PFLP-GC cell) played any part in it.

2.27 The court also dismissed the suggestion that the PFLP-GC might have infiltrated a bomb onto PA103A in Frankfurt through the medium of Khaled Jaafar, one of the passengers who died in the disaster. The court was satisfied on the evidence that Mr Jaafar only had two bags with him and that they were checked into the hold of PA103A at Frankfurt. The court was also satisfied that neither of the two bags contained an explosive device. After the crash, both bags were recovered and neither had suffered any explosion damage.

2.28 The court referred to the evidence regarding Talb, including certain associations between him, his circle, and members of the PFLP-GC cell in West Germany. Reference was also made to Talb's trip to Malta in October 1988. The court accepted that there was a great deal of suspicion as to the actings of Talb and his associates, but concluded that there was no evidence to indicate that they had the means or the intention to destroy a civil aircraft in December 1988.

Conclusions regarding the primary suitcase, the origin of the plot and the incrimination

2.29 The court was satisfied that it had been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt

and was loaded onto PA103 at Heathrow. The court stated that, with one exception, the clothing in the primary suitcase was the clothing purchased in Mr Gauci's shop on 7 December 1988. The purchaser was, on Mr Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer a substantial quantity of which had been supplied to Libya. The court acknowledged that it was not impossible that the clothing might have been taken from Malta, united somewhere with a timer from some source other than Libya and introduced into the airline baggage system at Frankfurt or Heathrow. When, however, the evidence regarding the clothing, the purchaser and the timer was taken with the evidence that an unaccompanied bag was taken from KM180 to PA103A, the inference that that was the primary suitcase became, in the court's view, irresistible. The court considered that the absence of an explanation as to how the suitcase was taken into the system in Luqa was a major difficulty for the Crown case, but after taking that difficulty into full account, the court remained of the view that the primary suitcase began its journey there.

2.30 The court stated that the clear inference from this evidence was that the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin. Whilst the court did not doubt that organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities during the same period, there was no evidence from which the court could infer that they were involved in this particular act of terrorism, and the evidence relating to their activities did not create a reasonable doubt about the Libyan origin of the crime.

Evidence against the co-accused

2.31 The principal piece of evidence against the co-accused came from two entries in his 1988 diary. This was recovered in April 1991 from the offices of Medtours, a company which had been set up by the co-accused and a Maltese man named Vincent Vassallo. At the back of the diary, there were two pages of numbered notes. The fourteenth item on one page was translated as "Take/collect tags from the airport (Abdulbaset/Abdussalam)". The word "tags" was written in English, the remainder in Arabic. On the diary page for 15 December there was an entry, preceded by an asterisk, "Take taggs from Air Malta," and at the end of that entry was in a different

coloured ink "OK". Again the word "taggs" was in English. The Crown maintained that the inference to be drawn from these entries was that the co-accused had obtained Air Malta interline tags for the applicant, and that as an airline employee he knew that the only purpose for which they would be required was to enable an unaccompanied bag to be placed on an aircraft.

2.32 From another entry on 15 December, translated as "Abdel-baset arriving from Zurich", it appeared that the co-accused expected the applicant to pass through Malta on that day. In fact, the applicant passed through on 17 December and missed seeing the co-accused. On 18 December, the co-accused travelled to Tripoli. He returned on 20 December on the same flight as the applicant. The Crown maintained that the inference to be drawn from this was that on that date the applicant was bringing component parts of the explosive device into Malta, and required the company of the co-accused to carry the suitcase through customs as the co-accused was well known to the customs officers who would be unlikely to stop him and search the case. This would have been consistent with the evidence of Majid. There was also a record of a telephone call from the Holiday Inn, where the applicant was staying, to the number of the co-accused's flat at 7.11am on 21 December.

2.33 There was no doubt, in the court's view, that the co-accused made the entries in the diary and that they could be seen to have a sinister connotation, particularly in the complete absence of any form of explanation. The Crown no longer suggested that the co-accused was a member of the JSO. As the court had rejected Majid's evidence that he had seen both accused arriving at Luqa with a suitcase, it followed that there was no evidence that either of the accused had in their possession any luggage, let alone a brown Samsonite suitcase. Whatever else may have been the purpose of the co-accused's visit to Tripoli, it was unlikely that this was to hand over tags, as this could have been done easily in Malta. The court did not think it proper to draw the inference that the co-accused went to Tripoli to escort the applicant through customs at Luqa. The court determined that there was no evidence at all to suggest that the co-accused was even at Luqa on 21 December. The Crown suggestion that the brief telephone call to the applicant's flat on the morning of 21 December could by a series of inferences lead to the conclusion that he was at the airport was, in the court's opinion, wholly speculative.

2.34 The court concluded that, while there may well have been a sinister inference to be drawn from the diary entries, there was insufficient other acceptable evidence to support or confirm such an inference, in particular an inference that the co-accused was aware that any assistance he was giving to the applicant was in connection with a plan to destroy an aircraft by the planting of an explosive device. There was therefore insufficient corroboration for any adverse inference that might be drawn from the diary entries.

Evidence against the applicant

2.35 In relation to the applicant, the court emphasised that the entries in the co-accused's diary could form no part of any case against him. The entries fell to be treated as equivalent to a statement made by a co-accused outwith the presence of the applicant. If both accused had been proved by other evidence to have been acting in concert in the commission of the crime libelled, then these entries could perhaps have been used as general evidence in the case as against any person proved to have been acting in concert. As the court was of the view that it had not been proved that the co-accused was a party to the crime, it followed that the normal rule must apply and the entries could not be used against the applicant.

2.36 The court referred to the evidence that on 15 June 1987 the applicant was issued with a coded passport with an expiry date of 14 June 1991 by the Libyan passport authority at the request of the JSO who supplied the details to be included. The name on the passport was Ahmed Khalifa Abdusamad. There was no evidence as to why this passport was issued to him. He used it on a visit to Nigeria in August 1987, returning to Tripoli via Zurich and Malta, travelling at least between Zurich and Tripoli on the same flight as Nassr Ashur who was also travelling on a coded passport. It was also used during 1987 for visits to Ethiopia, Saudi Arabia and Cyprus. The only use of the passport in 1988 was for an overnight visit to Malta on 20/21 December, and it was never used again. On that visit, he arrived on Malta on flight KM231 about 5.30pm. He stayed overnight in the Holiday Inn, Sliema, using the name Abdusamad. He left on 21 December on flight LN147, which was scheduled to leave at 10.20am.

2.37 According to the court, a major factor in the case against the applicant was the identification evidence of Mr Gauci. It accepted his identification of the applicant while recognising that this was not unequivocal. The court said it could be inferred from Mr Gauci's evidence that the applicant was the person who bought the clothing which surrounded the explosive device. In its view, the date of purchase was 7 December 1988. There was evidence that on that date the applicant arrived in Malta, departing on 9 December. He stayed at the Holiday Inn, Sliema, which was very close to Mary's House. In the court's view, if he were the purchaser it was not difficult to infer that he must have been aware of the purpose for which the clothes were being bought. The court accepted the evidence that he was a member of the JSO, occupying posts of fairly high rank. One of these posts was head of airline security, from which it could be inferred that he would be aware, at least in general terms, of the nature of security precautions at airports from or to which LAA operated. According to the court, he also appeared to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO.

2.38 The court went on to note that on 20 December 1988 the applicant entered Malta using the passport in the name of Abdusamad. There was no apparent reason for this visit, as far as the evidence disclosed. All that was revealed by acceptable evidence was that the applicant and the co-accused together paid a visit to the house of Mr Vassallo at some time in the evening, and that the applicant made or attempted to make a phone call to the co-accused at 7.11am the following morning. The court's view was that it was possible to infer that this visit under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device.

2.39 The court said that it was aware that in relation to certain aspects of the case there were a number of uncertainties and qualifications. The court was also aware that there was a danger that by selecting parts of the evidence which seemed to fit together and ignoring parts which might not fit, it was possible to read into a mass of

conflicting evidence a pattern or conclusion which was not really justified. However, having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, the court was satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of the applicant (albeit not absolute), his movements under a false name at or around the material time, and other background circumstances such as his association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, did fit together to form a real and convincing pattern. There was nothing in the evidence which left the court with a reasonable doubt as to the guilt of the applicant, and accordingly it found him guilty.

CHAPTER 3
THE APPEAL AGAINST CONVICTION

Introduction

3.1 The applicant appealed against his conviction. The grounds of appeal are set out in the note of appeal, a copy of which is contained in the appendix, and they are dealt with in detail in the opinion of the appeal court (a copy of which is also in the appendix).

3.2 Much of the appeal was taken up with the provenance of the primary suitcase and the evidence about the airports, including evidence not heard at trial in relation to Heathrow. As only limited submissions were made to the Commission on those issues, the summary below does not address in detail the arguments made at appeal in that regard or the reasons given by the court for rejecting them.

3.3 The appeal court also dealt with the evidence of Mr Gauci's identification of the applicant and the date of purchase. The court's view of these matters is summarised below.

Petition to the nobile officium

3.4 In appeals from jury verdicts the trial judge presents a report to the appeal court summarising the evidence and giving his views on any legal issues which are raised in the grounds of appeal. In the case of the applicant, a petition was presented to the nobile officium seeking an order that no such report should be sought or prepared because, it was argued, there was no power for the provision of such a report in the Order in Council which put into effect the international agreement in relation to the trial. The petition was refused by the High Court because in its view it was clearly implied in the Order that the appeal proceedings would be conducted in accordance with the procedure for solemn appeals as set out in the Act. The High Court's opinion in relation to this matter was reported as *Megrahi, Petitioner* 2002 JC 38.

The report by the trial court in relation to the note of appeal

3.5 A copy of the report prepared by the trial court in relation to the note of appeal accompanied the application to the Commission (see appendix). In the report the trial court stated in relation to the original judgment:

> "…*We would only say that in order to keep the length of the Opinion within reasonable bounds, we did not attempt to deal with every item of evidence which might be in dispute or with every criticism which was made of the evidence, but confined ourselves to dealing with those items of evidence and those criticisms which appeared to us to be of material importance…"*

Appeal hearing

3.6 The appeal was heard between 23 January and 14 February 2002 at Kamp Van Zeist. The appeal court's opinion was issued on 14 March 2002. The judges who presided at the appeal were the Lord Justice General (Cullen), Lord Kirkwood, Lord Osborne, Lord Macfadyen and Lord Nimmo Smith.

The appeal court's opinion

3.7 The court delivered a single opinion refusing the appeal, which is reported as *Megrahi v HMA* 2002 JC 99. It comprises 370 numbered paragraphs. A summary of that opinion follows.

Preliminary matters

3.8 The appeal court noted at paragraph 4 of its opinion that it was not argued on behalf of the applicant that the evidence not rejected by the trial court was insufficient in law for conviction. In paragraph 5 it noted that the applicant's counsel, Mr Taylor, also disavowed any reliance on section 106(3)(b) of the Act and accordingly there was no argument that the trial court's verdict was one which no reasonable trial court could have reached. Consequently the appeal court did not need to consider whether the verdict was unreasonable. The court, however, rejected an argument advanced by

Mr Taylor to the effect that section 106(3)(b) could not apply to the verdict of the court in this case. The fact that a written judgment had been issued did not, in the appeal court's view, affect the role of the appeal court in reviewing any alleged miscarriage of justice (paragraph 26).

3.9 Although the applicant did not argue that the verdict was unreasonable, he did submit that the trial court had given inadequate reasons for its verdict and had misdirected itself on a number of matters. The appeal court held that there was no ground for thinking that the perceived inadequacy of the reasons expressed by the trial court was to be regarded as of itself establishing that it was not entitled to come to a particular conclusion (paragraph 10).

3.10 The appeal court approached its task on the basis that it was not open to it to review the inferences drawn by the trial court unless it was satisfied that a particular inference was not a possible inference, in the sense that the drawing of such an inference was not open to the trial court on the evidence. The appeal court said that that would be indicative of a misdirection and it would require to consider whether or not the misdirection had been material (paragraph 25). Where it was not said that the trial court had misdirected itself by ignoring something, the amount of weight that should be attached to it was a matter solely for the trial court, and not for the appeal court (paragraph 27).

3.11 The appeal court said that since the Crown case was based entirely on circumstantial evidence, it was appropriate to make reference to the requirements of proof by such evidence, and what approach to it was open to the trial court. The court said at paragraph 32 that it was open to the trial court to find guilt established on circumstantial evidence from at least two independent sources. In such a case, it said, quoting Hume's Commentaries, volume ii, p 384, it was not to be understood that two witnesses were necessary to establish each particular, "because the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts" (paragraph 31).

3.12 At paragraph 36 the appeal court noted that each piece of circumstantial evidence did not need to be incriminating in itself; what mattered was the concurrence

of the testimony (*Little v HMA* 1983 JC 16). The nature of circumstantial evidence was such that it may be open to more than one interpretation, and it was precisely the role of the trial court to decide which interpretation to adopt (*Fox v HMA* 1998 JC 94). The trial court was entitled to reject evidence which was inconsistent with guilt precisely because it was inconsistent with circumstantial evidence pointing to guilt which it had decided to accept (*King v HMA* 1999 JC 226).

3.13 The appeal court summarised some of the key points of the trial court's judgment and in doing so noted at paragraph 55 that no issue had arisen in the appeal as to the trial court's treatment of the incrimination evidence.

The provenance of the primary suitcase

3.14 Counsel for the applicant argued a number of grounds of appeal regarding the evidence that the primary suitcase was placed on board Air Malta flight KM180 from Luqa airport in Malta to Frankfurt airport; that it passed through Frankfurt airport, where it was placed on board PanAm flight PA103A; and that it was thus carried to London Heathrow airport, where, in turn, it was placed on board flight PA103 to New York. The appeal court dealt in detail with these grounds and analysed the evidence at the trial. The court also heard additional evidence related to the possibility that the primary suitcase had been introduced to PA103 at Heathrow. It criticised a few of the specific conclusions made by the trial court about the evidence relating to Frankfurt airport, but held that the trial court was entitled to reach the conclusion which it did as to the provenance of the primary suitcase and as to its having been introduced at Luqa airport. Full details of the arguments made and the appeal court's reasoning are contained in paragraphs 59 to 274 of the appeal court's opinion.

The identification evidence of Anthony Gauci

3.15 Ground of appeal A2 related to the trial court's conclusion at paragraph 69 of its judgment that Mr Gauci's identification of the applicant as the purchaser, so far as it went, was reliable. The ground stated:

"... In reaching that conclusion the court failed to have proper regard or to give proper weight to the following considerations:

i. *the aspects of Gauci's initial description of the purchaser and his identification of a picture of Abo Talb and Mohamed Salem as resembling the purchaser which were inconsistent with the [applicant] being that person.*

ii. *the features in Gauci's evidence and previous statements which were consistent with the purchaser being substantially older than the [applicant] in 1988.*

iii. *that in picking out a photograph of the [applicant] in February 1991 (production 436) he was doing so 26 months after the purchase and that he qualified the identification by saying that the man in the photo would have to be ten years or more older to look like the purchaser.*

iv. *the difference in quality of the photograph of the [applicant] in production 436 from that of the other photographs.*

v. *that in picking out the [applicant] in court no explanation was advanced as to whether Gauci was making any allowance for the passage of 12 years since the purchase of clothes or whether the [applicant], then aged 48, resembled the clothes buyer as he was in 1988."*

3.16 The appeal court set out various criticisms by Mr Taylor of the trial court's approach to the identification and the response to these by the advocate depute. The appeal court observed that the trial court had reached the view that Mr Gauci was entirely credible and that no suggestion was made to the contrary, either at trial or at appeal. However, the trial court had recognised that, while a witness may be credible, his or her evidence may be unreliable or plainly wrong. The appeal court said at paragraph 290 that the trial court had had regard to the considerations listed in sub-paragraphs (i)-(v) of the ground of appeal and that the weight to be given to the evidence accepted by the trial court was a matter for it. The appeal court said, however, that in order to do justice to the arguments by Mr Taylor it would consider the approach by the trial court on the issue of identification.

3.17 The appeal court referred at paragraph 291 to Mr Gauci's initial descriptions of the purchaser of the clothes, which included references to his height being six feet or more and his age being about 50. There was evidence that the applicant was 5'8" in height and that in December 1988 he was 36 years of age. The appeal court noted that the trial court had recognised in paragraph 68 of its judgment that this was "a substantial discrepancy." It also noted that in September 1989 Mr Gauci had included in his description of the purchaser references to his chest, head, build, stomach and hair, but it was not suggested that what he said on those aspects would not have applied to the applicant.

3.18 At trial Mr Gauci had given evidence that he thought that the purchaser was below six feet, but he was "not an expert on these things." He did not give positive evidence that he had recognised the applicant as having been the purchaser of the clothing, and the trial court had treated his evidence as going no further than that the applicant closely resembled the purchaser (the witness having stated that "he resembles him a lot"). The trial court had accepted Mr Gauci's identification of the applicant as far as it went, and stated that it had not overlooked the difficulties in relation to his description of height and age. It followed, according to the appeal court at paragraph 291, that the discrepancies on which the applicant sought to found had been considered by the trial court. On this matter the appeal court could not say that the trial court was not entitled to reach the conclusion which it did.

3.19 Mr Taylor also founded on the fact that Mr Gauci had identified photographs of Mohammed Salem and Abo Talb in terms similar to the identification which he had made of the applicant's photograph in February 1991. The appeal court's view, at paragraph 292 of its opinion, was that the fact that the witness had stated that two other men, in addition to the applicant, resembled the purchaser did not detract from the evidence relating to the applicant. The evidence that the applicant resembled the purchaser was simply one of the circumstances founded on by the Crown as forming part of the circumstantial case against the applicant and, of course, all the other circumstances had to be taken into account.

3.20 The appeal court referred to the trial court's position that from Mr Gauci's evidence "it could be inferred that the [applicant] was the person who bought the clothing which surrounded the explosive device" (paragraph 88 of trial court's judgment) and it dealt with the submission by Mr Taylor that evidence of resemblance could not, of itself, support the inference that the applicant was the purchaser. In doing so, the appeal court noted that the trial court had accepted that Mr Gauci had not made a positive identification of the applicant. However, the trial court had referred, in paragraph 88 of its judgment, to the fact that it had already accepted that the date of purchase was 7 December 1988 when the applicant was shown to have been in Malta. The evidence of the date of the purchase was based primarily on Mr Gauci's evidence. The appeal court went on to say (paragraph 293):

> "*...it seems to us that the trial court was simply saying that Mr Gauci's evidence by resemblance taken along with evidence as to the date of the purchase, when the [applicant] was proved to have been staying in Sliema, enabled the inference to be drawn that he was the purchaser."*

3.21 The appeal court also referred to the alleged difference in the quality of the photograph of the applicant which was picked out by Mr Gauci in February 1991, compared with the other 11 photographs which he was shown at that time. Its view was that the difference in quality was "marginal" and that the trial court was fully justified in taking the view that the criticism of the photographs had no validity (paragraph 295).

3.22 The appeal court concluded its consideration of ground of appeal A2 by saying, at paragraph 297, that "having considered the criticisms of the way in which the trial court dealt with the issue of identification, we are satisfied that it was entitled to treat Mr Gauci's evidence, so far as it went, as being reliable and as being a highly important element in the case."

3.23 Ground of appeal A3 was in the following terms:

> *"While the court noted at para. 55 the defence submissions on the prejudicial effect of pre-trial publicity, it failed to deal with those submissions and, in*

particular, failed to indicate whether those considerations affected the value to be attached to the identifications at Identification Parade and in court."

3.24 The appeal court addressed this ground in paragraph 302 of its opinion, observing that the trial court had noted what had been said by the defence regarding pre-trial publicity. It said Mr Taylor's argument was based particularly on the fact that the witness had seen the *Focus* magazine article containing the applicant's photograph not long before the identification parade in April 1999. It noted the trial court's position that before assessing the quality and value of the identifications it was important to look at the history, and that the trial court had then proceeded to do that and had noted that Mr Gauci had picked out a photograph of the applicant in February 1991. Having considered the history in very considerable detail the trial court had concluded that Mr Gauci's identification by resemblance was reliable.

3.25 According to the appeal court Mr Taylor had submitted at appeal that Mr Gauci might have been influenced in his identification by having seen the applicant's photograph in the *Focus* magazine not long before the identification parade was held. The appeal court's view was that if it was going to be suggested that Mr Gauci's identification at the identification parade and in court had been influenced by seeing the photograph of the applicant in the magazine, that should have been put to Mr Gauci in cross examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci in cross examination, but it did not appear that the defence sought directly to challenge his evidence that the applicant resembled the purchaser of the clothes.

3.26 While it was also alleged by Mr Taylor at appeal that photographs of the applicant had previously been published in the media across the world, the appeal court noted that there was no evidence that, even if that had happened, Mr Gauci had seen any of them, other than the photograph contained in the *Focus* magazine shown to him by another shopkeeper. It concluded that there was no substance to this ground of appeal.

The date of purchase

3.27 In ground of appeal A1 it was alleged that the trial court erred in finding that the date of purchase of the clothes from Mary's House was 7 December 1988. The ground was then divided into nine sub-paragraphs, (a) to (i). The first three dealt with the evidence about football matches. Ground (d) addressed the weather evidence and grounds (e) and (f) related to the Christmas lights. The remainder addressed Mr Gauci's evidence that the purchase was about two weeks before Christmas, the evidence that 8 December 1988 was a public holiday in Malta and the evidence about an order of pyjamas on 25 November 1988.

3.28 Before addressing those grounds the appeal court summarised Mr Gauci's evidence as to the date at paragraph 313 of its opinion. It noted that in his evidence in chief, Mr Gauci said the purchase was made slightly before Christmas, and that it must have been about a fortnight before Christmas. The sale was made after 1830 hours, the shop normally closing at 1900 hours. He had told the police in September 1989 that he was sure that it had been midweek when the man called. In cross examination Mr Taylor explored what Mr Gauci meant by "midweek." Mr Gauci then stated that he thought Wednesday was midweek. He also stated that his brother, Paul Gauci, who was in the business with him, was not in the shop at the time of the purchase although he had come in after the purchaser had gone to get a taxi. Mr Gauci was asked where his brother had been that afternoon and he replied that "he must have been watching football, and when he comes late that is what usually happens, so I think that was what happened that day." The appeal court noted that Paul Gauci was not called as a witness.

Football evidence

3.29 Grounds of appeal A1 (a) to (c) were in the following terms:

> "(*a) The court misconstrued the terms of the joint minute read on day 31 as agreeing that "whichever football match or matches Paul Gauci had watched would have been broadcast by Italian Radio Television either on 23 November 1988 or 7 December 1988" (opinion para 64).*

That Minute only agreed that football was broadcast by Italian Radio Television at certain times on those dates.

There was no basis on the evidence for inferring that these were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988.

There was no evidence from which it could be inferred that Paul Gauci had watched football on television only on one or other of those dates.

Paul Gauci (Crown witness number 596) did not give evidence and the only evidence that he may have been watching football on the day of the purchase came as hearsay from his brother Anthony Gauci…

(b) There was no proper basis on the evidence for the finding at paragraph 67 of the opinion that the date of purchase of the clothes was either 23 November or 7 December 1988.

(c) The court accordingly erred in approaching the question of the date of purchase as a choice between only 23 November and 7 December 1988."

3.30 The appeal court noted the terms of the relevant joint minute and at paragraph 314 it referred to the trial court's judgment, in which the following statement was made (at paragraph 64):

"It was agreed by Joint Minute that whichever football match or matches Paul Gauci had watched would have been broadcast by Italian Radio Television either on 23 November 1988 or 7 December 1988."

3.31 The appeal court said at paragraph 319 that it was satisfied that the trial court had misinterpreted the joint minute. It simply related to football broadcasts on 23 November and 7 December. It did not contain any agreement that whichever football match or matches Paul Gauci had watched would have been broadcast on either of those dates.

3.32 The appeal court also noted Mr Taylor's argument that the date of the purchase of the clothing was important, as there was evidence that the applicant had been staying in Sliema on 7 December, but if the transaction had not taken place on 7 December, the purchaser could not have been the applicant.

3.33 According to the appeal court's opinion (paragraph 316) Mr Taylor submitted that the trial court's finding that the applicant was the purchaser was based on (1) Mr Gauci's evidence of identification as far as it went, (2) the finding that the purchase took place on 7 December, and (3) the fact that the applicant was in Malta on that date and had stayed in a nearby hotel. However, without the finding as to the date of purchase, the trial court would not have been able to conclude that the applicant had been the purchaser. Further, Paul Gauci had not been called to give evidence, so there was no first-hand evidence that he had actually been watching football on 7 December or on any other date. Mr Taylor stated that the applicant had not introduced 23 November as an alternative date. The defence position had been that there was no reliable evidence that the purchase had taken place on 7 December, the only date on which the purchaser could have been the applicant. Mr Taylor also submitted that although the defence had not treated 23 November as the only alternative, there was a body of evidence supporting 23 November. Indeed, the defence submission had been that the evidence demonstrated that 23 November was more likely to have been the date when the purchase took place.

3.34 The appeal court's view was that it was important to see how the two dates were introduced (paragraph 319). The Crown case was that the date of purchase was 7 December. Mr Gauci had stated that the purchase had taken place on a Wednesday, and 7 December was the only Wednesday (between 18 November and 21 December) when the purchaser could have been the applicant. The applicant had clearly put 23 November in issue as a competing date and had led evidence as to the weather conditions on both dates, submitting that this evidence, having regard to Mr Gauci's evidence as to the weather on the day of the purchase, favoured 23 November. Accordingly, the Crown's position was that there was evidence that the correct date was 7 December, and the defence position was that there was evidence showing that 23 November was a better candidate, although it was clear that any other date of purchase would be sufficient for its purposes. It did not appear that there was any

evidence which was directed to showing that the date of purchase was Wednesday 30 November or Wednesday 14 December. The critical issue was, according to the appeal court, whether the trial court was satisfied that the date of purchase was 7 December. If it had not been so satisfied, then one of the important circumstances relied upon by the Crown would not have been established. However, having regard to the way in which the case was presented to the trial court it seemed to the appeal court that, in effect, the only real competing date was 23 November. In the appeal court's opinion, the trial court did not err in approaching the case on that basis. If, however, it did err in its approach on this matter the appeal court was not satisfied that the error was of such materiality as to constitute a misdirection, nor was it satisfied that its misinterpretation of the terms of the joint minute was material.

The weather conditions

3.35 Ground of appeal A1 (d) related to evidence of the weather conditions at the time the clothes were purchased and the significance of that evidence in relation to the date of the purchase. It was in the following terms:

> *"(i) The court failed to take proper account of the nature of the rainfall about which Major Mifsud gave evidence when he said there was a 10% chance of rain at Sliema between 6.30pm and 7pm on 7th December 1988.*
>
> *Such evidence was inconsistent with Gauci's description of rainfall on the date of purchase which, he said, made the ground damp.*
>
> *(ii) The court failed to have proper regard to the finding that the weather on 23rd November would have been wholly consistent with a light shower between 6.30pm and 7pm."*

3.36 At paragraph 321 of its opinion the appeal court noted that in evidence Mr Gauci had described the weather when the man came to the shop:

> *"When he came by the first time, it wasn't raining, but then it started dripping. Not very… it was not raining heavily. It was simply – simply dripping, but as a matter of fact he did take an umbrella, didn't he. He bought an umbrella."*

3.37 The appeal court also referred to the fact that in an earlier statement to the police, Mr Gauci had said that the purchaser had put up the umbrella outside the door of the shop because it was raining. When he returned to the shop, the umbrella was down because it had almost stopped raining, and it was just drops coming down. In another statement he had said that it had almost stopped raining when the man came back, and there were a few drops still coming down. He said in evidence that it was not raining, it was just drizzling. In a statement dated 10 September 1990, he said that just before the man left the shop there was a light shower of rain just beginning. There was very little rain on the ground, no running water, just damp.

3.38 The appeal court noted that Major Joseph Mifsud had given evidence at the trial on behalf of the applicant. He had been the chief meteorologist at the Meteorological Office at Luqa airport between 1979 and 1988. He was shown his department's meteorological records for two periods, 7/8 December 1988 and 23/24 November 1988. He said that on 7 December 1988 there was a trace of rain at Luqa which fell at 0900 hours but that no rain was recorded later in the day. Sliema was about five kilometres from Luqa. At Sliema, between 1800 and 1900 on 7 December he said "that 90% there was no rain" but that there was always a possibility that there could be some drops of rain, about 10% probability. He thought that a few drops of rain might have fallen but he would not have thought that the ground would have been made damp. To wet the ground the rain had to last for quite some time. So far as 23 November was concerned there was light intermittent rain at Luqa from noon onwards which by 1800 GMT had produced 0.6 of a millimetre of rain, and he thought that the situation in the Sliema area would have been very much the same.

3.39 At paragraph 323 of its opinion the appeal court noted that the trial court had had no doubt that the weather on 23 November would have been consistent with a light shower between 1830 and 1900 but had gone on to say that the evidence of Major Mifsud did not rule out the possibility that there was a light shower on 7 December. The appeal court noted also that the trial court had observed that it was perhaps unfortunate that Mr Gauci was never asked if he had any recollection of the weather at any other time on that day, as evidence that this was the first rain of the day would have tended to favour 7 December over 23 November.

3.40 The appeal court said at paragraph 327 that the evidence about the weather conditions was only one of the factors which the trial court had taken into account in reaching its conclusion that the date of the purchase of the clothing had been 7 December. Ground of appeal A1 (d) alleged that the trial court "failed to take proper account" of Major Mifsud's evidence that there had been a 10% chance of rain at Sliema on 7 December and "failed to have proper regard" to the finding that the weather on 23 November would have been wholly consistent with a light shower between 1830 and 1900 hours. It was not suggested that the trial court had ignored those factors and, indeed they were expressly set out in paragraph 65 and 67 of its judgment. The appeal court observed that the criticisms related to the weight which the trial court placed on the evidence in question, but that the weight to be placed on it was a matter for it and not for the appeal court. The trial court had been entitled to take into account the evidence of the weather conditions on both dates when considering what inference should be drawn as to the date of purchase, and the appeal court did not think that any valid criticism could be made of its approach.

The Christmas decorations

3.41 Ground of appeal A1 (e) stated:

> *"In relying on Gauci's evidence that the purchase was about the time that the Christmas decorations went up in Sliema, the court ignored or failed to have proper regard to the following factors:*
>
> *i. that Gauci gave conflicting evidence as to whether the decorations were up or being put up at the time of the purchase.*
>
> *ii. that in statements given to the police in September 1989 and September 1990 he had said that the decorations were not up at the date of purchase.*
>
> *iii. that there was no evidence apart from a prior statement from Gauci as to when Christmas decorations were put up in Sliema.*

iv. the confusion in Gauci's evidence as to whether the Christmas decorations related to the date of purchase or to occasions when he had been interviewed by the police."

3.42 The appeal court said at paragraph 332 that the trial court had been fully justified in taking the view that the position about the Christmas decorations was unclear, and that Mr Gauci's recollection on this matter was confused. The appeal court was not satisfied that the trial court had been shown to have ignored material factors relating to the situation regarding Christmas decorations at the time of the purchase, and it did not seem to the appeal court that the trial court had placed much weight on Mr Gauci's evidence about the Christmas decorations. In evidence, he had initially said that the Christmas lights were on at the time of the transaction, but when asked to think carefully about whether the lights were on or not he had then said: "Yes, they were putting them up." The trial court had recognised that his recollection on the matter was rather confused, but in the circumstances it was entitled to say that it would seem to be consistent with his recollection that the purchase was about the time when the decorations would be going up and that this in turn was consistent with his recollection in evidence that it was about two weeks before Christmas. In the appeal court's view this was, however, but one of the factors taken into account by the trial court in determining what was the date of purchase and it appeared to have been a factor to which the trial court understandably did not give a great deal of weight.

3.43 Ground A1 (f) stated:

"In narrating the evidence of Gauci in para. 12 the court failed to take account of the fact that the terms of his prior statements demonstrated that he had not told the police in September 1989:

that the sale had occurred about a fortnight before Christmas;

or that the Christmas lights were just being put up."

3.44 At paragraph 334 of its opinion the appeal court said that Mr Taylor had submitted that nowhere did the trial court acknowledge that Mr Gauci had never told the police, at any of the early interviews, that the sale had taken place about a

fortnight before Christmas, or that the lights were just being put up, as he said in evidence 12 years after the event. The advocate depute's response was that Mr Gauci had given evidence that the police had come to see him at the beginning of September 1989. He could not remember the date of the sale but, on being asked if he was able to tell them that it was towards the end of 1988, he replied: "Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been a fortnight before Christmas but I can't remember the date." Therefore, according to the advocate depute, it appeared to be Mr Gauci's recollection that he had told the police that it was about a fortnight before Christmas. The question as to whether he had in fact said that to the police was not specifically brought out in evidence or made the subject of submission.

3.45 The appeal court noted at paragraph 336 that the trial court had referred to statements which Mr Gauci had made to the police in September 1989 in none of which was there stated to be any reference to the purchase having taken place about a fortnight before Christmas or to the fact that the Christmas lights were just being put up. The appeal court did not consider that it was necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage as this must have been quite apparent to it.

Other aspects of the evidence as to the date of purchase

3.46 Ground of appeal A1 (g) stated:

> *"In relying on Gauci's evidence that the purchase was about two weeks before Christmas, the court ignored or failed to have proper regard to the following factors:*
>
> *i. Gauci's evidence that he had no recollection of the day or date of purchase.*
>
> *ii. his evidence that his recollection had been better when he had given statements to the police.*

iii. the terms of those statements when he said on 1st September 1989 that the purchase had taken place in the winter of 1988 and 10th September 1990 when he said 'at the end of November' 1988.

iv. the evidence of the weather on 23rd November and 7th December 1988 which clearly favoured the former date."

3.47 At paragraph 338 of its opinion the appeal court referred to Mr Taylor's submission that in reaching the conclusion that the sale had taken place on 7 December, the trial court had relied in part on Mr Gauci's evidence that it had taken place about a fortnight before Christmas, but had ignored other material parts of his evidence which undermined that evidence. In evidence in chief, he had originally stated that he could not remember the date of the sale, and he had also stated in evidence that his memory of the sale had been better when he was interviewed by the police.

3.48 The appeal court noted at paragraph 340 that Mr Gauci was not at any stage able to put an exact date on the sale of the clothes. When interviewed by the police he had referred, *inter alia*, to "one day during the winter" and "the end of November 1988." In evidence, he had said that it must have been about a fortnight before Christmas. The trial court had seen and heard the evidence which he gave and it was open to it to accept the evidence given by Mr Gauci in court that it was about a fortnight before Christmas, and there was no need for it to refer in its judgment to previous statements which could be regarded as being contrary to the evidence which it chose to accept.

3.49 Ground of appeal A1 (h) was in the following terms:

"The court erred in dismissing a defence submission (at paras 64 and 67) that it should have regard to evidence that Thursday 8th December 1988 was a public holiday when all shops in Sliema would have been closed. That evidence whether viewed in isolation or together with the evidence of Mr. Gauci that the purchase occurred midweek, by which he meant that his shop would have been open the day after, was available for consideration and should not have been ignored."

3.50 The appeal court noted at paragraph 342 that Mr Gauci said in cross examination that by "midweek" he meant a Wednesday. It was not put to him that Thursday 8 December 1988 was a public holiday, being the day of the Feast of the Immaculate Conception. Defence evidence to that effect was later given by Major Mifsud. The trial court stated in paragraph 67 that it was unimpressed by the suggestion that, because Thursday 8 December was a public holiday, Mr Gauci should have been able to fix the date by reference to that. The trial court took the view that even if there was some validity in that suggestion, it lost any value when it was never put to him for his comments.

3.51 Mr Taylor had submitted to the trial court that the fact that the day after the sale had been a public holiday would stick in the shopkeeper's mind. That, in the appeal court's view, would have been all the more reason for putting the point to Mr Gauci in cross examination if anything was going to be made of it with a view to rebutting the Crown's case that the sale had taken place on 7 December. The defence having failed to do so, the appeal court was of the opinion that the trial court was correct in taking the view that the failure to cross examine Mr Gauci on the matter resulted in the point losing any value which it might otherwise have had (paragraph 345).

3.52 Ground of appeal A1 (i) stated:

> *"The court erred in dismissing a defence submission that it should have regard to the fact that eight pairs of pyjamas were ordered by Gauci on 25th November 1988 as raising an inference that the purchase of clothing, including pyjamas, had taken place prior to that date (para 66).*
>
> *That evidence was available for consideration by the court and the ability of the court to draw inferences from it did not depend on Gauci being asked about the sequence of events or the state of his stock on 7th December 1988."*

3.53 The appeal court noted at paragraph 350 that it was for the trial court to decide what inferences to draw from evidence which it accepted. The suggestion by the defence that Mr Gauci's re-ordering of eight pairs of pyjamas on 25 November was related to his sale of two pairs of pyjamas appeared to the appeal court to have

been no more than a matter of speculation. In any event, even if it was a possible inference, it was certainly not one which the trial court was bound to draw, particularly since, as the trial court noted at the end of paragraph 66 of its judgment, the matters were not put to Mr Gauci.

Appeal court's conclusions regarding the date of purchase

3.54 The appeal court's concluding remarks on the subject of the date of purchase are contained in paragraph 351 of its opinion and are in the following terms:

> *"For the reasons which we have given, we have not been persuaded by the submissions advanced in support of any of the sub-paragraphs of ground of appeal A1 that there was a misdirection on the part of the trial court. It was not submitted to us that there had been insufficient evidence to entitle the trial court to conclude that the date of the purchase of the clothing was 7 December 1988. It was for the trial court, having considered all the evidence, to decide what, if any, inference should be drawn as to the date of the purchase of the clothing. It is clear that the trial court placed reliance, as it was entitled to do, on Mr Gauci's evidence that the sale had taken place about two weeks before Christmas. The sale was made after 1830 hours and the shop closed at 1900 hours. When he was first interviewed by the police on 1 September 1989 Mr Gauci said that he thought that the sale had been on a weekday. On 19 September 1989 he told the police: "I am sure it was midweek when he called." At the trial the defence elicited from him that when he used the word "midweek" he meant a Wednesday. So his evidence was to the effect that the transaction had taken place on a Wednesday about two weeks before Christmas. The trial court considered the other evidence having a possible bearing on the date of the purchase. Mr Gauci's recollection was that at the time of the transaction his brother had been watching football on television, but he said that he had appeared at the shop when the purchaser was away getting a taxi. It was agreed in the joint minute that on 7 December a football match was being shown on television which began at about 1640 hours and finished at 1834 hours local time, which was consistent with the sale having taken place on 7 December, although it was agreed that football was also on television on the afternoon of 23 November. The evidence about the weather was*

wholly consistent with the transaction having taken place on 23 November but the possibility of a light shower in Sliema between 1830 and 1900 hours on 7 December was not ruled out. The evidence of Mr Gauci about the Christmas decorations was confused but could be regarded as being consistent with 7 December being the date of purchase. The trial court stated that it had considered all the relevant factors and concluded that the date of purchase was Wednesday 7 December. In our opinion that was an inference which it was entitled to draw on the basis of the evidence before it."

Applicant's association with Edwin Bollier

3.55 Ground of appeal E stated:

"The court erred in treating evidence of association with the witness Bollier and apparent involvement in military procurement as supportive of a finding of guilt (paras 88 and 89)."

3.56 The appeal court noted that in paragraph 88 of the trial court's judgment it stated that it accepted evidence that the applicant was a member of the JSO, occupying posts of fairly high rank. One of these was head of airline security, from which, it said, it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which LAA operated. The trial court then stated:

"He also appears to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO. In his interview with Mr Salinger he denied any connection with MEBO, but we do not accept his denial."

3.57 The appeal court observed at paragraph 354 that this passage of the trial court's judgment might be taken along with earlier passages in which the trial court said that MEBO supplied electrical, electronic and surveillance equipment (paragraph 44), and that in 1988 it leased an office in its Zurich premises to a firm ABH in which

the applicant and Badri Hassan were principals. They had explained to Mr Bollier that they might be interested in taking a share in MEBO or in having business dealings with MEBO (paragraph 54).

3.58 At paragraph 356 the appeal court expressed its view that it did not consider that the trial court had taken into account irrelevant matters. It had to be borne in mind that circumstantial evidence may well not be of itself of a criminal character. Thus, the evidence of association or involvement could not of itself show the applicant's guilt. However, it could show that the applicant was no stranger to Mr Bollier and that, at least to some extent, he was involved with the obtaining of military equipment. The appeal court was satisfied that neither of these matters should be regarded as having no conceivable bearing on the proof of the circumstantial case against the applicant.

The use of the Abdusamad passport

3.59 Ground of appeal F stated:

> *"In determining in para. 87 in relation to the Abdusamad passport that 'there was no evidence as to why this passport was issued to him' the court failed to take account of the defence submission that there was an inference to be drawn from the evidence of the witness Gharour which offered such an explanation."*

3.60 Moloud Mohamed El Gharour gave evidence as the interim director of the General Passport and Nationality Department in Libya.

3.61 The appeal court stated at paragraph 358 that on an examination of the defence submissions, it could be seen that they were founded on evidence that, despite the imposition of sanctions, LAA had continued to operate, the inference being, it was said, that it had found a way round them. It was also suggested that it could be inferred that someone associated with LAA might have a use for a coded passport. Mr Gharour had given evidence that, whatever department wanted to have a coded passport issued to a member of its staff, applications for such a passport were directed through the JSO, later named the ESO. The implication, according to Mr Taylor

when addressing the appeal court, was that the applicant required such a passport in connection with the obtaining of aviation parts for the airline company in the face of sanctions.

3.62 The appeal court stated at paragraph 359 that it could well understand why the trial court did not specifically deal with this suggestion, as it was entirely based on speculation. There was no evidence before it that the applicant was involved in obtaining aviation parts for LAA, let alone had reason to use a passport with a false name in this connection. It was noted that at the trial counsel for the applicant had departed from a line of evidence which was directed to showing that the issue of coded passports was designed to circumvent sanctions. There was no explanation as to what the applicant had been doing on his previous trips in which he had used the Abdusamad passport. As for Mr Gharour, all that he had said was that his department did not know why a coded passport was to be issued to a member of the staff of another department. He could not give an example of a purpose for which one might be requested as he was not a specialist.

Alternative explanations for the applicant's visit to Malta on 20-21 December 1988

3.63 Ground of appeal D stated:

> *"The court erred in ignoring the explanation advanced for the [applicant's] visit to Malta on 20th and 21st December 1988 and the evidence of the behaviour of the [applicant] inconsistent with terrorist activity at that time (para 88). That explanation and evidence was set out in the submissions for the [applicant] on day 83 pages 10043.21-10061.2."*

3.64 The appeal court noted that in paragraph 88 of the trial court's judgment it had stated:

> *"On 20 December 1988 he entered Malta using his passport in the name of Abdusamad. There is no apparent reason for this visit, so far as the evidence discloses. All that was revealed by acceptable evidence was that the [applicant] and the second accused together paid a brief visit to the house of Mr Vassallo at*

some time in the evening, and that the [applicant] made or attempted to make a phone call to the second accused at 7.11am the following morning. It is possible to infer that this visit under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device. Had there been any innocent explanation for this visit, obviously the inference could not be drawn. The only explanation that appeared in the evidence was contained in his interview with Mr Salinger, when he denied visiting Malta at that time and denied using the name Abdusamad or having had a passport in that name. Again, we do not accept his denial."

3.65 The appeal court said at paragraphs 363 to 364 that the trial court had considered what evidence about the applicant's visit should be accepted, and had expressed its view in the course of paragraph 88. It was not for the appeal court to review what the trial court had decided to accept. There was no evidence before the trial court as to the actual purpose of the applicant's visit to Malta on 20-21 December 1988. It could be seen from his submissions that Mr Taylor sought to rely on a number of pieces of evidence. However, none of them purported to provide an actual explanation for the visit. Thus, first, the trial court was reminded that at that time arrangements must have been made for the managing director and an employee of a Maltese company to go to Tripoli to see if that company could build a staircase in the applicant's house and provide him with a quotation for the purpose. According to that evidence, they went to Tripoli on 29 December 1988. Secondly, reference was made to evidence that the applicant was taking an interest in a company Medtours, which was being set up by the co-accused and another man, Vincent Vassallo, and that it was hoped that the applicant could use a contact with an oil company to provide Medtours with a business opportunity. Thirdly, the defence founded on evidence that it was not unusual for persons to come to Malta from Libya for a short period, for example to do shopping.

3.66 The appeal court stated at paragraph 365 that the trial court was entitled to regard none of these pieces of evidence, even if they had been accepted, as providing an alternative explanation. None of them in any event could provide an explanation

for the applicant travelling under a false name, let alone doing so on this occasion, and that for the last time.

3.67 The appeal court observed that as regards the behaviour of the applicant which was said to be inconsistent with terrorist activity, the trial court was asked to consider whether it would be consistent with such an activity for the applicant, for example, to stay in a hotel where he had stayed two weeks previously under his real name (and to which he had had to return when his flight was cancelled), and where he claimed discount as an airline official. On arrival at Malta, he had stated that he would be staying in the hotel, although he had been under no obligation to do so. He had made himself identifiable by Mr Vassallo and his wife. When leaving at Luqa airport he had, in effect, drawn attention to himself by being checked-out alone at an Air Malta desk.

3.68 The appeal court stated that these were matters for the trial court to consider. In particular, it was for the trial court to consider whether these points really addressed the undisputed fact that the applicant was travelling under a false name (paragraph 367). This ground of appeal was rejected.

Conclusion

3.69 The appeal court concluded by repeating its introductory comments that the Crown case against the applicant was based on circumstantial evidence, and that that made it necessary for the trial court to consider all the circumstances founded on by the Crown. The appeal court went on to note once again that the appeal was not about sufficiency of evidence or the reasonableness of the verdict, Mr Taylor's position being that the trial court had misdirected itself in various respects. The court had therefore not had to consider whether the verdict was one which no reasonable trial court, properly directing itself, could have returned in the light of the evidence which it had accepted, and characterised the grounds of appeal as being concerned, for the most part, with complaints about the treatment by the trial court of the material and submissions which were before it. It then formally refused the appeal.

CHAPTER 4
THE REVIEW PROCESS

(1) The nature and scope of the submissions to the Commission

4.1 This section sets out the nature of the various submissions received by the Commission and the approaches taken to certain of these.

(a) The initial application made on behalf of the applicant

4.2 On 23 September 2003 the applicant, through his then solicitors MacKechnie and Associates, lodged an application with the Commission seeking review of his conviction. The application was extensive, comprising a large volume of submissions (volume A), together with fifteen volumes of supporting materials (volumes B to P).

4.3 Volume A contained detailed arguments under a number of different heads, notably: procedural unfairness, unreasonable verdict, sufficiency of evidence, the identification evidence, the incrimination defence, disclosure, defective representation, abuse of process and fresh evidence. The submissions concluded with draft grounds of appeal. It was submitted that these grounds were of obvious substance, and that the applicant had not been given the opportunity to have them argued before the High Court. The Commission was urged to make a reference and to investigate further those matters raised in the section of volume A concerning fresh evidence. A copy of volume A is contained in the appendix of submissions.

4.4 The volumes of supporting materials contained a wide variety of detailed information, including copies of documents relating to the trial and appeal process, legal authorities, documentation purportedly relating to fresh evidence, media reports and numerous other papers connected with the submissions.

4.5 The Commission's views on the issues raised by volume A are set out in the following chapters.

(b) The subsequent submissions made by MacKechnie and Associates

4.6 Following submission of the initial application, MacKechnie and Associates continued to conduct its own enquiries in the case and in due course made various further submissions on the applicant's behalf.

4.7 The majority of these submissions related to items found to have been present within the primary suitcase. The first two sets of further submissions, concerning the fragments of grey Slalom shirt (submitted to the Commission on 2 June 2004) and the fragments of Toshiba manual (submitted on 21 June 2004), greatly expanded upon matters raised in the initial application. Subsequently, submissions were made regarding the fragments of a pair of brown check Yorkie trousers (submitted on 29 July 2004) and a blue babygro (submitted on 22 November 2004), which raised matters not referred to at all in the initial application. On 4 October 2004 the Commission received three large volumes of submissions regarding the Crown witness, Anthony Gauci. Copies of all the further submissions are contained in the appendix of submissions.

4.8 The further submissions significantly broadened the scope of the application and the enquiries that might require to be conducted. Furthermore, the Commission was concerned that the frequency of the submissions was impeding the effective planning of the Commission's investigation and essentially rendering its task open-ended. In light of this, the Commission issued MacKechnie and Associates with a deadline of 30 November 2004, beyond which no further submissions would be accepted. In practice, the Commission was prepared to receive further submissions, but only where these were brief, were related to grounds that had already been raised, or were plainly of critical importance.

4.9 The submissions contained various allegations about the provenance of items recovered from the crash site and referred to in evidence. Underlying each of the submissions was a deep suspicion about the conduct of the investigating authorities. Specifically, serious allegations were made to the effect that various statements, productions and other records had been manipulated, altered, or "reverse-engineered" in order to make out a case against the applicant. Although based to some extent upon

allegations attributed to an anonymous witness referred to by MacKechnie and Associates as "the Golfer" (see chapter 5), the submissions went far beyond these.

4.10 The allegations made in the further submissions are addressed in detail in chapters 7 to 11 and 17 below. However, at this stage it is worth recording that, despite their seriousness, many of the allegations were speculative, unfocused and unsupported by proper evidence. For example, inferences of malpractice, or even criminality, were often founded on nothing more than perceived inconsistencies or irregularities in records relating to the finding, processing and examination of items of debris linked to the primary suitcase. Nevertheless, given the nature of the allegations, the Commission considered it important to investigate fully the matters raised in the submissions. This became all the more necessary, in the Commission's view, when some of the allegations later featured in the media where they were reported seemingly as fact.

4.11 The breadth of the allegations, and the often vague manner in which they were presented, meant that the Commission's examination of the further submissions was highly labour intensive. A detailed examination required to be undertaken of the procedures employed by the police and other agencies, such as the Royal Armaments Research and Development Establishment ("RARDE"), in the recording and handling of recovered debris. Numerous requests for information required to be made to Dumfries and Galloway Police ("D&G"), and inspections undertaken of original productions held by them. Witnesses required to be interviewed, and visits made to the Forensic Explosives Laboratory ("FEL") at Fort Halstead, Kent.

4.12 As noted above, while some of the allegations made in the submissions were based upon information said to have been provided by the Golfer, others were based purely on perceived irregularities in the recorded chain of evidence. The Commission's approach to the latter was that in any police enquiry, let alone one as large scale and complex as the present one, human error is inevitable. Although apparent omissions, inconsistencies or mistakes in productions records may, after a long period of time, appear difficult to explain, or even suspicious, in the Commission's view they do not, in themselves, support allegations of impropriety against those involved in the investigation.

4.13 In short, the Commission was not prepared to accept the possibility of criminality or malpractice on the part of the investigating authorities without credible, reliable and material evidence to support this.

(c) Submissions by other parties

4.14 In terms of section 194(D)(2)(b) of the Criminal Procedure (Scotland) Act 1995 ("the Act"), when considering whether to refer a case the Commission must have regard not only to the submissions made by or on behalf of an applicant, but also to any other representations made to it. In the present case, a large number of submissions were made by parties other than the applicant and his representatives.

4.15 In general, many of the submissions received from third parties were devoted to advancing alternative theories as to either the reasons for PA103's destruction, or the identity of the perpetrators. In some cases, it was clear that similar submissions had been made to the Crown and/or the defence teams at the time of trial. The Commission found nothing in any of these submissions to suggest that a miscarriage of justice may have occurred in the applicant's case. Brief summaries of the submissions are provided in the appendix.

4.16 One third party contribution worth noting here is that made by the Crown witness, Edwin Bollier, who submitted a number of lengthy reports as well as various other pieces of correspondence. As with MacKechnie and Associates, a deadline required to be issued to Mr Bollier in order to stem the flow of his submissions. In the event this did not deter Mr Bollier and he continued to submit additional reports, none of which was considered by the Commission.

4.17 The submissions which the Commission was prepared to receive from Mr Bollier's consisted of two principal allegations. The first related to the fragment PT/35(b), the item recovered from the crash site which the Crown alleged had formed part of an MST-13 timer produced by Mr Bollier's firm, MEBO. Under reference to various photographs and other documents, Mr Bollier submitted that a fragment of timer which had been obtained from a non-working prototype MST-13 circuit board

had been "planted" by the authorities. According to Mr Bollier, when the authorities realised that the fragment was from a non-working prototype they replaced this with another fragment taken from a machine-made circuit board.

4.18 Mr Bollier's other principal allegation related to the evidence obtained from Frankfurt airport which suggested that on 21 December 1988 an unaccompanied item had been transferred to PA103A from Air Malta flight KM180 which travelled from Malta to Frankfurt. Mr Bollier submitted that, in fact, the item in question had been transferred from a flight arriving from Berlin, and comprised the baggage of a passenger named Wagenfuhrer, whose journey had ended at Heathrow.

4.19 In approaching Mr Bollier's submissions, the Commission recognised that the trial court considered him to be an unreliable and, at times, untruthful witness. Furthermore, in a letter to the Commission of 5 May 2005, MacKechnie and Associates distanced themselves from Mr Bollier's submissions. It was also clear from Mr Bollier's submissions that he was at least partly motivated by financial self-interest. He referred on a number of occasions to a $32m law suit against him and MEBO which had been instigated by Pan Am's insurers, the success of which he recognised was dependent upon the finding that an MST-13 timer had initiated the explosion on board PA103. In the circumstances, it is not difficult to attribute a strong ulterior motive to Mr Bollier's submissions.

4.20 For these reasons the Commission approached what Mr Bollier had to say regarding the timer fragment with considerable scepticism. However, the Commission was not prepared to dismiss Mr Bollier's submissions on this topic out of hand. Along with Mr Meister and Mr Lumpert, Mr Bollier is one of only a small number of witnesses who has direct knowledge of MST-13 timers and who can speak to their production and supply. Moreover, his allegations regarding the timer were in some ways consistent with submissions made on the same subject by MacKechnie and Associates. Accordingly, the Commission considered the issues raised by Mr Bollier as part of its overall examination of the provenance of PT/35(b) in chapter 8.

4.21 On the other hand, the Commission did not consider Mr Bollier's submissions on the baggage evidence to warrant further enquiry. Mr Bollier is not,

and does not profess to be, an expert in airport baggage handling procedures. The validity of the evidence relating to Frankfurt airport was the subject of great scrutiny by the defence both at trial and at appeal. Moreover, the substance of Mr Bollier's allegations was communicated by him to the applicant's defence team prior to the appeal, and an assessment of his submissions at that stage concluded that they were based on a misunderstanding of the evidence.

(d) The relatives of the victims

4.22 The Commission did not receive any submissions from the families of the victims. However, Ms Marina de Larracoechea Azumendi (sister of Nieves De Larracoechea Azumendi who died in the disaster) enquired periodically as to progress in the investigation. The Commission also received correspondence in November 2005 from the Reverend John F Mosey (father of another of the victims, Helga Mosey). Writing on behalf of "UK Families of Flight 103", Reverend Mosey suggested that if the applicant were repatriated to Libya, or the Crown refused to oppose any appeal, alleged new evidence concerning the murder might never be examined in court. Correspondence was also received in June 2006 from Dr Jim Swire (father of Flora Swire) who expressed concern as to the length of the review process. (Similar concerns were expressed in a letter dated 21 June 2006 from Tam Dalyell, former MP for Linlithgow). Although in terms of its founding legislation the Commission was restricted in the amount of information it could disclose to the relatives, all correspondence received from them was acknowledged.

(2) The Commission's enquiries

4.23 In order fully to investigate the application, the Commission undertook a large number of enquiries both in the UK and overseas. In many instances these enquiries were preceded by protracted negotiations which significantly extended the overall review period. This section details the agencies and other bodies who assisted the Commission, and the types of information recovered.

(a) Dumfries and Galloway Police ("D&G")

4.24 As the custodians of much of the evidence, D&G was the principal source of information for the Commission, receiving over 200 separate requests for assistance. During its investigation, D&G used the Home Office Large Major Enquiry System ("HOLMES") to collate and organise the vast amount of material generated. Many of the Commission's calls for information consisted of straightforward requests for print-outs of documents stored on that system, while others required officers at D&G to carry out searches of the database or the evidence stores to address specific questions posed by the Commission.

4.25 For a significant period of the review, D&G allocated former Superintendent Thomas Gordon, then senior investigating officer in the case, and his successor, Det Inspector Michael Dalgleish (who was subsequently promoted to the rank of Det Chief Inspector), to work exclusively on the Commission's requests. Various other resources were also made available to the Commission, including a scenes of crime officer who photographed certain label productions of interest. Overall, D&G's assistance and cooperation was invaluable to the review.

4.26 A good deal of the material obtained from D&G is referred to throughout the following chapters. However, one specific issue is worth noting here.

4.27 A number of requests made to D&G related to material which was "protectively marked" (or classified). In order to resolve the potential conflict between the restrictions upon D&G as to its handling of such material, and the Commission's desire to access this and its statutory obligation to report its findings, the Commission drafted a minute of agreement regulating the obligations of both parties in respect of the production and onward disclosure of protectively marked items. Following a period of negotiation, the agreement was eventually signed in October 2005 (see appendix).

4.28 In many respects, the terms of the agreement reflect the provisions of the Commission's founding legislation and, in particular, sections 194I and 194L of the Act. For example, under the agreement D&G was obliged to produce to the

Commission, upon request, any protectively marked items which the Commission considered might assist in the exercise of its functions in the applicant's case. In return, the Commission undertook not to disclose such material to any third party without first obtaining D&G's written consent. The conditions under which such consent could be refused reflected those contained in section 194L of the Act.

4.29 Accordingly, the agreement placed the Commission in an equivalent position to that in which it would have been had it obtained an order from the High Court for production of the material. As a result of the agreement, the Commission obtained a number of items of interest, reference to which is made in the following chapters.

(b) The Security Service

4.30 Although the above agreement covered all protectively marked items in D&G's possession or control, D&G was entitled to refuse disclosure to the Commission where this would breach an undertaking given to any third party not to disclose the material in question. The purpose of this provision was to exclude from the agreement materials "owned" by the intelligence services.

4.31 In these circumstances the Commission considered it necessary to pursue a separate agreement with the Security Service in order to regulate access to material owned by them but held by D&G. This agreement was signed in January 2006 and broadly reflects the terms of that entered with D&G. A copy of the agreement is contained in the appendix of protectively marked materials.

4.32 Following the signing of this agreement, visits were made to D&G on a number of occasions during which members of the enquiry team were granted unrestricted access to protectively marked materials held there. The materials were substantial, comprising the entire contents of two filing cabinets and a very large number of index cards listing the "nominals" of various figures in the case, as well as other "categories" of information.

4.33 Given the volume of the material, targeted searches were conducted to identify any documents relating to particular individuals who featured in the case.

These included the applicant, Abo Talb, Haj Hafez Dalkamoni, Marwan Khreesat, Ahmed Jibril and Abu Elias. Documents relative to the Miska bakery were also examined. Additional searches were conducted to identify materials relating to Anthony and Paul Gauci. Searches were also undertaken for documents relevant to the circuit board fragment PT/35(b) and MST-13 timers in general, including those indexed under headings such as MEBO, M580, CIA, the Stasi and Senegal (see chapter 8). More general searches were conducted to cover all documents in particular date ranges considered by the Commission to be of significance. A number of miscellaneous files and folders containing protectively marked materials were also examined.

4.34 During its examination of these materials it became apparent that other protectively marked items, known as Special Branch Other Documents ("SBOD"), existed. The Commission sought access to these materials in 2006 but was informed by an officer at D&G that they had been destroyed. However, on 15 January 2007 DCI Dalgleish wrote to a member of the enquiry team advising that during a reorganisation of D&G's secure store a filing cabinet marked "SBOD" had been discovered. DCI Dalgleish offered access to the entire contents of the cabinet but given that the Commission was by that time focussing upon materials held by the Security Service (see below) ultimately only a small number of SBOD items were viewed. None of these items was thought to justify a request for consent to disclose.

4.35 Several visits were made to the offices of the Security Service at Thames House, London, during which a member of the enquiry team was given access to a substantial quantity of protectively marked items held there. Searches were conducted within the general case files to cover all documents in particular date ranges considered to be of significance.

4.36 Notes were taken by the Commission of all protectively marked items considered to be relevant to the case and these are currently held by D&G and the Security Service as appropriate.

4.37 As indicated, in terms of the agreements with D&G and the Security Service the Commission undertook not to disclose protectively marked materials without first

obtaining the consent of those organisations. In the event of a dispute, provision was made in the agreements for this to be determined by the courts. The Commission sought the consent of both D&G and the Security Service to disclose a number of the items to which it was given access under the agreements. Where such consent was granted, reference is made to the items in the relevant chapters below and/or copies of the items themselves are produced (with redactions by D&G or the Security Service) in the appendix of protectively marked materials.

4.38 In many cases, consent to disclose was not granted due to the fact that the Security Service considered the material concerned had originated from sensitive sources and where they judged that its disclosure in the Commission's statement of reasons would risk damage to national security. In the case of the materials "owned" by D&G, consent to disclose was not granted where D&G judged either that the source of the material or the material itself was sensitive or where, in consultation with the Security Service, it judged that disclosure of the material in the Commission's statement of reasons would risk damage to national security.

4.39 The Commission considered taking legal action in respect of the recovery of certain of the items for which consent to disclose was not given. However, given the need to finalise the review, and the fact that a number of grounds of referral had already been identified, the decision was taken not to do so. In any event, even if an order had been obtained by the Commission under section 194I of the Act, in terms of paragraph 6(5) of Schedule 9A to the Act it would have been open to the Security Service to notify the Commission that onward disclosure might be contrary to the interests of national security. In such circumstances, the Commission would have been bound to deal with the material in a manner appropriate for safeguarding the interests of national security. It is therefore unlikely that the Commission would have been any less constrained in its ability to disclose the items had it made use of its statutory powers.

4.40 It is important to make clear, however, that the only undisclosed items under the agreements which caused the Commission to conclude that a miscarriage of justice may have occurred are those referred to in chapter 25.

4.41 By letter dated 23 March 2007, Crown Office advised the Commission that in 1999 and the early part of 2000 members of the prosecution team attended the offices of the Security Service at Thames House to examine protectively marked materials held there. In addition, following the disclosure to the Crown of the Goben memorandum (see chapter 14), arrangements were made in early October 2000 for the prosecution team to examine certain UK intelligence files in relation to "the asset of the Norwegian Police Security Service who was the subject of that disclosure". Material was also made available to the Crown by other intelligence agencies, namely the Secret Intelligence Service ("SIS") and Government Communications Headquarters ("GCHQ"). According to the letter the purpose of the examination was to find material which: (a) was potentially disclosable to the defence; or (b) might assist the Crown in the presentation of its evidence. Crown Office confirmed in its letter that it did not inform the defence of its examination of any of these materials. According to Crown Office the only information disclosed to the defence as a result of this exercise was contained in a letter dated 23 April 2000 which is referred to in chapter 8 (and reproduced in the appendix to that chapter).

(c) Crown Office

4.42 The Commission submitted a large number of requests for information to Crown Office during the course of the review. While ultimately the Commission received responses to these requests, significant delays were encountered in the provision of much of the information. In some cases, these delays undermined the Commission's attempts to complete enquiries within planned timescales.

4.43 At an early stage of the review, Crown Office provided the Commission with details of the computer software company which produced the "flipdrives", the electronic databases used at trial which contained scanned images of the documentary productions. The Commission later obtained a number of these from the company concerned. Due to the limited nature of the flipdrives, however, it proved difficult to compare productions, or to print copies of these. Accordingly, on 4 March 2004 the Commission requested from Crown Office hard copies of the documentary productions in the case. In the event, Crown Office encountered difficulties in

collating and copying a full set of the productions and it was not until 8 October 2004 that these were finally produced.

4.44 On 21 June 2004, the Commission requested from Crown Office a copy of the police report of the investigation, an item which the Commission considered would assist in furthering its understanding of the case. In the event, the main body of the report was issued to the Commission in three separate instalments, the first of which was received on 21 September 2004 and the last on 28 February 2005. A further, protectively marked, section of the report, for which Crown Office required to obtain consent prior to disclosure, was not received by the Commission until 6 May 2005.

4.45 Similar delays occurred in the provision of Crown Office's "disclosure files", which contained details of evidence disclosed to the defence during the proceedings. Despite a request having been made for all such files on 21 June 2004, Crown Office could find only two, and those were not passed to the Commission until 6 May 2005. Crown Office was also asked to provide a copy of a confidential section of the papers which had been passed to them by the German police force, the Bundeskriminalamt (the "BKA"). As explained in chapter 14 below, this section of the BKA papers was not included in those which the Crown disclosed to the defence prior to the trial. In the event Crown Office advised the Commission that despite a review of their files they had not been able to find any copies of this material or any information in relation to their consideration of it.

4.46 Throughout 2004 and early 2005 the Commission made a number of requests for copies of specific Crown precognitions. However, owing to difficulties experienced by Crown Office in providing complete responses to these requests, in May 2005 the Commission sought copies of all precognitions obtained by the Crown during its preparations for trial. Part of the rationale behind this request was to ensure that no precognitions were inadvertently omitted by Crown Office staff, something always possible given that witnesses involved in more than one part of the case often gave more than one precognition, each stored under a different chapter heading. In the event, while statements in the majority of the chapters of the Crown precognition

were provided to the Commission at the end of June 2005, many of those outstanding were not received until 5 October 2005.

4.47 A further significant delay occurred in the provision of the precognition volumes containing chapter 10 of the Crown case (MEBO and MST-13 timers). In June 2005, Crown Office explained that both master sets of the chapter 10 precognitions had gone missing during the photocopying process. Eventually it was confirmed in December 2005 that despite extensive searches they could not be found. In October 2005, the Commission had been provided with an incomplete working copy of the chapter 10 materials which, along with other items subsequently provided by Crown Office, was presented to the Commission as a "reconstructed" version of the chapter 10 papers. Crown Office also undertook to compile for the Commission a "best copy" of the precognitions in chapter 10. This was finally received in June 2006, at which time Crown Office confirmed that the Commission was in possession of all Crown precognitions relating to chapter 10 of the case. The "best copy" included a small number of important items which had not been contained in the materials previously provided.

4.48 The Commission also encountered delays in obtaining responses from Crown Office for more specific information. For example, two enquiries made in April 2005 regarding the Crown witness Abdul Majid Giaka were not addressed by Crown Office until June 2006. A request for important information concerning the distribution of MST-13 timers communicated to Crown Office in April 2005 remained unanswered until January 2006.

4.49 As a result of these delays, frequent reminders required to be issued to Crown Office in relation to outstanding items, and in October 2005 the Commission was forced to write to the Crown Agent warning of possible proceedings under section 194I of the Act. In the event, such action did not prove necessary in light of assurances given by Crown Office and responses received between October and December 2005. However, further delays in early 2006 necessitated another letter to the Crown Agent on 27 April 2006. Regrettably, the situation did not improve. For example, copies of records relating to the applicant's bank accounts which were requested by the Commission in October 2006 were not received until January 2007.

4.50 Throughout January 2007, Crown Office staff assured members of the enquiry team that outstanding requests would be dealt with within specific timescales. As these were not met, on 13 February 2007 the Commission wrote once again to the Crown Agent asking that all outstanding requests be dealt with immediately, and seeking his assurance that any further requests would be accorded the highest priority.

4.51 One further issue of concern relates to the Commission's enquiries into various fragments of an umbrella recovered from the crash site and linked to the primary suitcase. According to the evidence at trial, in 1988 Anthony Gauci sold a similar umbrella to a man who, he said, closely resembled the applicant. In June 2006, the Commission obtained from the Forensic Science Service ("FSS") a preliminary opinion as to the merits of examining two fragments of the recovered umbrella (PI/449 and PK/206) for any identifiable fingerprints. The Commission considered that in the event that such prints were found they might be compared with those obtained from the applicant following his arrest. Any match would clearly have affected the Commission's conclusions in the case.

4.52 As the items in question were held by D&G, the Commission requested that they liaise with FSS regarding their handover for testing. However, shortly before the work was to commence, D&G advised the Commission that Crown Office was assuming control of the instructions to FSS and would intimate the results of the testing to the Commission. Although the Commission did not consider that the outcome of the testing would be affected by this development, it was concerned that the actions of Crown Office could be seen as undermining the Commission's independence. In the Commission's view, this was an important consideration given that the results of the testing might have confirmed the applicant as the purchaser of the clothing.

4.53 Arrangements were made by Crown Office for PI/449 and PK/206 to be submitted to FSS along with several other items, namely PT/57(a) to (d) (debris extracted from PI/449) and PT/23 (comprising fragments of plastic, locking mechanism and catch concluded to have formed part of the primary suitcase). By

letter dated 3 July 2006 Crown Office advised that forensic scientists at FSS had raised the possibility of analysing the items for DNA.

4.54 On 21 November 2006 Crown Office passed to the Commission copies of five reports by FSS. According to the reports no identifiable fingerprints were recovered from any of the fragments. However, from two pieces of plastic comprising PT/57(a) an incomplete low copy number ("LCN") DNA result was obtained. In terms of the findings the profile appeared to be from a male but did not match the DNA of the applicant and could not have come from him. According to one of the reports it was more likely than not that the larger section of PT/57(a) came from the closing mechanism of an umbrella similar to the control sample umbrella obtained by the police from Mary's House in 1989 (DC/45).

4.55 Crown Office thereafter arranged for DNA samples to be obtained from various witnesses who were known to have been involved in the recovery of PI/449. However, upon analysis of the samples there was no evidence to suggest that any of those individuals had contributed to the profile. Thereafter, on 6 April 2007, Crown Office advised that arrangements were in place to obtain DNA samples from the forensic scientists, Allen Feraday OBE, Dr Thomas Hayes, and from Mr Gauci himself.

4.56 On 13 June 2007 Crown Office sent to the Commission a report by FSS which indicated that Mr Feraday could have contributed to the profile obtained from PT/57(a). According to the report, all but one of the DNA components which make up that profile are present in Mr Feraday's DNA profile. Although there remains a single additional DNA component which could have originated from a source other than Mr Feraday, according to the report this component was unsuitable for interpretation purposes since a large number of individuals from any population might be expected to match it. The report also indicates that there is no evidence to suggest that Dr Hayes contributed to the result obtained from PT/57(a). Copies of all the FSS reports produced to the Commission are contained in the appendix.

4.57 While the delays experienced in obtaining materials from Crown Office were a source of great concern and frustration to the Commission, it is fair to say that their

responses to requests were often detailed and helpful. Furthermore, at an early stage in the Commission's enquiries Crown Office provided the Commission with an electronic database containing virtually all the statements obtained by police during the original investigation and throughout the preparations for trial. As indicated, Crown Office also facilitated the provision to the Commission of the flipdrives. Without these resources, the Commission's ability to review the case would have been seriously hampered.

(d) Justiciary Office

4.58 As well as supplying copies of various court papers, Justiciary Office provided the Commission with three copies of a CD ROM containing the entire transcript of evidence and closing submissions at trial. Transcripts of the submissions made by counsel in chambers on days 64, 65 and 66 of the trial were supplied by Justiciary Office separately in February 2006.

4.59 The Commission also obtained through Justiciary Office an additional flip drive containing those productions to which the judges were referred at trial.

(e) Foreign and Commonwealth Office ("FCO")

General

4.60 The Commission approached the FCO in respect of its enquiries in both Malta and Libya, and upon arrival in these countries members of the enquiry team obtained assistance from the British High Commission in Valletta and the British Embassy in Tripoli.

4.61 Many of the difficulties faced by the Commission in respect of its overseas enquiries stemmed from the absence of any provision in the Crime (International Cooperation) Act 2003 enabling the Commission to issue "letters of request" to foreign authorities. In terms of section 7(1) of that Act, only the Lord Advocate, a procurator fiscal or an accused person can competently apply to the domestic courts for assistance in obtaining evidence outside the UK, and only where an offence is

being investigated or proceedings have been instituted. While in terms of section 7(6) of that Act the Lord Advocate or a procurator fiscal can request such assistance directly from the foreign country, again this provision applies only when the conditions prescribed under section 7(1) are satisfied.

4.62 In most cases, however, provided that the witnesses concerned were agreeable to interview, the shortcomings of the domestic legislation did not affect the Commission's ability to conduct enquiries abroad. On the other hand, where witnesses refused to be seen, the Commission had no ready means of obtaining their accounts. A particular example of the difficulties faced by the Commission in this connection is given below.

Malta

4.63 Members of the Commission's enquiry team visited Malta on five separate occasions, mainly to interview witnesses there. The initial visit, during which an introductory meeting was held between representatives of the Commission, the British High Commission and the office of the Attorney General of Malta, took place in November 2004. In December 2004, a further visit took place in which a number of witnesses were interviewed, mainly in connection with points raised in the further submissions made by MacKechnie and Associates. Further visits took place in May and November 2005 and August 2006.

4.64 The Commission sought at an early stage of its enquiries to establish whether Anthony and Paul Gauci would be willing to cooperate in its investigation. It quickly became apparent that neither witness was prepared to do so. In July 2004, the Commission was advised by Supt Gordon of D&G that, having discussed the matter with the witnesses, it was unlikely that they would submit to interview in the absence of some means of compelling them to do so.

4.65 D&G's advice reflected that given by the Attorney General of Malta Dr Silvio Camilleri at the meeting with him in November 2004. Although Dr Camilleri was confident that the majority of witnesses the Commission sought to interview would cooperate, he did not believe that Anthony and Paul Gauci would do so. It was

explained to Dr Camilleri that under UK domestic law the Commission was not empowered to issue, or to have issued, letters of request to foreign judicial authorities to obtain their assistance in securing statements from reluctant witnesses. In these circumstances, Dr Camilleri was asked to what extent Maltese law and procedure might assist the Commission in securing the cooperation of reluctant witnesses. Dr Camilleri explained that article 649 of the Maltese Criminal Code ("the Code") had recently been amended to allow the Attorney General to receive letters of request not only from foreign courts but also from "administrative" authorities. Dr Camilleri seemed confident that the Commission could make some use of these provisions.

4.66 A copy of article 649 of the Code is contained in the appendix. Briefly, it provides that where the Attorney General passes to a magistrate a request by a foreign, judicial or administrative authority for the examination of any witness present in Malta, the magistrate shall examine that witness on oath on the interrogatories provided by the authority concerned. In terms of article 649(2), however, this provision applies only where the request by the authority in question is made pursuant to "any treaty, convention, agreement, or understanding" between Malta and the country from which the request originates.

4.67 In light of these provisions, the Commission considered that the best means of securing Anthony and Paul Gauci's cooperation was to obtain an agreement or understanding between the UK and Malta, the terms of which would permit the Attorney General of Malta to receive and act upon requests by the Commission under article 649(1) of the Code. The Commission raised this matter with the FCO at a meeting in January 2005. In June of that year the FCO indicated that, given the absence of any existing agreements between the UK and Malta, negotiations should be held with a view to establishing an Understanding of the kind envisaged by the Commission. Thereafter, on 20 July the Commission wrote to the FCO enclosing a draft Understanding and letter of request. On 25 July 2005, both drafts were forwarded by the FCO to the British High Commission, which in turn communicated them to the Attorney General's office in Malta.

4.68 After considerable correspondence and efforts by the Commission, the High Commission and the FCO, the Understanding was finally signed on 6 June 2006 on

behalf of the UK by the High Commissioner, and on behalf of the Republic of Malta by the Attorney General. A copy of the Understanding is contained in the appendix. Briefly, it allowed the Commission, where it believed that a person present in Malta had information regarding the applicant's case, to issue a letter of request to the Attorney General seeking his assistance under Maltese law and procedure. The Understanding therefore provided a means by which the Commission could make use of the provisions of article 649(1) of the Code.

4.69 On 6 June 2006, the Commission's senior legal officer wrote to DI Dalgleish at D&G enclosing letters addressed to Anthony and Paul Gauci. In the letters, the role and function of the Commission were explained, and both witnesses were asked to make contact in order to arrange interviews. The witnesses were also informed of the nature and effect of the Understanding which had been signed. DI Dalgleish then met the witnesses and explained matters to them. A further meeting then took place between the witnesses and an officer from Strathclyde Police who had been responsible for their security throughout the trial and appeal processes.

4.70 Interviews with both witnesses took place in Malta on 2 and 3 August 2006. In January 2007, Paul Gauci provided a brief supplementary account in which he sought to clarify several aspects of his initial statement. Copies of both statements were sent to him and, subject to those clarifications, he confirmed that they reflected his position on matters. The Commission considered sending Anthony Gauci's statement to him, but because he does not read English it was decided that the best means of confirming its contents was to arrange a further meeting with him. As they had been interviewed separately the Commission also wished to avoid a situation in which Paul Gauci became involved in reading Anthony Gauci's statement to him. The Commission was informed, however, that Anthony Gauci was unwilling to attend a further meeting and accordingly the terms of his statement have not been approved by him. Nevertheless, the Commission is satisfied that the statement accurately reflects his position at interview. Copies of the statements given by both witnesses are contained in the appendix of Commission interviews.

Libya

4.71 The sole purpose of the Commission's enquiries in Libya was to interview the co-accused, Al Amin Khalifa Fhimah.

4.72 The Commission first wrote to the British Embassy in Tripoli on 5 August 2004, seeking assistance in obtaining approval for its enquiries from the Libyan authorities. Despite various attempts by the British Ambassador and his staff to obtain that approval, by the end of 2004 it seemed unlikely that anything would come of this. In November 2004, the Commission wrote directly to both the Libyan Ambassador to the UK Mohammed Zwai and the Libyan Minister of Justice seeking their assistance in the matter, but it was not until the involvement of the applicant's then solicitor, Edward MacKechnie, that approval for the Commission's enquiries was obtained from both the Libyan authorities and the co-accused himself. The interviews took place in Tripoli in February and May 2005. Reference is made in chapter 27 to the contents of the co-accused's statements, and copies of the statements themselves are contained in the appendix of Commission interviews.

(f) The UK Liaison Magistrate to Italy

4.73 During its preparations for trial the Crown obtained broadcast schedules held by the Italian state television channel, Radio Televisione Italiana ("RAI"), which indicated that certain football matches were shown live on 23 November and 7 December 1988 (CP 1832). The contents of these schedules eventually formed the basis of joint minute number 7 upon which the trial court relied to establish the date on which the various items were purchased from Mary's House.

4.74 As the broadcast schedules obtained by the Crown appeared to have been restricted to 23 November and 7 December 1988, the Commission sought to obtain from RAI the schedules relating to the entire period between 18 November and 20 December 1988. This was in order to establish whether during that period live football matches of the kind Paul Gauci might have watched were shown on weekdays other than 23 November and 7 December 1988.

4.75 In May 2006 the Commission approached the UK Liaison Magistrate to Italy Sally Cullen in Rome. As a result of her involvement, in November 2006 the schedules were produced by RAI to the Court of Appeal in Italy from where they were transferred to the Commission.

4.76 The Commission thereafter arranged for the schedules to be translated by the Language Centre at the University of Glasgow. The translations confirmed that, leaving aside weekends, the only live football matches broadcast by RAI during the period of 18 November to 20 December 1988 were shown on 23 November and 7 December (as detailed in joint minute number 7 at trial) and 8 December, a public holiday in Malta when Mary's House was unlikely to be open. The translations of the schedules are contained in the appendix.

(g) Public Broadcasting Services, Malta ("PBS")

4.77 PBS is the state-owned broadcasting service in Malta and was the only Maltese television channel in existence in 1988 (at which time it was known as "TVM"). The Commission approached PBS in order to obtain its scheduling records for television programmes broadcast in the period 18 November to 20 December 1988. Again, the purpose of this was to establish whether PBS had shown any live football matches of a kind that Paul Gauci might have watched.

4.78 Although the schedules for that period are no longer available, PBS informed the Commission that details of the programmes shown could be obtained from archive copies of "Gwida", a television listings magazine published in Malta. PBS thereafter supplied the Commission with excerpts of the relevant editions of the magazine. However, having viewed the broadcast schedules obtained from RAI the Commission found that the listings in Gwida for RAI channels 1, 2 and 3 were inaccurate.

(h) Malta Football Association ("MFA")

4.79 The Commission approached the MFA in order to establish whether an international football match played on 23 November 1988 between Malta and Cyprus was televised in Malta. MFA eventually confirmed to the Commission that the match

had not been televised and at interview Paul Gauci was clear that he would not have attended the match as a spectator.

(i) Meteorological Office, Luqa airport

4.80 As the defence productions included weather records in respect of only a limited range of dates, the Commission obtained from the Chief Meteorological Officer at Luqa airport copies of such records for all weekdays in the period 18 November to 20 December 1988.

(j) University of Malta

4.81 One of the matters raised on behalf of the applicant concerned the reliability of Anthony Gauci's identification of the purchaser of the clothing as being a Libyan. In terms of the judgment this was one of only two aspects of Mr Gauci's evidence which the trial court found "entirely reliable" (paragraph 67). According to the submissions, however, the Maltese commonly refer to all persons of Arab extraction in Malta as "Libyan", and Mr Gauci's evidence was therefore open to doubt.

4.82 Several of the Maltese witnesses interviewed in the early stages of the Commission's enquiries confirmed that such a tendency existed among the Maltese, although other witnesses denied that this was the case. In the circumstances the Commission considered it appropriate to conduct further enquiries in this connection.

4.83 Initially, contact was made with the departments of psychology and anthropology at the University of Malta in order to establish whether research in this area had previously been undertaken and, if possible, to obtain an opinion from a suitable expert. The Commission was advised, however, that no such research had been conducted and that the psychologists based at the University were employed in a clinical, as opposed to a research, capacity. The Commission therefore approached two research psychologists in the UK, Professor Tim Valentine of Goldsmiths College, University of London and Professor Ray Bull of the University of Leicester, both of whom specialise in matters concerning eyewitness identification. In particular their views were sought on the value of an empirical research project in Malta

designed to assess the extent to which Maltese men of a similar age and occupational background to Mr Gauci are able reliably to distinguish men of Libyan nationality from those of other Arab nationalities. Both experts considered such a study viable and submitted proposals as to how this might be achieved.

4.84 It was considered essential that a Maltese researcher also be involved in the study and the Commission therefore recruited Dr David Zammit, senior lecturer in law and anthropology at the University of Malta, to join the researchers. A member of the administrative staff at the law faculty of the University also assisted in recruiting participants for the study and during the testing itself, which took place at the University in July 2005.

4.85 The findings of the research were submitted to the Commission in a report by Professors Valentine and Bull on 10 November 2005 which was followed by a brief supplementary report by Professor Valentine on 5 January 2006. The Commission's views on the findings are contained in chapter 26.

(k) Forensic Explosives Laboratory, Fort Halstead, Kent ("FEL")

4.86 The majority of the further submissions made by MacKechnie and Associates concern the forensic evidence at trial and the conduct of, and records kept by, the scientists involved in the case. In order fully to investigate these, the Commission considered it important to review the materials held at FEL where the examination of various items of recovered debris had taken place.

4.87 An initial visit to the laboratory was made by two members of the enquiry team on 2 and 3 June 2005, during which time unrestricted access was given to all materials pertaining to the Lockerbie enquiry. Various items of potential significance were recovered including, in some cases, original documents and photographs. The contents of a small number of floppy disks found amongst the materials were transferred to a CD ROM by FEL staff who later provided this to the Commission. Members of the enquiry team also obtained records showing the movement of various productions, as well as copies of photographic log books. Reference is made to the relevant materials throughout chapters 6 to 11.

4.88 A second visit to FEL took place on 7 and 8 March 2006, when the forensic scientists, Mr Feraday and Dr Thomas Hayes, were interviewed. Various photographic negatives, relevant to matters raised in the submissions, were also examined during this visit.

4.89 Full details of the more significant items recovered are given in the relevant chapters below. However, it should be emphasised at this stage that nothing was found during either visit which might support the allegations made against Mr Fereday and Dr Hayes in the submissions.

(l) MacKechnie and Associates

4.90 As the firm of solicitors initially instructed in connection with the application, MacKechnie and Associates were a valuable source of materials during the early stages of the Commission's enquiries. In particular, they provided the Commission with a large number of defence precognitions, including those obtained from the applicant and the co-accused, the entire collection of correspondence files produced by McCourts, the firm of solicitors which represented the applicant throughout the trial and appeal, and a full copy of the register of debris recovered from the crash scene by police (the "Dexstar log"). As indicated MacKechnie and Associates were also instrumental in furthering the Commission's enquiries in Libya.

(m) McGrigors

4.91 Although it appeared that MacKechnie and Associates were in possession of the majority of the defence materials (or at least those in hard copy form), they were unable to exclude the possibility that McGrigors (the firm of solicitors instructed by the co-accused at trial and of which Mr MacKechnie was once a partner) might still retain some items. Following enquiries with McGrigors, in July 2005 the Commission obtained from them an electronic database containing all case-related documents in their possession, ranging from correspondence to internal memoranda and precognitions.

(n) ID Enquiries

4.92 ID Enquiries, a firm of private investigators, were instructed by the applicant's trial solicitors to precognosce witnesses based within the UK. The Commission received electronic copies of all such precognitions in August 2005.

(o) Taylor and Kelly

4.93 In August 2005, the applicant appointed a new firm of solicitors, Taylor and Kelly, to represent him in respect of his application to the Commission. By that stage, the Commission had already obtained from MacKechnie and Associates the vast majority of the materials it required for its review. Those items outstanding were dealt with by Taylor and Kelly throughout the remainder of 2005 and 2006. At a meeting held shortly after the change of agency, Mr Kelly, the partner dealing with the applicant's case, indicated that he would not be making any additional submissions to the Commission.

5.3 These allegations were expanded upon in a number of the further submissions lodged by MacKechnie and Associates. For example, in the submissions concerning the Slalom shirt (see chapter 7 below), it was alleged that the discrepancy in the label attached to PI/995 had been brought [redacted] In the submissions regarding the Toshiba manual (see chapter 9 below), it was claimed that the Golfer had recovered the main portion of this from the Dexstar production store, but that at that time it was intact and bore no resemblance to the fragmented item produced at trial. The same submissions alleged that the Golfer had attended a meeting of senior police officers when it was agreed that the manual would be "engineered" in order to persuade the German authorities of a link between the Autumn Leaves suspects (i.e. the Palestinian cell in West Germany which was raided by the BKA in October 1988) and the Lockerbie bombing.

5.4 The Golfer was apparently also the source of the allegations contained in the so called "Yorkie trousers" submissions (see chapter 10 below). It was claimed that during a surveillance operation in Malta prior to the bombing a person or persons associated with an alleged Palestinian terrorist cell operating on the island were observed purchasing items of clothing from Mary's House. It was also alleged that prior to Scottish police officers first attending Mary's House a further surveillance operation was carried out to ensure that the shop was not connected to terrorists.

5.5 Finally, in the submissions concerning the "babygro" (see chapter 11) it was claimed that the Golfer could speak to such an item having been found intact at the crash site, following which it was subjected to explosions and the resulting fragments presented as evidence in the case.

5.6 At a meeting with Mr MacKechnie on 16 June 2004, members of the enquiry team were informed that the Golfer had been present when an umbrella was subjected to an explosion by the Scottish police in order to procure fragments of the item. The purpose of such an exercise was not made clear at the meeting, although the implication was that it was conducted in pursuit of some illegitimate aim.

CHAPTER 5
"THE GOLFER"

The applicant's submissions

5.1 In the application to the Commission reference is made to a former police officer who, it is alleged, worked at a senior level in the original enquiry and could provide "sensitive" information about various aspects of the case. The true identity of this witness is not disclosed; instead a pseudonym, "the Golfer", is used.

5.2 According to volume A, the Golfer could speak to the following:

- that there was a different version of Anthony Gauci's first police statement of 1 September 1989;

- that Anthony Gauci had failed to identify the applicant and the co-accused from photographs shown to him;

- [redacted]

- that other police labels and productions had been interfered with or removed, including the Toshiba instruction manual recovered from the crash site (PK/689), and a US passport belonging to the passenger, Khaled Jaafar (see chapter 13); and

- that there was no investigative or operational reason to divert the focus of the enquiry from the incriminees to Libya, and that many senior officers were unhappy when this occurred.

Enquiries with MacKechnie and Associates

5.7 As part of the Commission's enquiries in this area, Mr MacKechnie was asked to provide copies of written records of all meetings that had taken place between the Golfer and representatives of his firm. On 12 August 2004 Mr MacKechnie wrote to the Commission enclosing memoranda relating to two meetings held with the Golfer during 2003. While both he and Mr Thomson, an investigator employed by his firm, had met the Golfer on other occasions, no notes were taken of these meetings. Mr MacKechnie went on to say in his letter that the Golfer had in fact visited his offices and been shown all statements given by Anthony Gauci, as well as the productions relating to the Toshiba manual, the babygro and the umbrella. According to Mr MacKechnie, this was done in order to test the Golfer's recollection and credibility. At a meeting with members of the enquiry team on 21 January 2004, Mr MacKechnie remarked that the Golfer was "doing some work" at his offices.

5.8 The first of the two memoranda is dated 23 February 2003 (see appendix), and contains details of a meeting between the Golfer and Mr Thomson. The Golfer is described as a [redacted] year old former police officer who retired from [redacted]. The memorandum suggests that the Golfer [redacted] Lockerbie enquiry, but explains that, as this was a possible motive for his coming forward, the subject had not been raised at the meeting. According to the memorandum, while the Golfer believed that the applicant might have had some involvement in the bombing, he thought that he should not have been convicted on what was described as "rubbish" evidence.

5.9 The memorandum goes on to list a number of "revelations" made by the Golfer during the meeting. These included:

- that US secret service agents attended the crash scene to recover weapons from their colleagues who had died in the disaster;

- that British secret service agents were present during police investigations;

- that while involved in the investigation [redacted] Khaled Jaafar, and was adamant that he had carried the bomb in a suitcase placed in the hold of the aircraft;

- that a second man had driven the purchaser of the clothing to Mary's House;

- that the Golfer had found the Toshiba manual in the Dexstar store and that this was used to provide a link between PA103 and the Autumn Leaves suspects; and

- [redacted] alarm clocks from a supplier in Germany frequented by the Autumn Leaves suspects, which transpired to be a forensic match to recovered fragments of the improvised explosive device used to bomb PA103.

5.10 The second of the two memoranda (see appendix) is undated but, according to Mr MacKechnie, relates to a follow up meeting between the Golfer and Mr Thomson, probably in March or April 2003. According to that memorandum, the Golfer "vaguely recalled" that the version he saw of the first police statement by Anthony Gauci mentioned that Paul Gauci was also present in the shop when the purchase of the clothing had taken place. This version of the statement, it was alleged, indicated that it had been taken by [redacted] whose name appeared in the heading. Although the Golfer had not recognised [redacted] handwriting, he was able to tell that the statement had not been produced by DC1 Henry Bell, whose handwriting he considered distinctive. According to the memorandum, the Golfer thereafter checked copies of Anthony Gauci's statements but was positive that the version he had seen was not included. The Golfer reportedly saw the statement after being asked by [redacted] to retrieve it from a fax machine at the Lockerbie Incident Control Centre ("LICC"), without letting anyone else see it. According to the memorandum, however, another officer, [redacted], was also present when the statement arrived on the fax machine.

5.11 The second memorandum contains a further reference to the Golfer having purchased alarm clocks while conducting enquiries in Germany. However, contrary to what is reported in the first memorandum, the Golfer is said on this occasion to have been unaware of the results of any forensic testing.

The Commission's interviews with the Golfer

General

5.12 In order to assess these allegations, the Commission sought to interview the Golfer on the same basis as it would any other witness in the case. It quickly became apparent, however, that obtaining a direct account from him would not be a straightforward matter. As the Commission had not been advised of his identity, contact initially required to be established through MacKechnie and Associates. In correspondence, Mr MacKechnie explained that the Golfer had hoped simply to point the defence in specific directions, leaving them to "uncover" evidence in support of his allegations. The Golfer was said to be concerned that former colleagues would deny involvement in the improprieties he was alleging and that attempts would be made to impugn his integrity and motives. In particular, by revealing not only what he knew but *how* he knew it, he was fearful that he would open himself up to potential repercussions.

5.13 On 28 August 2004 a preliminary meeting took place between the Golfer and the Commission's senior legal officer during which arrangements for a possible interview were discussed. The Golfer explained at the meeting that, although he was prepared to attend an interview, he would do so only if what he revealed was treated in strict confidence. For a number of reasons, the Commission was not prepared to accept the Golfer's account on this basis. Generally, the acceptance of information from witnesses in confidence does not, in the Commission's view, sit easily with its obligation under section 194D of the Act to provide reasons for its decisions. In circumstances where such information was viewed by the Commission as significant, a potential conflict would arise between its statutory obligations and its undertaking to the witness concerned. In the present case it appeared to the Commission that what was being sought by the Golfer was not simply anonymity (which he had in any

event) but an undertaking that whatever he said at interview would not be referred to by the Commission in its statement of reasons. Given the nature of what was attributed to the Golfer in the defence memoranda, which in some cases amounted to allegations of criminal activity, the Commission considered it essential that his accounts be fully aired. In the Commission's view, this became all the more necessary when certain of the allegations attributed to him were later reported in the press where they were presented seemingly as fact (see appendix).

5.14 The Commission's senior legal officer wrote to the Golfer (via MacKechnie and Associates) on 10 September 2004 setting out the following conditions upon which it was prepared to accept his account:

1. the interview would be conducted by two members of the enquiry team, to whom the Golfer would be expected to provide a full account of what he knew;

2. the information provided would be used by the Commission as a basis for any further enquiries it considered necessary;

3. providing it was relevant to the eventual decision in the case, the information provided by the Golfer would be referred to in the Commission's statement of reasons; and

4. aside from details of his career history, and his role in the case, the Commission would not seek from the Golfer personal details such as his name and address.

5.15 After considering his position, the Golfer contacted the senior legal officer by telephone on 7 October 2004. At that time he seemed largely content with the above conditions and was even prepared to have the interview recorded on an audio facility. The Golfer's only difficulty related to the first condition in the letter which required that he give a full account of what he knew about the case. His position on this reflected what was reported by Mr MacKechnie in his letter of 12 August 2004, namely that while he was prepared to disclose what he knew, he was not prepared to

reveal *how* he knew it. As the precise basis for his allegations was the principal means by which the Commission could assess his veracity, it was reiterated to the Golfer that he would be required to provide a full account. In the event, it was agreed that the Golfer would seek legal advice before reaching a final decision on the matter.

5.16 On 13 October 2004 the Golfer contacted the senior legal officer again to say that after taking legal advice he was prepared to inform the Commission of "everything" he knew, but not how he had come to know it. Although it was considered that this might affect the eventual weight to be attached to his allegations, it was agreed in the interests of making progress with the investigation that the interview proceed on this basis.

The first interview: 20 October 2004

5.17 Prior to the start of the interview, the Golfer [redacted] informed the senior legal officer of some additional concerns he had regarding his involvement in the Commission's enquiries. In particular, he explained that in the event of a reference to the court the Crown might consider it necessary to have him identified and thereafter investigate his claims. The process of doing so, he explained, would be made easier were he to provide the Commission with details of his career history and his involvement in particular areas of the police investigation. Furthermore, while he was prepared to tell the Commission "where to look", this would be in the capacity of an informant. Despite this apparent departure from his previous position, the interview proceeded, although the Golfer declined to have it recorded. The statement, based on notes taken by a member of the enquiry team, is contained in the appendix of Commission interviews.

5.18 Despite his initial concerns the Golfer gave an account of his involvement in the investigation, explaining that he had worked in one of the search sectors as well as in [redacted] His involvement in the case had come to an end about [redacted] into the enquiry when he had completed as much as he could of the work assigned to him. He was thereafter "returned to force" (the name of which he was not prepared to divulge [redacted] from which he eventually retired after about [redacted] years of service.

5.19 The Golfer alleged that Mary's House had been placed under surveillance prior to the first visit to it by the Scottish police in order to ensure that it was not a terrorist "hotbed". Furthermore, certain of the Autumn Leaves suspects were followed to the shop "at some juncture" prior to the bombing. This latter piece of information had been given to him by "a particular individual" who told him that information regarding "the team responsible" had been picked up on listening devices in the UK. The Golfer did not know who conducted the surveillance on this occasion, although he suspected that "the Germans" were involved.

5.20 The Golfer also alleged that evidence of the babygro purchased at Mary's House, and later linked by forensic scientists to the primary suitcase, had been "introduced", by which he meant that it had been fabricated. He made a similar allegation in respect of the order number "1705" which appears on a fragment of Yorkie-make trousers (PT/28; CP 181, photograph 110) recovered from the crash site, and which linked that item to a specific order placed by Mary's House (see chapter 10). However, he claimed to have no direct knowledge of this and offered no comment about those who may have been involved in it, other than to say that no-one had told him about their involvement.

5.21 The Golfer went on to expand on his allegation that the terms of Anthony Gauci's first police statement were subsequently altered. He confirmed that he had been instructed to retrieve a version of the statement from a fax machine at LICC and take it straight to the senior investigating officer, without having it entered on the HOLMES system. He alleged that in this version of the statement Anthony Gauci referred to his brother, Paul, as having been present at the time the purchase of the clothing had taken place. The Golfer was able to recall this detail, he claimed, because at the time he had read through the statement looking for corroboration of Anthony Gauci's account. The statement also contained reference to an umbrella, a babygro and a "list of costs". The Golfer later saw a copy of the same statement either the same or the following day, but could not remember seeing it on any other occasion.

5.22 Eventually, perhaps less than a year later, the Golfer saw another version of the same statement in which there was no reference to Paul Gauci having been present at the time of the purchase. He also noticed that this version of the statement was in different handwriting to the version he had seen previously. At interview, the Golfer was shown the manuscript version of Anthony Gauci's statement of 1 September 1989 (CP 452) and confirmed that this was not the version he had retrieved from the fax machine at LICC. He reiterated that the version he had retrieved from the fax machine was [redacted] which he recognised.

5.23 The Golfer was asked why anyone might wish to remove from the statement any reference to Paul Gauci's presence in the shop at the time of the purchase. Although initially he claimed not to know the answer to this question, the Golfer suggested that because of concerns for his safety the Gauci family might not have wanted Paul to become involved. He then went on to say, however, that he had in fact been told this by one of the officers who had interviewed Anthony Gauci. He had discussed the matter with the officer concerned in 1990 or 1991 and had been informed that the change to the statement had been made in order to protect a witness. This was, in the Golfer's view, a "justifiable" reason and "was not about perverting the course of justice". Asked why the Gauci family should be concerned about Paul's welfare but not Anthony's, the Golfer offered the "opinion" that Anthony had been "induced" by the reward on offer from the US authorities. Although the Golfer had not seen any of the statements given by Paul Gauci, he assumed that they contained no reference to his presence in the shop at the material time.

5.24 The Golfer was asked to provide the names of those officers whom he suspected of being aware of the alleged alteration to the statement. His initial position was that he would be willing to do so provided that members of the enquiry team took no notes of what he said; however, he accepted that the officers who took the statement must have seen it. After it was explained to him that the Commission would act upon such information whether or not the details were formally noted, the Golfer requested time to consider his position, and the interview broke for lunch.

5.25 After lunch the Golfer was reminded of some of the conditions set out by the Commission in its letter of 10 September 2004. It was explained that the Commission

might pursue further enquiries based upon his account and that, in any event, reference would be made to his interview in the eventual statement of reasons. Despite his previous agreement to these conditions, the Golfer replied that, unless he was given an undertaking that there would be no reference to him at all in the statement of reasons (including his pseudonym, the information that he was giving, or even the fact that such information had been given by an informant), he was not prepared to continue the interview. As the members of the enquiry team were not prepared to provide such an undertaking, the Golfer terminated the interview. Prior to his departure, he was warned about the Commission's power to seek a warrant against him in terms of section 194H of the Act.

5.26 In the Commission's view, while the Golfer may simply have misunderstood the conditions set out in the Commission's letter, this seems unlikely given their very clear terms and the Golfer's partial acceptance of them on 7 October. Indeed, if he truly believed at the beginning of his first interview that the Commission would make no reference to him or his allegations in its statement of reasons, it is difficult to understand his concern that the Crown might seek to identify him if the case were referred to the High Court.

The second interview: 14 December 2004

5.27 On 3 November 2004 the Golfer telephoned a member of the enquiry team from a bar, apparently under the influence of alcohol. MacKechnie and Associates had previously indicated to the Commission that the Golfer had on occasions contacted them while in a similar condition. The Golfer explained during the call that he no longer wished to deal directly with the Commission and that there would be no benefit in precognoscing him on oath. Despite this, after meeting with both his own solicitor and representatives of MacKechnie and Associates, the Golfer agreed to attend a further interview.

5.28 Prior to the second interview, the Commission made efforts to confirm the Golfer's true identity. It was considered that, as well as confirming his involvement in the police investigation, this would assist the Commission if it required to precognosce him on oath. As a result of these enquiries, the Commission obtained the

Golfer's name and address, and satisfied itself as to his role in the original investigation and his rank both at that time and upon retiral from the force. The Golfer was informed of the outcome of these enquiries before the beginning of his second interview, and during the course of that interview he confirmed that he had been correctly identified. The Commission has not included details of the Golfer's identity in the statement of reasons, but will release these if requested to do so by the court.

5.29 A copy of the Golfer's second statement is in the appendix of Commission interviews. In general, he remained reluctant to divulge details of his career history, although he was prepared to confirm that he had been [redacted]. He said that during the police investigation he had carried out enquiries in the UK and the US as well as [redacted] Part of his role in the latter, he said, involved creating a "profile" of [redacted]. While the Golfer regarded everything about [redacted] as "strange", his enquiries had produced nothing "as such" to link him to the bombing.

5.30 The Golfer said that while [redacted] he was instructed by [redacted] to [redacted] According to the Golfer, [redacted] considered that similar items might have been the source of [redacted] identified by the forensic scientists in the case. Later in the interview the Golfer claimed to have been told by [redacted] that forensic analysis [redacted] had proved inconclusive.

5.31 The Golfer also named [redacted] of his allegation that surveillance had been carried out in Malta prior to the bombing. When pressed, however, the Golfer seemed unable to point to anything to distinguish this alleged operation from the unauthorised surveillance of a Palestinian named Abu Nada which took place after the bombing and which led to the suspension of police enquiries in Malta. Nevertheless, he maintained that he would not have confused the two incidents. [redacted] was also allegedly the source of the allegation made by the Golfer at his interview on 20 October that certain of the Autumn Leaves suspects had been followed to Mary's House. Following further questioning, however, the Golfer

alleged that Mr Orr had told him only that the suspects had been followed to "a shop" in Malta, and had not specifically mentioned Mary's House.

5.32 As to his allegation that Mary's House was under surveillance prior to the arrival of Scottish officers, the Golfer claimed to have been told this by [redacted] had informed him that surveillance on the shop had confirmed that there was no link with terrorists. According to the Golfer, there had been no "cold calling" on Mary's House by officers following enquiries at Yorkie Clothing on 1 September 1989.

5.33 The Golfer was asked to expand on his allegation that evidence of the order number "1705", which appears on the fragment of Yorkie trousers (PT/28), was fabricated. He alleged that he had seen the photographs of this item which were taken to Malta by DCI Bell during initial enquiries there, none of which showed the order number. He had seen the photographs before they were taken to Malta, but had not seen them subsequently. Asked the basis for his allegation that evidence of the number had been fabricated, he said that he would reveal this at the end of the interview.

5.34 The Golfer was also asked further detailed questions about his allegation that Anthony Gauci's first police statement had been altered. He was referred to the passage in his statement of 20 October 2004 in which he claimed to have been told about the reason for the alteration by one of the officers involved in Anthony Gauci's interview. In an abrupt change of position, the Golfer responded "Did I say that?", before denying that he had been told any such thing by an officer involved in enquiries in Malta. Although he knew the officers who had obtained Anthony Gauci's first statement (DCI Bell and DS Armstrong), he did not know them well and had not questioned either of them about the statement.

5.35 The Golfer went on to say that it was not he himself who had discovered the alleged discrepancy between the two versions of the statement, but rather a HOLMES operator who had thereafter brought it to his attention. On being asked the name of this officer, the Golfer again pledged to disclose this at the end of the interview.

5.36 The Golfer alleged that the only other officer likely to have seen the "original" version of the statement as it arrived on the fax machine at LICC [redacted] who was at that time a [redacted]. Although the Golfer had not discussed the statement with [redacted] in any detail, he believed that [redacted] might have read parts of it himself. As to the other officers who would have been aware of the terms of the original version of the statement, the Golfer named [redacted] the officers involved in obtaining the statement and the officer who he intended naming at the end of the interview.

5.37 Contrary to the allegation made in the application, the Golfer claimed to know nothing about Anthony Gauci having failed to identify the applicant from photographs shown to him. Similarly, with regard to the babygro, aside from a belief that it was not found in the manner described by the police, the Golfer claimed to know nothing about the allegation attributed to him by MacKechnie and Associates to the effect that evidence relating to the item had been fabricated.

5.38 The Golfer was also questioned about the allegations which had been attributed to him concerning the umbrella, fragments of which were recovered from the crash scene and linked by forensic scientists to the primary suitcase. He alleged that [redacted] but that this was included in the later version he had seen. He also alleged that the umbrella subsequently relied upon in evidence was not the item found at the crash scene. As to his basis for this assertion, once more the Golfer informed members of the enquiry team that he would return to the matter at the end of the interview.

5.39 The Golfer repeated his allegations in respect of the Toshiba instruction manual (PK/689), another item recovered from the crash scene and linked forensically to the primary suitcase. According to the Golfer, while in the Dexstar store on one occasion he had come across the manual which, although dirty, was intact. Some time later, during a discussion with [redacted] regarding the apparent reluctance by the German police ("BKA") to accept the existence of a link between the Autumn Leaves suspects and PA103, the Golfer told both officers about his find. On being shown at interview a photograph of PK/689 taken from the RARDE report,

the Golfer alleged that this was not the same item as he had come across. According to him, if PK/689 had come from the item he had seen, there must have been some "jiggery pokery". The manual he had seen was of a different size and shape to the one shown to him at interview and was almost complete.

5.40 The Golfer confirmed the allegation attributed to him by MacKechnie and Associates regarding [redacted], and the police label attached to PI/995. In particular, the Golfer claimed that [redacted] for the Crown, [redacted] had told him that he was concerned about an alteration that had been made to a police label [redacted]. The Golfer confirmed that this conversation took place [redacted]

5.41 The Golfer was asked how he had first come to the attention of MacKechnie and Associates. According to him, Mr MacKechnie's colleague, Mr Thomson, had previously worked for a firm of solicitors in Paisley. Mr Thomson's replacement at that firm was aware that the Golfer had worked on the original police investigation and suggested to Mr Thomson that he might wish to speak to the Golfer about the case. According to the Golfer, it transpired that MacKechnie and Associates, seemingly by coincidence, were already in the process of tracing him. According to him, this was because [redacted]

5.42 The Golfer was asked if he had ever been employed by MacKechnie and Associates in any capacity. This followed comments by Mr MacKechnie that the Golfer was carrying out work for his firm. According to the Golfer, while MacKechnie and Associates had met his hotel and travel expenses, he had never been paid for his work, nor had he wanted such payment. Although he had never been employed as an investigator with MacKechnie and Associates, he had worked at their offices, sometimes for a week at a time, and had also carried out an enquiry on their behalf. This consisted of an approach t[redacted]o ascertain whether he would be prepared to speak to MacKechnie and Associates about the change made to the

label attached to PI/995. According to the Golfer, after taking advice [redacted] declined to do so. The Golfer added that [redacted] was unable to recall their alleged conversation [redacted].

5.43 As to why he had decided to come forward at this stage, the Golfer stated that he believed the applicant to be innocent. It was suggested to him that if he felt this way he could have spoken up before the applicant's conviction, rather than after. The Golfer claimed that he had tried to raise his suspicions at Crown precognition but that "they" would not listen to him. He claimed to have told the Crown that he was "unhappy" about the case, but was informed that it was none of his business and that he was only there to speak to the recovery of an item of debris.

5.44 Despite his concerns about the case, and the alleged dismissal of these by the Crown, the Golfer frankly admitted that when precognosced by the defence he had told them nothing. This, he sought to explain, was because it was only when speaking to MacKechnie and Associates after the trial that the significance of what he knew became apparent. In particular, it was only when he saw copies of Anthony Gauci's statements that he noticed that the version of the first statement he had seen was not there. Prior to that, he did not think the "dropping" of Paul Gauci from the statement was significant. The Golfer was pressed as to why he had not informed the defence of his concerns, but had no answer to this. He denied that he was simply making up stories or had an ulterior motive for now coming forward.

5.45 The Golfer was asked about the matters to which he said he would return at the end of the interview. His initial response to this was, "What matters are they?" However, after being reminded of what he had said about the order number on the fragment of Yorkie trousers, he informed the members of the enquiry team that he did not wish to say anything about this. On being asked to explain himself, he claimed to have received advice not to answer such questions on the grounds that he might incriminate himself. He said that although he had planned to come back to this issue, he had changed his mind.

5.46 The Golfer was asked with whom he had discussed the alleged change to Anthony Gauci's first statement, and replied that he had done so with DS Sandy Gay,

who at that time was a statement reader in the HOLMES room. According to the Golfer, it was Mr Gay who had drawn his attention to the differences between the two versions of the statement. He said they had discussed the matter together within a day or two of receipt of the first statement.

5.47 With regard to the umbrella, the Golfer repeated that he did not believe this to have been a "legitimate and proper evidential find". However, when asked the basis for his suspicions, he replied that he did not wish to "go down that line" on the basis that he might incriminate himself. In particular, he was concerned that by not coming forward with this information at an earlier stage he might somehow be guilty of attempting to pervert the course of justice.

5.48 Following the meeting, the Golfer was urged to seek legal advice before attending any further interview.

The third interview: 21 January 2005

5.49 A copy of the Golfer's third statement is contained in the appendix of Commission interviews.

5.50 Despite agreeing to seek legal advice prior to attending interview, the Golfer indicated that he wished to proceed without it, although he reiterated that he had no intention of disclosing the sources of his information.

5.51 The Golfer was first asked about those issues which he had refused to address at his previous interview. With regard to the order number on the fragment of Yorkie trousers, the Golfer claimed to know from a "source" that "the thing as presented in court may not be as it originally was". However, he claimed not to have "much specific information" about this and did not know the detail of "what was done and who did it". At first, the Golfer denied that his source had given him any specific information, but he then went on to say that he had taken from what he had been told that the order number did not originally feature on the fragment and had been "added" later. He had been shown the relevant productions by MacKechnie and Associates and had noticed that one of the photographs of the fragment did not show the order

number. As to what the source had said to make him think that the order number had been added to the item, the Golfer again refused to "go down that line", saying only that the number had been suggested to him as an "addition". The source had not told him it was an addition "as such", only that there was something "not right about it". He was asked why he considered the evidence to have been fabricated, to which he responded that he did not think that "as such", and that there might be a reason as to why certain of the photographs do not show the order number. Initially, the Golfer declined to name his "source", but after further questioning he said that the information "came out" when Mr Gay "was telling [redacted] about it". Specifically, Mr Gay appeared to have had some suspicion that the order number might not have been on the fragment when it was found and had appeared only after the police visits to Malta. The Golfer accepted that what he had allegedly heard might simply have been "gossip or conspiracy theories that sometimes arise in investigations". He claimed not to have discussed the matter with anyone else, and to know nothing more about it.

5.52 With regard to the umbrella, the Golfer's only information was to the effect that more than one such item had been recovered from the crash scene.

5.53 According to the Golfer, Mr Gay was also the source of his allegation that evidence regarding the babygro had been fabricated. Mr Gay, he said, had found it strange that the original police enquiries in Malta in connection with this item had "come back negative", when there was subsequently such an issue made of it on the basis that it had been purchased from Mary's House. In a subsequent conversation, Mr Gay allegedly repeated his suspicions to the Golfer, and suggested that evidence of the babygro had been "planted". The Golfer was not aware of the basis for Mr Gay's allegation, other than that it was something he (Mr Gay) had read.

5.54 The Golfer was asked about the extent of his involvement in MacKechnie and Associates' enquiries into the babygro. He said that although he had seen photographs and scientists' reports, he did not consider himself to have "really" been involved in their investigation. He had asked them whether they had looked at these items and was told that they had not. Some time later, they had asked him to "come

down", which he had done. He had directed MacKechnie and Associates to look into the babygro issue purely because of Mr Gay's alleged suspicions on the matter.

5.55 The Golfer denied having told MacKechnie and Associates at any stage that a babygro had been subjected to explosions in the US and the fragments presented as evidence in the case. He regarded such an allegation as "ridiculous". He claimed never to have seen the submissions to the Commission in which this allegation was made.

5.56 The Golfer also described as "rubbish" a further allegation attributed to him, namely that Anthony Gauci had been shown photographs of both accused but had failed to identify them. He also denied telling MacKechnie and Associates that persons associated with a Palestinian terrorist cell had been followed to Anthony Gauci's shop where they had been observed purchasing items of clothing. Although he maintained that he was told by [redacted] that a Palestinian had been followed to a shop in Malta, and that thereafter he had assumed that this was Mary's House, he claimed never to have told MacKechnie and Associates that the shop in question was Mary's House or that the suspects had been observed making purchases.

5.57 It was explained to the Golfer that, in light of his allegations, the Commission might wish to speak to Mr Gay. He replied that this was "certainly what I would do". According to the Golfer, he and Mr Gay "went back years".

Subsequent events

5.58 Following the third interview, MacKechnie and Associates advised the Commission that the Golfer had been in touch with them complaining that their submissions to the Commission did not accurately represent his position. Despite this, MacKechnie and Associates stood by the allegations they had attributed to him. In a letter dated 2 February 2005, Mr MacKechnie stated that the Golfer had in fact admitted to him that he had made the allegations, but claimed to have been unable to confirm these to the Commission for fear of exposure.

5.59 On 1 March 2005 the Golfer attended the Commission's offices again in order to confirm the contents of the three statements he had given. After viewing the statements, he confirmed that he was satisfied with them, subject to certain proposed amendments and deletions. The Golfer was advised that these would be considered, and a further arrangement was made to meet.

5.60 The Golfer's final visit to the Commission's offices took place on 10 March 2005. Each of his proposed amendments was discussed with him and explanations given as to the Commission's decisions to accept or reject them. Generally, amendments were permitted where their purpose was to clarify something recorded in the statement, but were rejected where they consisted of deletions of particular comments which the Golfer did not dispute making. In the event, the Golfer refused to sign the statements and informed members of the enquiry team that he did not wish to have copies of them.

5.61 Some time after the Golfer's final interview the Commission was contacted by a journalist named Ian Ferguson who made reference to specific details of one of the Golfer's interviews. Mr Ferguson also referred to the Commission's general reluctance to accept information in confidence from witnesses. The Commission declined to discuss the matter with Mr Ferguson.

Consideration

5.62 In terms of a draft protocol between the Commission and Crown Office, where the Commission becomes aware of evidence which suggests that a criminal offence has been committed it may, if it considers it appropriate, refer the matter to Crown Office for investigation. In practice, the Commission's approach to this provision has been to refer such allegations only where their source is considered credible and reliable. To do otherwise would risk inundating Crown Office with the numerous unsubstantiated allegations to which the Commission is exposed. In the present case it was decided that unless or until the Commission was persuaded of the Golfer's credibility and/or found support for his allegations in other evidence, it was not necessary to refer the matter to Crown Office. For the reasons given below the Commission did not consider it appropriate to do so.

5.63 The Commission is satisfied that the Golfer was an officer in the original police investigation and, as such, was potentially party to information regarding the various enquiries undertaken. Throughout his interviews he displayed an awareness of the evidence and aspects of the enquiry which, in the Commission's view, could only have been gathered through first hand involvement. Any possible doubt as to the Golfer's background and credentials was removed by the results of the Commission's enquiries directed to establishing his identity.

5.64 Despite this, the Commission has serious misgivings as to the Golfer's credibility and reliability as a witness. In determining this issue, the Commission is aware that such matters are, in the final result, for the High Court to determine. Accordingly, in assessing credibility and reliability the Commission generally applies a low standard and may hold that a witness is credible merely where it considers the witness capable of being believed by a reasonable jury. In the Golfer's case, however, the Commission is not persuaded that his accounts satisfy even this standard.

5.65 Part of the basis for the Commission's rejection of the Golfer's allegations is the vast array of inconsistencies between, and sometimes within, his various accounts. As well as this, the Commission considers some of his allegations to be implausible when considered alongside other elements in the case, and unsupported or refuted when viewed in the context of some of the Commission's other findings.

5.66 As indicated, in both the original submission to the Commission and those made subsequently, it was alleged that the Golfer had read a version of Anthony Gauci's first police statement which he later found was different in certain respects from the version eventually lodged as a production at trial. The first recorded reference to this allegation appears in the second defence memorandum, as described above. In that account, and in those given to the Commission, the Golfer alleges that in the "original" version of the statement, Anthony Gauci claimed that his brother Paul was present in the shop when the purchase of the clothing took place; but that this detail had been removed from the "official" version, in which Anthony Gauci is said to have been alone in the shop at the time of the purchase.

5.67 An examination of the Golfer's accounts of this allegation reveals a wealth of often irreconcilable inconsistencies.

5.68 In the second defence memorandum, the Golfer is said to recall only "vaguely" that the original version of the statement contained details of Paul Gauci's presence at the time of the purchase, and that he "cannot now remember certainly what was in the statement". At his first interview with the Commission, however, the Golfer was much more firm in his recollection. In particular, he stated that he was as certain as he could be about the reference to Paul Gauci in the original version of the statement, and that he did not doubt his memory in this respect. In the Commission's view, one would not normally expect a reliable witness to recall an event only vaguely in one account, and to then display a clearer recollection of the same event in an account given later.

5.69 The Golfer went on to say at his first interview that, after noticing the discrepancy between the two versions of the statement, he had questioned one of the officers responsible for interviewing Anthony Gauci about this. According to the Golfer, the officer concerned told him that the statement had been altered in order to extract Paul Gauci from involvement in the case. The Golfer also suggested that he had first seen the official version of Anthony Gauci's statement (and therefore the discrepancies between the two versions) "not soon after" he retrieved the statement from the fax machine, though "perhaps less than a year after".

5.70 At his second interview, however, the Golfer strenuously denied having discussed the alleged alteration to the statement with one of the officers involved in Anthony Gauci's interview. Instead, he claimed that the alteration had first been brought to his attention by a HOLMES operator, who was not involved in the enquiries in Malta. Asked later if he had any explanation as to why he had given an entirely different account at his first interview, the Golfer could only state that he did not recall having done so.

5.71 Later in his second interview, the Golfer identified the HOLMES operator as DS Alexander Gay (on whom, more below) but he then contradicted himself again by saying that he was already aware of the alleged alteration to the statement by the time

Mr Gay raised this with him. In addition, contrary to the position adopted at his first interview (that he had learned of the alleged alteration "perhaps less than a year" after he retrieved the item from the fax machine) the Golfer stated that his discussion with DS Gay took place within days of him having read the first statement. When this discrepancy was put to him, he claimed not to know "where this year thing comes from", and said that although it may have been more than a couple of days after the fax came in, it was not of the order of nearly a year.

5.72 Further contradictions in the Golfer's account of this incident emerged at his third interview. There, he could not recall having discussed the alleged alteration to the statement with anyone at all, including Mr Gay.

5.73 The Golfer's position as to the differences between the two versions of the statement he allegedly saw was also prone to variation. For example, at his first interview he claimed that the original version of the statement contained reference to the sale of a babygro, whereas in his second and third statements he maintained that there was no reference to such an item. Similarly, at his first and third interviews he claimed that there was some reference in the original statement to the sale of an umbrella, while in his second statement he claimed that there was not. While one can appreciate an honest witness simply forgetting such details over time, the apparent certainty with which the Golfer often expressed his differing recollections hardly served to vouch his reliability or credibility.

5.74 As well as these inconsistencies (which are not exhaustive), the Commission has serious doubts as to the substance of the Golfer's allegation regarding Anthony Gauci's first police statement. First of all, as a police conspiracy to play down Paul Gauci's role in the case it was plainly unsuccessful, given that he was eventually cited by the Crown to give evidence and was, until a late stage of the proceedings, likely to be called. Moreover, if the allegation were true, it would follow that various police officers have connived with Anthony and Paul Gauci in order to obscure the latter's presence in the shop at the time of the purchase. If that is the case, it is clear that those concerned have gone to extraordinary lengths to cover their tracks. Not only must the terms of Anthony Gauci's statement of 1 September 1989 have been altered to reflect the fact that he was alone when the purchase took place, the passage in

which he claims that Paul Gauci was watching football on television at the time must also have been fabricated. The various statements attributed to Paul Gauci in which the police attempt to identify precisely which matches he might have watched that day must also be an invention, together with the enquiries carried out to establish the times at which particular matches were broadcast on television in Malta. In the Commission's view, such a scenario beggars belief.

5.75 The Commission has established that a number of Anthony Gauci's statements were indeed faxed to LICC, but there is no support for the suggestion that his first statement was transmitted by this means. The Commission obtained all faxed versions of Mr Gauci's statements in D&G's possession, and his statement of 1 September 1989 was not among them. By letter dated 28 April 2005, D&G informed the Commission that statements would be faxed only where the officers involved in enquiries were likely to be delayed in their return to the UK. In terms of DCI Bell's HOLMES statement (S2632X, see appendix), which describes his initial enquiries in Malta, it appears that the visit during which Anthony Gauci was first seen was relatively short, lasting from 30 August to 5 September 1989.

5.76 At interview with members of the enquiry team (see appendix of Commission interviews), Mr Bell explained that there was no hard and fast rule governing whether witness statements were faxed to the incident room. In circumstances where officers were in Malta for three weeks Mr Gauci's statements would probably have been faxed to LICC if they were obtained at the beginning of the visit. However, if the officers were into the last week of the visit when they obtained the statements they might simply have been delivered by the officers concerned to LICC. Mr Bell recalled that statements would normally be faxed from the British High Commission. However, according to him, after the first meeting with Mr Gauci officers encountered problems getting in to the High Commission due to it having been a half day. He could not recall faxing Mr Gauci's first statement but did not rule this out as a possibility. Mr Bell thought that he had just telephoned to report what had happened.

5.77 As to the alleged surveillance of Mary's House to ensure that it was not a terrorist "hotbed", Mr Bell confirmed at interview that his first visit to Mary's House

took place on 1 September 1989, the same day as he first visited Yorkie Clothing. He recalled that en route to Mary's House he asked the Maltese police officer, Inspector Godfrey Scicluna, who accompanied him on these enquiries, whether he knew of Mary's House and whether it posed a risk. According to Mr Bell, Mr Scicluna appeared to be aware of the Gauci family and assured him before they attended the shop that there was no risk. Mr Bell's recollections were supported by Mr Scicluna himself, as well as by his then superior, former Commissioner of the Maltese police, George Grech, both of whom were also interviewed by the enquiry team.

5.78 Further doubts as to the Golfer's credibility arise from his failure to bring his allegations to light at an earlier stage. Although he claims to have tried to do so at Crown precognition, he was unable to explain why he made no similar attempt when seen by the defence. While he sought to suggest in his third statement that at the time he was precognosced by the defence he had "no idea what the evidence was", this begs the question as to why he allegedly tried to communicate his concerns to the Crown. Given the nature of his current allegations, it is difficult to see how his ability to reveal them depended upon some wider knowledge of the evidence in the case. As to his motives for coming forward, the explanation given by him in his second statement to the effect that he believed the applicant to be innocent does not sit well with the contents of the first defence memorandum, in which he is recorded as saying that the applicant may well have had some involvement in the bombing.

5.79 The results of a number of the Commission's enquiries also significantly undermine the allegations attributed to the Golfer. As indicated in chapters 7, 9, 10 and 11, the Commission has investigated the evidence surrounding the fragments of the grey Slalom shirt, the Toshiba manual, the brown tartan Yorkie trousers and the babygro, and in all cases is satisfied as to its validity and legitimacy.

5.80 A further, potentially disturbing, feature of the Golfer's accounts concerns his comments regarding a former colleague, DS Alexander Gay. The Golfer first referred to Mr Gay at his second interview when he claimed to have discussed with him the alleged alterations to Anthony Gauci's statement. In his third statement, the Golfer went on to name Mr Gay as the officer who had expressed doubts as to the provenance of the evidence concerning the babygro, and the order number which

appears on the fragment of Yorkie trousers. He indicated that Mr Gay might still be a serving officer in Strathclyde Police.

5.81 Subsequent enquiry with Strathclyde Police established that Mr Gay in fact [redacted] on 16 February 1992, a time when the Golfer was a serving officer with that force. According to [redacted] now a [redacted] with [redacted], who was interviewed in connection with the Golfer's accounts (see appendix of Commission interviews), Mr Gay's death was, as one might expect, well known among his fellow officers. Although [redacted] did not know Mr Gay well on a personal level, he had attended his funeral. Mr Gay [redacted] explained, had [redacted] which were in no way related to the Lockerbie case.

5.82 Given the Golfer's comment in his third statement that he and Mr Gay "went back years", it is difficult to avoid the conclusion that he was fully aware of Mr Gay's death at the time of his interviews, and deliberately misled the Commission by proffering him in support of his allegations. When the information about Mr Gay's death was put to him at his final meeting with members of the enquiry team on 10 March 2005, the Golfer denied any prior knowledge of it.

5.83 [redacted] was named by the Golfer in two contexts. First, he said on more than one occasion that [redacted] might have been present when he allegedly retrieved Anthony Gauci's first police statement from the fax machine at LICC, and may have read parts of the statement. Secondly, the Golfer alleged that Mr Gay had, in the Golfer's presence, expressed concerns to [redacted] about the order number on the fragment of Yorkie trousers. Accordingly, while the Golfer suggested that [redacted] was present on particular occasions, he stopped well short of levelling any allegations against him.

5.84 In order to respect the undertaking given to the Golfer that his anonymity would be preserved as far as possible during the Commission's investigations, [redacted] was not informed about the precise reasons for the interview. Despite this, he appeared to answer fully and frankly all questions put to him. He had no specific recollection of seeing Anthony Gauci's first police statement and explained

that, if he had not been [redacted] in the HOLMES room at the time, he would have had no reason to see it. He was unable to recall whether he had [redacted] from the fax machine, but emphasised that this was not to say that it did not happen. All statements received at LICC, he explained, should have been processed through HOLMES first, and he had no knowledge of statements being taken to the senior investigating officer without this having been done. He recalled a briefing on the terms of Anthony Gauci's first statement, but could not remember physically seeing the statement itself. He could not recall anything specific in the statement but was generally aware that it contained a detailed list of clothing. When asked if he could recall any reference to Paul Gauci in the statement, he replied that Paul had not been in the shop at the time the purchase had taken place. Asked whether he had gleaned this information from the statement itself, he replied that it would be in the statement as it was very important.

5.85 As regards the Yorkie trousers, [redacted] stated that he only had a very vague recollection about the number on the trousers. When shown a photograph of the order number 1705, he stated that he knew nothing about it. Asked if anyone had ever expressed any doubts to him about the fragment, he responded that no-one that he knew of had done so. He would have remembered if anyone, including Mr Gay, had done so.

5.86 In the Commission's view, [redacted] was an entirely credible witness whose account offers no support for the Golfer's allegations.

5.87 One other matter raised with [redacted] is worthy of note. At his first interview, the Golfer was shown handwriting samples of four police officers (DCI Bell, DS Armstrong, DC Crawford and DC Byrne) who at various stages noted statements given by Anthony Gauci. In the event, the Golfer identified each of them correctly. Given that [redacted] was employed as a [redacted], and therefore might be expected to recognise the handwriting of officers involved in the enquiry, the same samples were shown to him at interview. Unlike the Golfer, however, he was unable to identify any of them. As the Golfer was not employed in the HOLMES room during the enquiry, it occurs to the Commission that his abilities in this area may stem more from his recent exposure

to Anthony Gauci's statements at the offices of MacKechnie and Associates than from his time as an officer in the investigation. Support for such a conclusion can be found in the second defence memorandum in which the Golfer is recorded as saying that at the time he allegedly retrieved Anthony Gauci's first statement from the fax machine he was unable to identify [redacted]

5.88 The precise extent to which the Golfer assisted MacKechnie and Associates in their work is not known, but if one accepts what he said at interview on the subject it seems that his involvement went beyond that normally expected of a witness. While the Golfer does not appear to have been formally employed by the firm, by his own word (and indeed that of Mr MacKechnie) he "worked" at their offices and was even shown parts of the initial application lodged with the Commission. Indeed, his involvement appears to have extended to the further submissions lodged by MacKechnie and Associates. In an appendix to the Slalom shirt submissions (see chapter 7) there is an internal memorandum produced by MacKechnie and Associates in which a ground of review relating to the timer fragment (see chapter 8) is outlined. The memorandum bears to have been copied to the Golfer, despite the fact that he has never claimed any knowledge of the matters raised. A copy of the memorandum is included in the appendix.

5.89 Although even in the absence of his connection with MacKechnie and Associates, the Commission would still have had no hesitation in rejecting the Golfer's allegations, it seems clear that some of what he had to say has been influenced by his exposure to materials by that firm. One example of this concerns the Golfer's allegations regarding the order number which appears on the fragment of Yorkie trousers (PT/28). As indicated, in his second statement the Golfer claimed that part of the basis for this allegation was that the number did not feature in any of the photographs of the item he had seen. While he claimed in that statement that he had seen these photographs on only one occasion (prior to their being taken to Malta by the officers involved in the enquiries there) in his third statement (and in his first), he suggested that these were in fact shown to him by MacKechnie and Associates and that he had never seen them prior to them being taken to Malta by police officers.

5.90 It is, of course, possible that the Golfer may deliberately have sought to provide inconsistent accounts in order to diminish his significance to the Commission's investigation, and thus extract himself from further scrutiny by the authorities. According to MacKechnie and Associates this was precisely the explanation given by him as to why he had failed to speak to certain of the allegations attributed to him. It would also be consistent with the Golfer's position at his meeting with members of the enquiry team on 1 March 2005, when he agreed much of the contents of the Commission's three statements, without querying or even mentioning the obvious inconsistencies between them.

5.91 However, even if the Golfer has deliberately misled the Commission in this way, it does not follow that his allegations are more likely to be true. Indeed, such behaviour may be equally consistent with someone who has levelled false allegations, but who never envisaged matters developing as far as they did. In any event, as indicated, the Commission's reasons for rejecting the Golfer's accounts are based not simply upon the wealth of inconsistencies between them, but also upon the inherent implausibility of what he had to say, and the fact that many of his allegations simply do not stand up to scrutiny when viewed in the context of other aspects of the case.

Conclusion

5.92 In terms of the decision in *Al Megrahi v HMA* 2002 SCCR 509, in considering evidence not heard at trial, the court must be persuaded that it is capable of being regarded as credible and reliable by a reasonable jury (or fact finder); and likely to have had a material bearing on, or a material part to play in, the determination of a critical issue at the trial.

5.93 For the reasons given, and applying the low standard of assessment described above, the Commission does not consider that the Golfer's accounts meet the first branch of this test. As such, the Commission does not believe that the absence of the Golfer's evidence at the applicant's trial suggests that a miscarriage of justice may have occurred in his case.

CHAPTER 6
INTRODUCTORY MATTERS RELATING TO CHAPTERS 7 TO 11

6.1 In the submissions concerning the Slalom shirt, the timer fragment, the Yorkie trousers, the Toshiba manual and the babygro, allegations are made as to the provenance of certain items purportedly recovered from the crash site. Before dealing with these submissions the Commission sets out its findings on some of the procedures employed by the police and forensic scientists in connection with the recovery and examination of debris.

Difficulties with early record keeping

6.2 It became apparent to the Commission during its review of the police statements and other records that uncertainties existed in the evidential chains of many of the items recovered from the scene of the crash. Following receipt of the full copy of the Crown's precognition volume dealing with the recovery of debris (chapter 5 of the case), which included the Crown's own "summary and analysis" document, it was clear that such difficulties had also been identified by the Crown during its preparations for trial.

6.3 Because of the passage of time, many witnesses involved in the recovery of debris could not remember specific items they were said to have been involved in finding or handling. The sheer volume of debris recovered and the conditions in which the searches took place made record keeping difficult. Notebooks were not generally used, and witnesses often did not provide statements recording what they had found. Although the HOLMES system contains statements which purportedly record the finding or handling of various items of debris, these were often produced by officers of the police enquiry team on the basis of documentary records, rather than by the witnesses themselves on the basis of their actual recollections. This practice was not confined to the finding and handling of debris: as former DC Callum Entwistle confirmed at interview with the Commission (see appendix of Commission interviews), the collation of the police report involved an element of rewriting and rewording of statements. Thus, a statement referred to in the police report might not

have been written by the police officer to whom it was ascribed. Instead, it might have been written by a member of the "collation of reports team" (such as Mr Entwistle), and based either on a previous statement given by the witness or purely on the available records. It was therefore apparent to the Commission that the HOLMES statements, although often helpful and informative, could not always be relied upon in and of themselves in establishing the provenance of particular items.

6.4 In response to such difficulties, the Crown's approach to the recovery of debris, both at precognition and in evidence, was to present witnesses with original production logs along with the items themselves (including the police labels attached to the items). This allowed witnesses to reach a conclusion about their involvement with particular items, even if they had no specific recollection of the matter. This reliance on the production logs involved precognoscing the officers responsible for completing the logs, as well as the officers recorded as being responsible for finding individual items. It also depended on police labels attached to items having been completed at the time of discovery. As stated below, signatures on such labels were, in fact, often obtained from witnesses long after the event. Moreover, sometimes the original labels were replaced after the items were handed into the Dexstar store, and often in such circumstances the original label was either lost or destroyed.

6.5 Accordingly, it cannot be said with regard to every piece of debris recovered that a full and reliable evidential chain exists. For the purposes of dealing with the submissions on this issue, it is important to address in more detail four specific issues. The first is the procedures adopted at Hexham, which was the initial property centre for many items found in Northumbria. The reason for focusing on Hexham is that it provides a good illustration of the difficulties that arose in accurately recording items; and also because the submissions raise a number of points regarding items that were processed there. The second issue of importance is the exercise which was conducted to obtain signatures on labels retrospectively. The third concerns the decision by the defence teams at trial to agree, in joint minute number 1, the provenance of many items of debris. The fourth concerns the photographs taken of the debris at the Royal Armaments Research and Development Establishment ("RARDE") and the accuracy and reliability of the notes made by the expert witness Dr Hayes, particularly in

relation to the dates on which the photographs were taken and when the notes themselves were written.

Hexham

6.6 Debris recovered in most search sectors was collected and logged in the Dexstar warehouse at Lockerbie ("Dexstar"). However, debris found in the Kielder Forest area of sector K was collected at Hexham police station where it was processed by a team of officers from Strathclyde Police. DI Alexander Brown spoke in evidence to the procedures employed at Hexham (4/600). The system there mirrored that employed at Dexstar, in that property sheets identical to those used at Dexstar were completed for items. However, a different numbering system was used for items at Hexham which involved ascribing a "PKF" prefix and a consecutive number, rather than a "PK" number. The items themselves and the original Hexham log sheets were then transported to Dexstar, where the sheets were amended and each PKF prefix changed to a PK prefix. Copies were taken of the Hexham log sheets before they were sent to Dexstar. These were retained by D&G, who provided the Commission with copies of the entries relevant to various items.

6.7 According to the evidence of DI Brown and also of DS Gordon Wotherspoon (14/2145), items handed in at Hexham generally comprised bags full of debris, where only the bag itself had been labelled. Much of the searching of the Kielder Forest area was carried out by groups such as Mountain Rescue teams. Generally, the leader of the team took responsibility for all the finds made by his team, and it was his details that were inserted on the label or pro forma sheet attached to each bag of debris. Police officers at Hexham processed the individual items within the bags by attaching a Scottish police label to each of them (although it is clear that on occasions bags of debris, rather than their individual contents, were processed as one item). The details inserted in each Scottish label would be taken from the label or sheet which was attached to the bag from which the item came. Thus the leader of a team of searchers would be recorded in the log as the finder of all the items in the bag, even though it was often another team member who had found them. The true finder was therefore not known.

6.8 The original police labels or pro formas attached to the bags of debris were not normally retained, and the earliest available record of the finding of most items is the entry in the Hexham log. As the Hexham witnesses confirmed in Crown precognitions and in evidence at trial (e.g. DS Wotherspoon 14/2148) that the entries in the logs came from the original labels or statements, in the absence of persuasive evidence that the logs are invalid the Commission is satisfied that there is a sufficient evidential connection between these records and the original finds.

Late signing of labels

6.9 It is suggested in a number of the submissions that labels for important items of debris were signed retrospectively, often in circumstances where the person signing could not remember finding or being involved in the handling of the item in question. This allegation is, in many cases, well founded. In their respective HOLMES statements, DC Brian McManus (S3070DH) and DC Rolf Buwert (S4649O, P, U and AF) make reference to an exercise conducted to secure the signatures of witnesses on labels they should have signed previously. It appears from DC McManus' statement that this began on Monday 10 September 1990, and that a number of signatures were obtained between then and 19 September 1990 when preparations for the fatal accident inquiry were finalised. DC McManus' statement does not contain details of which labels were signed during this exercise, or of who was asked to sign them. It records, however, that there remained a large number of witnesses who had not signed labels, and that whenever such a situation was identified a "message" was placed on the HOLMES system to record the fact.

6.10 In his statement S4649U DC Buwert narrates that from 28 October 1990 one of his tasks was to ensure that production labels were signed by the witnesses who had identified the relevant productions. Details of those labels that required to be signed, and by which witnesses, were furnished to him by DC McManus. DC Buwert's statement contains a list of the labels signed in his presence, which included details of the police production numbers, the names of the witness and the date and place of signing.

6.11 D&G also provided the Commission with copies of a large number of the messages from the HOLMES system which, it was explained, listed most, if not all, of the labels that were to be signed in this manner. It is apparent, however, that neither these, nor DC Buwert's statements, contain a comprehensive list of all the labels which were signed retrospectively. For example, there is no record of Brian Walton, the police officer who took receipt of PK/689, the main fragment of the Toshiba manual (see chapter 9 below), signing the label for that item, yet it is clear that this was done retrospectively.

6.12 In his Crown precognition DC Buwert explained that signatures were sought only where the item in question originated from a bag of debris. In such situations, the individual items within the bag would not be labelled until the bag was processed at the productions store, in which case the labels would not include the finder's signature. However, it is clear that in fact the exercise DC Buwert conducted in getting labels signed was wider than this. For example, the label attached to PI/995 (see chapter 7) was signed retrospectively by DC Stuart Robertson despite the fact that PI/995 was not originally found in a bag of debris; and DC Robertson appears to have been involved only in conveying the item to RARDE, not in its discovery. DC Buwert's Crown precognition also indicates that witnesses would be asked to sign labels only if they could remember finding the item in question, but again it is clear from the Crown precognitions of other witnesses involved in the debris recovery process that it was not only those who specifically recognised the items in question who signed labels retrospectively. There were various instances of witnesses appending their signatures to labels, even though they could not remember the item in question, simply because they assumed the police records indicating their involvement with the item must be correct.

6.13 In the submissions, such irregularities are highlighted in relation to particular items of debris in order to cast doubt upon their provenance and to imply deliberate interference with evidence by police or forensic witnesses. However, although the exercise of obtaining signatures on police production labels may have been worthless and ill-advised from an evidential perspective, the Commission does not take the view that in itself it suggests any sinister motive on the part of officers or undermines the integrity of the police investigation.

Agreement of evidence

6.14 A potential consequence of the questionable evidential value of HOLMES statements described above is that where, as often occurred, a police officer being precognosced by the defence simply recited the HOLMES statements attributed to him, the defence might have been led to believe that a witness could speak to something which in reality he could not. Although if this did occur it is clearly not satisfactory, the Commission has not come across any specific examples where such a difficulty arose. In relation to the recovery of debris, it is clear that the defence teams were well aware of the potential difficulties in establishing the chain of evidence of many of the items, and indeed had access to the Crown precognitions on the subject. The matter is canvassed in detail by one of the co-accused's solicitors in a briefing paper entitled "Debris Analysis" dated 20 August 1999. While the paper details the various irregularities in the recording procedures, the view taken is that these were not sufficient to justify a challenge to the admissibility of the debris evidence. The paper notes also that in assessing the matter the trial court would require to consider not only the question of fairness to the accused, but also the public interest in excusing the irregularities in the particular circumstances of the case.

6.15 It is also clear that a good deal of consideration was given by the defence to precisely which items were to be included in joint minute number 1. Among the materials provided to the Commission by McGrigors, the firm which acted on behalf of the co-accused at trial, there is a substantial document which assesses the merits of agreeing the provenance of numerous items of debris. It is clear that the relative importance of each item was taken into account in reaching a decision on whether or not to agree its provenance. For example, although the defence thought it unlikely that the Crown would have difficulty establishing the provenance of items such as AG/145 (fragments of Toshiba circuit board) and PI/995 (from which the fragment of MST-13 timer was allegedly recovered), a decision was taken not to agree this evidence, but to call upon the Crown to establish its provenance. Among other factors which were taken into account was whether, if a difficulty arose in relation to the evidential chain of one item, the provenance of other items sharing a common origin was likely to be proved.

6.16 In the Commission's view the defence adopted a careful, reasoned and realistic approach to the agreement of evidence in joint minute number 1, which in no way can be said to have contributed to a potential miscarriage of justice in the applicant's case.

Enquiries regarding the Forensic Explosives Laboratory ("FEL"), Fort Halstead

(i) RARDE photography

6.17 Various submissions to the Commission, most notably those relating to the fragments of grey Slalom shirt (chapter 7), refer to photographs which were taken of items of debris at RARDE and raise questions about these, such as when they might have been taken. The Commission considered it an important step in assessing the provenance of the items of debris to establish the process by which photographs were taken at RARDE and, in particular, what records were kept of this.

6.18 DC Steven Haynes was interviewed by a member of the Commission's enquiry team on 18 April 2005, in advance of the Commission's visit to FEL (see appendix of Commission interviews). DC Haynes, of Kent Police, was the senior photographer at RARDE during the Lockerbie enquiry. DC Haynes explained that once photographs were developed by the photographic laboratory, the prints and negatives would be returned to the photographer, and a number would be written on the back of each print. This number would correspond to the number ascribed to the negative from which the print was produced. Details of this negative number, and of the date on which the print was returned from the photographic laboratory, would be recorded in a log book along with other details about the particular job. As the date listed in the log book indicated the date on which the print was returned from the developing laboratory, it would normally follow that the photograph was exposed on a date prior to this. DC Haynes explained that he would generally wait until he had taken enough shots to make the processing job worthwhile, so that it might be a number of days after taking a photograph that the prints would be received. The log book would then be completed with the date on which the prints were received. DC Haynes confirmed that the log book should have been retained at Fort Halstead.

6.19 The Commission thereafter obtained from D&G one of the original copies of the RARDE report, appended to which were the volumes of photographs bearing negative numbers on the reverse, as DC Haynes had described. D&G also provided a list which cross-refers these photographs and the corresponding negative numbers (see appendix). During the visit to FEL on 2 and 3 June 2005, further original versions of the photographic albums appended to the RARDE report were obtained, which again had negative numbers written on the reverse of each of the prints. Members of the enquiry team also examined various photograph log books and took photocopies of relevant pages from these (see appendix). Of particular interest was a log book (marked with a "1") containing photograph reference numbers with the prefix "FC" (which DC Haynes later explained meant "full colour"). The vast majority of the photographs contained in the appendices to the RARDE report have negative numbers written on the reverse bearing the prefix FC.

6.20 After the visit to FEL, copies of pages from log book 1 were sent to DC Haynes who confirmed that they originated from the book to which he had referred at interview. He also confirmed that the majority of the entries in this log book were inserted by him. His supplementary statement to this effect is contained in the appendix of Commission interviews.

6.21 During a subsequent visit to FEL in March 2006, members of the Commission's enquiry team examined a number of the original negatives of photographs which were considered significant to the review, and were satisfied that the negatives corresponded to the photographs.

6.22 The result of these enquiries was that the Commission had what it considered to be a reliable method of establishing the latest date on which photographs of recovered debris could have been taken at RARDE. As can be seen in chapters 7 to 11, this proved to be of great assistance in addressing many of the submissions made by MacKechnie and Associates.

(ii) Investigations regarding Dr Hayes' notes

6.23 A recurring theme in the submissions regarding the items of debris concerns whether Dr Hayes' examination notes are contemporaneous. In the initial stages of the police enquiry Dr Hayes was the forensic scientist principally responsible for examining the debris recovered in and around Lockerbie. His notes often contained the first description of an item of debris, beyond the sparse details recorded on the police label or in the Dexstar log. In alleging that a number of crucial debris fragments had been "reverse engineered", the submissions expressly or impliedly allege that Dr Hayes' notes had been altered to cover this up. A number of the submissions point to specific passages in the notes which it is suggested might be additions or alterations made after the date recorded on the page.

6.24 The Commission obtained Dr Hayes' original file of notes (CP 1497) from D&G and instructed a forensic document examiner, John McCrae, to examine it. Mr McCrae obtained ESDA (Electrostatic Detection Apparatus) tracings of the pages of interest, in order to examine the patterns of indented writing and to identify any anomalies which might indicate that passages had been added or altered after the note was originally written. He also used VSC (Video Spectral Comparator) techniques to identify differences in ink, which again would assist in identifying any entries that might have been added at a later date.

6.25 Mr McCrae's findings in relation to particular passages from Dr Hayes' notes are described in the relevant chapters below. However, in general he found that certain passages relating to items referred to in the submissions had been added to or altered after the original note was written. Indeed, he considered such additions and alterations to be "habitual". A copy of his report is contained in the appendix.

6.26 The Commission interviewed Dr Hayes about this and other matters on 8 March 2006 (see appendix of Commission interviews). Dr Hayes' memory of his involvement in the Lockerbie enquiry had faded significantly, and his account must be treated with some caution. Nevertheless he appeared to be a credible witness who seemed to be doing his best to recall events and to answer questions as fully as he could.

6.27 In respect of his evidence at trial that his notes were "contemporaneous", Dr Hayes explained that what he meant by this was that they were written while he had the item in question before him: he did not examine an item and then write up his notes of this later. He added, however, that, although his notes recorded a date on which he had examined items, it was possible that he had revisited items at a later date and made further notes. He acknowledged that in such circumstances the date at the top of the page would not necessarily reflect the date on which the entirety of the note had been completed.

6.28 Dr Hayes' explanation is consistent with some of Mr McCrae's findings, and in the Commission's view it is significant that this explanation was offered by him prior to his being informed that his notes had been the subject of forensic examination. However, his account at interview appears inconsistent with his position in cross examination at trial, namely that by "contemporaneous" he meant that the note was written on the date specified on the page, and while he was carrying out the examination of the item in question (16/2592). On the other hand, Dr Hayes subsequently accepted in evidence, under reference to page 19 of his notes, that he had added wording to his notes after the date recorded on the page, and he was cross examined in detail about this by counsel for the co-accused (16/2613 et seq).

6.29 The Commission's enquiries show that Dr Hayes' notes cannot be regarded as containing a definitive record of the dates on which particular items of debris were examined. The implications of this are considered below in relation to particular items of debris.

Conclusion

6.30 In the absence of further material evidence, the Commission is not prepared to view the deficiencies of the evidence discussed in this chapter as suggesting the existence of a conspiracy on the part of the forensic and police authorities to tamper with or create evidence. In these circumstances the Commission does not consider that the deficiencies indicate that a miscarriage of justice may have occurred.

CHAPTER 7
THE SLALOM SHIRT

Introduction

7.1 Various submissions were made to the Commission regarding the provenance of the fragments of clothing listed at section 5.1.3 of the RARDE report (CP 181), which were accepted by the trial court as having formed part of a grey "Slalom" brand shirt contained within the primary suitcase.

7.2 In volume A reference is made to the finding and handling of one of these clothing fragments, PI/995. It was suggested that the date on which Dr Hayes examined PI/995 and extracted from it various items was not 12 May 1989 as indicated in his handwritten notes (CP 1497). This is said to be important given the trial court's acceptance that one of those items, PT/35(b), a fragment of circuit board identified as having originated from an MST-13 timer, was found by Dr Hayes within PI/995 on this date. The timer fragment was crucial evidence which turned the focus of investigation away from Palestinian organisations and towards Libya. If it could be shown that the timer fragment had not been extracted at the time specified in Dr Hayes' notes, but in fact had been discovered later, that would support the proposition in the application that evidence of the fragment had been fabricated with the intention of directing the investigation away from Palestinian organisations, with links to Syria and Iran, at a time when the co-operation of those countries was necessary for the Gulf War.

7.3 It was also submitted in volume A that the anonymous witness "the Golfer" (see chapter 5) had information regarding a change which was made to the police label attached to PI/995.

7.4 On 2 June 2004, MacKechnie and Associates lodged substantial further submissions regarding the fragments of grey Slalom shirt. An additional note on the subject was submitted by them on 2 February 2005. Copies of these submissions are contained in the appendix of submissions.

7.5 In order to address them effectively, the Commission has divided the submissions into three broad grounds, each of which is detailed and addressed below. In light of its conclusions on these three grounds, a fourth ground, which alleges irregularities in respect of the finding and handling of the three other fragments of the grey Slalom shirt (PK/1978, PK/1973 and PK/339), is addressed in the appendix rather than in the statement of reasons. Based on the results of its enquiries, the Commission has no reason to doubt the provenance of any of these items.

Ground 1: photograph 116 of the RARDE report depicting PI/995 "before dissection"

7.6 MacKechnie and Associates sought to question the contents of Dr Hayes' notes which suggest that he extracted PT/35(b) from PI/995 on 12 May 1989. In support of this, reference is made in the submissions to the following passage of the RARDE report relating to PI/995:

> *"This is a severely damaged fragment of grey cloth which is shown after its partial dissection in photograph 117, and at the bottom centre of photograph 116 (before dissection)"* (section 5.1.3, p 66).

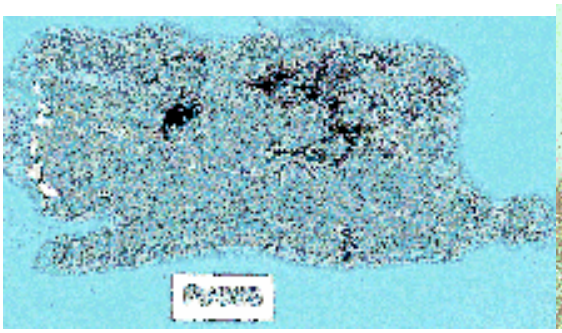
7.7 In evidence (16/2484), Dr Hayes confirmed that photograph 116 depicts PI/995 prior to dissection.

7.8 Central to the submissions is the allegation that photograph 116 cannot have been taken prior to 12 May 1989, the date on which PI/995 was purportedly dissected; and therefore that the date of dissection must have been later. In particular, the submissions suggest that, as at 12 May 1989, the three other fragments of grey Slalom shirt pictured in photograph 116 alongside PI/995 – PK/339, PK/1973 and PK/1978 – had not been identified and examined in detail at RARDE. Reference is made in the submissions to a number of sources said to confirm this. For example, Dr Hayes' notes record that he examined PK/1973 and PK/339 on 22 May 1989 and PK/1978 on 10 October 1989 (CP1497; pp 75, 76 and 112). In addition, police statements, reports and a memo by Dr Hayes, all dated August 1989, refer to PK/339, PK/1973 and

PI/995 having been identified as of common origin, but do not mention PK/1978. It is submitted that, because PK/1978 had not been associated with the other three fragments by August 1989, the four fragments could not have been photographed collectively by 12 May 1989.

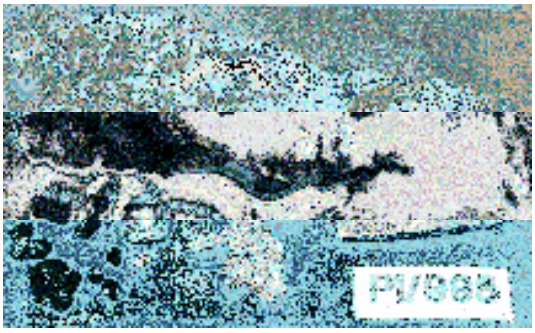
7.9 As explained below, the Commission accepts the submission that photograph 116 could not have been taken on or before 12 May 1989. Therefore, it is not necessary to address in detail all the evidence referred to in the submissions which seeks to prove that point.

7.10 During a meeting with MacKechnie and Associates on 29 July 2004, it was suggested by members of the enquiry team that the passage in the RARDE report quoted above might simply contain an error, and that in fact photograph 116 might not depict PI/995 prior to dissection. In response to this, it was submitted that the appearance of PI/995 in photograph 116 was noticeably different to its appearance in photograph 117 of the RARDE report, the latter supposedly depicting the fragment post-dissection. It was argued that these differences in appearance were attributable to the process of dissection and that, therefore, photograph 116 must depict the fragment pre-dissection. Reference was also made to a third photograph of PI/995, contained in Crown production number 435 (a booklet of photographs purportedly compiled in August 1989 for police officers to take to Malta). It was suggested that the photograph in production number 435 also showed PI/995 in a pre-dissected state, and that it appeared to be an image of PI/995 in the same condition as, but showing the reverse side of, the fragment as it appeared in photograph 116 of the RARDE report. Close-ups of PI/995 in the three photographs are recreated below (from images stored on the flip drive):



Close up from photograph 116

Close up from production 435



Close up from photograph 117

7.11 The submissions concerning the appearance of PI/995 in the various photographs were repeated and expanded upon in the note submitted by MacKechnie and Associates on 2 February 2005. It was suggested that production number 435 might contain the same photographs as the booklet referred to by Allen Feraday in his handwritten notes (CP 1498, p 61) as PT/18. Specifically, Mr Feraday referred in his notes to various negative numbers relating to the photographs in PT/18.

Consideration of ground 1

7.12 If the submissions were to prove correct that photograph 116 depicted PI/995 prior to dissection, and that the photograph must have been taken long after 12 May 1989, that would indicate that the fragment of timer (PT/35(b)) could not have been extracted until a point later than that specified in Dr Hayes' notes. This might, in turn, lend support to the proposition that evidence of the timer fragment had been fabricated to implicate Libya.

Enquiries regarding photographic records

7.13 The enquiries undertaken by the Commission with the RARDE photographer, DC Haynes, and at the Forensic Explosives Laboratory ("FEL"), have been detailed in chapter 6. The result of these enquiries is that the Commission has established a means of identifying the likely point at which photographs of particular items were taken at RARDE.

Photograph 116

7.14 On the reverse of the original print of photograph 116 obtained by the Commission, DC Haynes has noted its negative number as "FC4374". The entries in photograph log book number 1 which correspond to this number (see appendix to chapter 6) are as follows:

Date	**Neg No**	**Subject**	**Originator**	**Remarks**
6-4-90	FC4373 to 86	PP8932 Lockerbie Clothing	A Feraday	Restricted

7.15 This indicates that photograph 116 was taken at the instruction of Allen Feraday before or, at the very latest, on, 6 April 1990, along with other photographs in the sequence FC4373 to FC4386. Confirmation of this finding was obtained following enquiries at FEL in March 2006. Members of the Commission's enquiry team gained access to the negative corresponding to photograph FC4374, as well as to those relating to various other photographs. These negatives were stored in sheaths, each of which was date-stamped and bore the reference numbers of the negatives contained inside. The negative for FC4374 was found to correspond in appearance to photograph 116, and the date stamp on the sheath in which it was contained was "6 April 1990", consistent with the contents of the photographic log book.

7.16 If photograph 116 was indeed taken some time in the days before 6 April 1990, rather than prior to 12 May 1989, this would be consistent with the dates on which other items depicted in photograph 116 were examined, including PK/1978 on 10 October 1989. It would also be consistent with the passage of Dr Hayes' evidence (16/2609), in which he stated that composite photographs (ie photographs of more than one item of debris), and those relating to control samples, may have been taken at a time after the examination of each fragment was carried out. Photograph 116 is a composite photograph of the four fragments of grey Slalom shirt, and a number of the other photographs in the sequence FC4373 to FC4386 are of control samples.

7.17 The movement records of the four fragments of grey Slalom shirt are also consistent with photograph 116 having been taken some time shortly before 6 April 1990. According to the police and RARDE records, while fragments PI/995, PK/339 and PK/1973 were all stored at RARDE from January or February 1989 until July 1991, PK/1978 left there on 9 March 1989 and was only returned on 25 September 1989. Thus, PK/1978 was not within RARDE's control on or around 12 May 1989 when, if the RARDE report and Dr Hayes' evidence were accurate, photograph 116 would require to have been taken. After being returned to RARDE on 25 September 1989, PK/1978 was released again on 5 January 1990, before returning to RARDE on 27 February 1990, where it remained until July 1991. It was therefore present at RARDE, along with the three other fragments, from 27 February 1990, which would be consistent with photograph 116 having been taken on or shortly before 6 April 1990. Copies of the relevant pages of the RARDE movement records obtained by the Commission from the FEL are included in the appendix. Also included are copies of the relevant pages from DP/29, which comprises informal records kept by the productions officer, DC Brian McManus.

The other photographs of PI/995

7.18 The Commission has also established the likely point at which the other photographs of PI/995, referred to above, were taken.

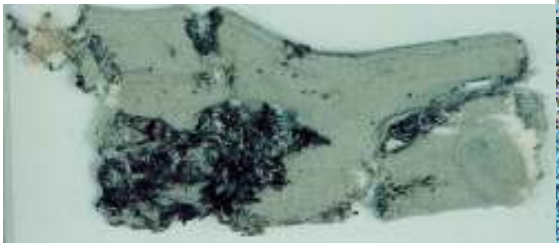
7.19 With regard to the photograph contained in Crown production number 435 as this is a Polaroid there is no direct record of when it was taken, but the booklet of photographs designated PT/18 contains an identical image of PI/995, suggesting that it was taken at the same time as the Polaroid in production 435. Photograph log book number 1 indicates that the photographs in PT/18 were taken at Dr Hayes' instruction before, or at the very latest on, 23 August 1989. Such a date would be consistent with the police label attached to PT/18, which is dated 23 August 1989, as well as with the fact that Crown production number 435 is recorded as having been taken to Malta by police officers on 30 August 1989 (see DCI Bell's statement S2632C in the appendix to chapter 10; the police label on CP 435 is dated 28 August 1989).

7.20 Similarly, by cross-referring the negative number on the original print of photograph 117 (FC3521) with the corresponding entry in photograph log book 1, it appears that the photograph was taken before, or at the very latest on, 22 May 1989, which again is reflected in the date stamped on the sheath containing the negative. Photograph 117 clearly depicts PI/995 following dissection, and if taken shortly before 22 May 1989, would be consistent with page 51 of Dr Hayes' examination notes, which indicates that his examination of PI/995 took place on 12 May 1989.

7.21 If the records in photograph log book number 1 are accurate, then clearly the passage in the RARDE report quoted above, in which photograph 116 is said to depict PI/995 prior to dissection, is not. Similarly, if one accepts the contents of the log book one must reject the submission made on behalf of the applicant that the photograph of PI/995 in Crown production number 435 was taken prior to its dissection.

7.22 However, as indicated, MacKechnie and Associates allege that PI/995 appears differently in photograph 116 (and in production number 435) than it does in photograph 117, and that this is because only the latter image shows the item after dissection. If that were to prove correct, the records in the photograph log book could not be regarded as accurate, and there would be considerable uncertainty concerning the provenance of PI/995. In particular, doubt would be cast upon 12 May 1989 as the date on which the item was examined and PT/35(b) extracted.

7.23 It is apparent from the images of PI/995 above that the fragment appears somewhat differently in photograph 117 from how it appears in the other two photographs. The Commission has investigated whether these differences may have been caused by dissection of the fragment. During a visit to Dumfries Police Station on 17 March 2005, two members of the enquiry team examined PI/995 and were present when a scenes of crime officer photographed the fragment. Prints of these photographs were developed and handed to the members of the enquiry team the same day. Close-ups of three of the photographs are recreated below, and are compared with the images of PI/995 referred to above.

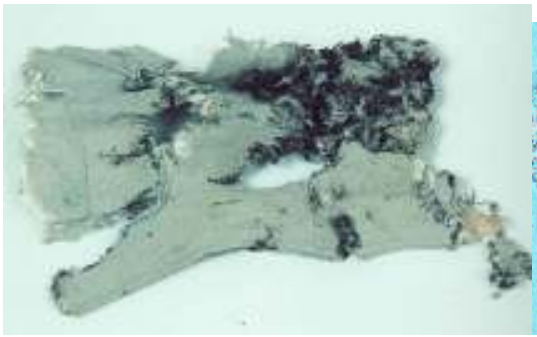


Photograph 1 taken at Dumfries 17/3/05

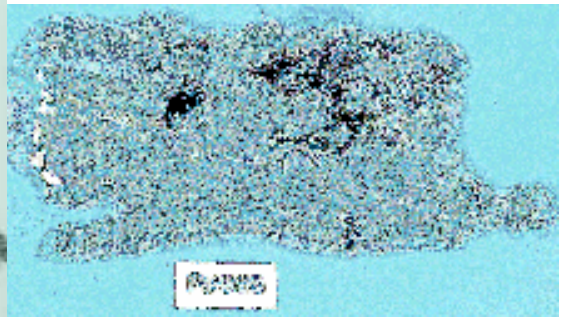
Close-up from photograph 117 of RARDE report

7.24 As one would expect, PI/995, as depicted in photograph 1, is similar in appearance to the item pictured in photograph 117 (albeit the latter appears to have been taken at a shallower angle and in different lighting conditions).

7.25 After photograph 1 was taken, one of the enquiry team in attendance at Dumfries examined the fragment and found that it was folded along a crease. The fragment was thereafter unfolded and further photographs taken.

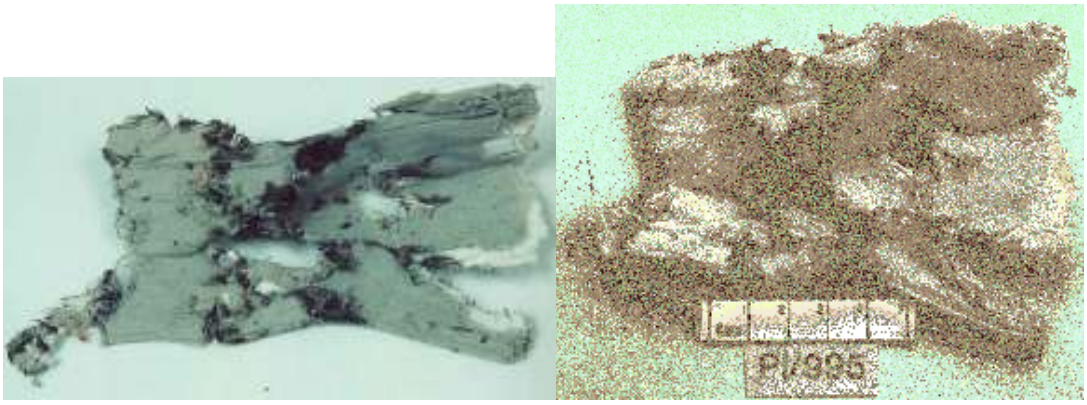


Photograph 2 taken at Dumfries 17/3/05



Close up from photograph 116 of RARDE report

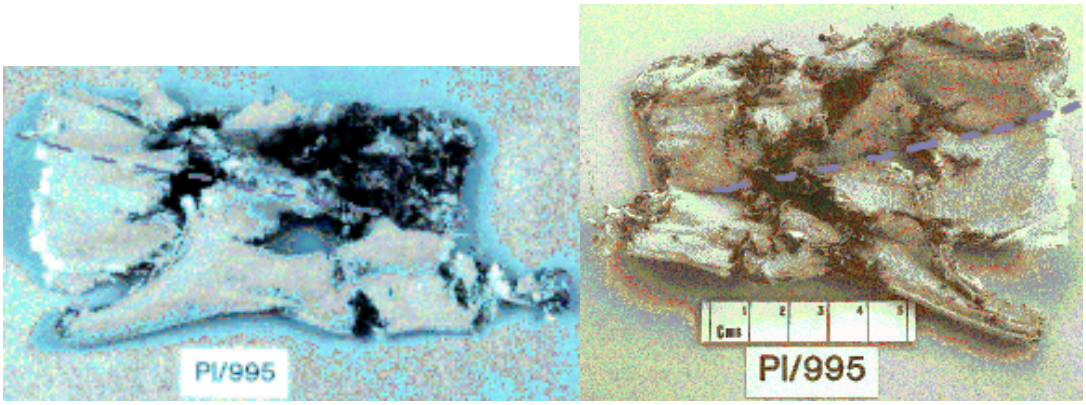
7.26 Photograph 2 depicts the fragment unfolded. In the Commission's view, its appearance corresponds closely with the fragment as depicted in photograph 116 which, according to the RARDE report, shows PI/995 prior to dissection.



Photograph 3 taken at Dumfries 17/3/05 Close up from Crown production 435

7.27 Photograph 3 shows the reverse side of the unfolded fragment. In the Commission's view, its appearance corresponds closely with the fragment as depicted in the Crown production number 435, which MacKechnie and Associates submit was also taken prior to its dissection.

7.28 Based on these photographs, the Commission sees no basis for the submission that the dissection of PI/995 has altered its shape and size. In the Commission's view, any difference in appearance can be explained, quite simply, by the fact that in photograph 117 the fragment is pictured folded along a crease, whereas photograph 116 and production number 435 show the fragment in an unfolded state. The crease is clearly visible in the latter two photographs, and is marked by the broken line:



Close-ups from photograph 116 (left) and production 435 (right) with broken line showing crease.

Interviews of forensic scientists

7.29 Allen Feraday and Dr Thomas Hayes were interviewed by members of the Commission's enquiry team on 7 and 8 March 2006, respectively (see appendix of Commission interviews). Both witnesses accepted that, based on the records in the photograph log book and those indicating that PK/1978 was not at RARDE in May 1989, the passage in the RARDE report in which photograph 116 is said to depict PI/995 prior to dissection was an error. Mr Feraday accepted that the differences in appearance of the fragment between photographs 116 and 117 might be attributed to it having been folded when the latter photograph was taken. Dr Hayes, on the other hand, expressed some surprise at this, as he would normally have expected efforts to be made to show the full extent of the fragment. He suggested, however, that greater importance was attached to photographing the various items that had been extracted from PI/995 than to PI/995 itself.

Conclusions on ground 1

7.30 In summary, the Commission has concluded that: photographs 116 and 117, the photograph of PI/995 in production number 435, and the photograph of PI/995 in booklet PT/18, all depict the item after dissection; that the reference in the RARDE report in which photograph 116 is said to depict PI/995 prior to its dissection is simply an error; and that the apparent differences in PI/995's appearance between photographs is attributable to the fact that it was folded at the time of its depiction in photograph 117, but unfolded when the other photographs were taken.

7.31 In light of these enquiries, the Commission does not believe that the submissions concerning the photographs of PI/995 cast doubt on the evidence that this item was dissected on 12 May 1989, as recorded in Dr Hayes' notes.

Ground 2: the size of shirt from which the fragments originated

7.32 The second broad submission made by MacKechnie and Associates relates to the size of the garment from which the four fragments of grey Slalom shirt, PI/995, PK/339, PK/1973 and PK/1978, originated.

7.33 According to the submissions, the trial court accepted that the four fragments originated from the size 42 grey Slalom shirt which the witness Anthony Gauci testified he had sold to a Libyan on an occasion in 1988. The submissions state that the trial court was not entitled to make this evidential link. In evidence (16/2480), Dr Hayes (quoting the RARDE report) stated that the grey fragments came from a smaller size of shirt than a size 42 control sample grey Slalom shirt (given police reference DC/398). Accordingly, on the evidence, the shirt in the primary suitcase must have been of a smaller size than the one which Mr Gauci said he had sold on the occasion in question.

7.34 The submissions go on to suggest that the fragments might not have originated from a grey Slalom shirt at all. Reference is made to the "difficulties" encountered by the police in establishing a link between PK/1978 and the shirts sold by Mr Gauci and, in particular, to police statements obtained from two Maltese clothing manufacturers, Tonio Caruana and Godwin Navarro, in January 1990. Both these witnesses are recorded in their statements as being of the opinion that PK/1978, which includes part of a pocket and part of a buttonhole seam, or placket, came from a child's size of shirt. The submissions also refer to the police statement of Joe Calleja, a salesman for Alf Mizzi and Sons (the owners of the Slalom brand), dated 22 January 1990, in which he states that plain Slalom shirts such as the grey one supposedly sold by Mr Gauci were made only in adult sizes. It is suggested in the submissions that if this evidence had been available at trial, the court would have been precluded from drawing a link between the grey shirt fragments and the shirt Mr Gauci said he had sold.

7.35 According to the submissions, the witnesses Caruana, Navarro and Calleja were all precognosced by MacKechnie and Associates in April 2004 and maintained the views they had expressed in their police statements. Another individual, John Sultana, was also precognosced at that time. He too had given a police statement in January 1990, when he was a sales manager for Johnsons Clothing, the company which manufactured the Slalom shirts on behalf of Alf Mizzi and Sons. In the statement Mr Sultana explained that he could not tell from PK/1978 what size of shirt it had come from because the distance between the pocket and the placket varied from

shirt to shirt. According to the submissions, however, when precognosced in 2004 Mr Sultana disputed the terms of his police statement and claimed that he had in fact informed the police of his opinion that PK/1978 had originated from a child's size shirt. When shown a photograph of the fragment in 2004, he maintained this view.

7.36 Furthermore, according to Mr Calleja's police statement, the stitching in which the Slalom name appears on the label should, for grey shirts, be blue in colour, whereas the colour of the stitching on the label attached to PK/1978 is in fact brown. MacKechnie and Associates found on Mr Calleja's account and the apparent irregularities in the size of PK/1978 to suggest that the Slalom label which adheres to PK/1978 might have been attached during the police investigation in order to fabricate a link between that fragment and the clothing sold by Mr Gauci.

7.37 The statements and precognitions of the witnesses referred to above are contained in the appendix. A number of other issues are raised by MacKechnie and Associates under this head, but given the conclusions reached below, the Commission does not consider it necessary to detail them here.

Consideration of ground 2

The evidential link between Mr Gauci's evidence and that of Dr Hayes

7.38 At paragraph 10(3) of its judgment the trial court recounts the evidence that four charred fragments of grey cloth were found to have come from the primary suitcase and that in terms of colour, weave and texture these were consistent with having originated from a grey Slalom brand shirt. No mention is made in that paragraph about the size of the shirt, although at paragraph 12 the court narrates Mr Gauci's evidence that he sold to the man, among other things, two Slalom shirts, collar size 16½ (which equates to size 42). The court also states at paragraph 12 that it is "satisfied… that [Mr Gauci's] recollection of these items is accurate", and concludes that it is "entirely satisfied that the items of clothing in the primary suitcase were those described by Mr Gauci as having been purchased in Mary's House". Accordingly, the court appears to have concluded that fragments PI/995, PK/1978, PK/1973 and PK/339 originated from a size 42 shirt.

7.39 Given Dr Hayes' evidence that the fragments originated from a shirt smaller than size 42, the trial court appears to have had no foundation for this conclusion. In the Commission's view, however, this apparent error is of little materiality. Even in its absence, the fact remains that Mr Gauci claims to have sold to the purchaser a Slalom brand shirt of a type recovered from the crash site, and linked to the primary suitcase. In reaching the conclusion that these items were one and the same, the trial court would have been entitled to place more weight on these factors, than on the apparent discrepancy in the precise size of the item, particularly when one considers the similarities between the other items Mr Gauci claims to have sold and those linked to the primary suitcase.

7.40 It is worth noting that although Mr Gauci recalled in evidence selling a pair of size 36 Yorkie trousers (31/4732 et seq) and also (at first at least) a babygro of size 2 years (31/4744), the fragments linked to the primary suitcase indicated that the Yorkie trousers (PT/28) were in fact size 34 and the babygro (PK/669) size 12-18 months. These discrepancies were made apparent during Mr Gauci's evidence, but they did not lead the trial court to reject the link between the two sets of items. In the Commission's view, the court's approach to this issue was rational and logical, and would have been no different regarding the grey Slalom shirt had the discrepancy regarding the size of shirt been appreciated.

Enquiries regarding the size of shirt from which PK/1978 originated

7.41 Joseph Calleja's assertion in his police statement (S5220) that the grey Slalom shirts were made only in adult sizes is borne out by John Sultana's police statement (S5166) and by Crown production number 510, which contains papers relating to the order for shirts made by Alf Mizzi and Sons to Johnsons Clothing. Production number 510 indicates that the grey flannel shirts were to be made in adult sizes 37, 38, 39, 41, 42, 43 and 44. If it is correct that PK/1978 came from a child's size shirt, as the submissions suggest, this might cast doubt either about the provenance of PK/1978, or upon the records which suggest that grey Slalom shirts were made only in adult sizes.

7.42 The Commission notes firstly that there is evidence beyond that contained in the RARDE report to support the conclusion that the fragments of grey material originated from a Slalom shirt. Firstly, Alexander Bugeja, former assistant general manager at Johnsons Clothing, confirmed in evidence (14/2169-2170) that PK/1978 originated from one of the Slalom shirts his company manufactured. Secondly, prior to trial the defence commissioned a forensic report from Dr Ann Priston of the Forensic Science Service who, following a microscopic comparison of the constituent fibres, concluded that PI/995 was consistent with having originated from the collar of a shirt like DC/398. A copy of her report is contained in the appendix. Neither of these sources was mentioned in the submissions to the Commission. Nevertheless, given the seriousness of the allegation made in the submissions, the Commission considered it important to make further enquiries, in order to remove any possible doubt.

7.43 In his police statement (S5149), Mr Caruana is recorded as having given the following reasons for his opinion that PK/1978 came from a child's size shirt: the narrowness of the placket; the size of the button holes; the size of the pocket; and the distance between the placket and the pocket. Likewise, Mr Navarro in his police statement (S5150) referred to the narrowness of the placket and to the size of the pocket as factors which indicated that the shirt was made to fit a boy.

7.44 Another Maltese individual interviewed by the police in January 1990, but not referred to in the submissions, was a tailor, Saviour Abela (S5163), who sold men's clothing including Slalom shirts. According to his statement, Mr Abela provided two sample Slalom shirts to the police. The first was a grey Slalom shirt, size 41 (given police reference DC/399), which he indicated had a 16 inch collar; the second was a beige Slalom shirt, size 37 (given police reference DC/403), which had a 14½ inch collar. After comparing PK/1978 to the control sample shirts, Mr Abela concluded that PK/1978 appeared to come from a shirt smaller than the size 41 grey shirt. However, he found that the dimensions of PK/1978 were the same as the size 37 beige shirt, which made him conclude that PK/1978 came from a similar size of shirt. As indicated, the documentation from Johnsons Clothing (CP 510) records that the smallest size of grey Slalom shirt was size 37. Mr Abela's opinion, as recorded in

his statement, was that a shirt with a 14½ inch collar (ie size 37) would be for a small man of normal build, or a boy with a similar build to a small man.

7.45 The witnesses Caruana and Navarro were interviewed by members of the enquiry team (see appendix of Commission interviews). According to the Maltese authorities, the other witnesses referred to in the submissions (Mr Sultana and Mr Calleja) either could not be traced or were unwilling to cooperate. Given the outcome of its enquiries in this area, the Commission did not consider it necessary to pursue those witnesses further.

7.46 At interview, both Mr Caruana and Mr Navarro were shown an image of PK/1978 on which had been noted the various dimensions of the fragment itself, the pocket, the placket, the button holes and the distance between the placket and pocket, all as described in the RARDE report and Dr Hayes' notes. Neither witness had a good recollection of the events surrounding their respective police interviews in 1990, and neither recognised the image as being of the item the police had shown to them. More significantly, neither witness was as clear that the fragment had originated from a child's shirt as their police statements and precognitions appeared to convey. Indeed, Mr Caruana expressly stated that he thought the fragment originated from a small size of adult shirt. While in the precognition obtained from him in 2004, Mr Caruana is recorded as having believed that PK/1978 came from a 13½ or 14½ inch shirt, at interview with the Commission both witnesses accepted (consistent with Mr Abela) that shirts with a 14½ inch collar could be considered a large boy's or small adult's size.

7.47 During a visit to Dumfries Police Station on 17 March 2005, members of the enquiry team examined PK/1978, PK/339 and DC/403 (the size 37, 14½ inch collar beige shirt obtained by the police from Mr Abela as a control sample) and took measurements of their various features. These measurements can only be regarded as approximate because of the creased and warped condition of the fragments. Nevertheless, they were compared with each other and, despite some discrepancies, the measurements were sufficiently similar to satisfy the Commission that the fragments PK/1978 and PK/339 could have originated from a shirt of a similar size to DC/403.

7.48 In light of the foregoing enquiries, the Commission is satisfied that PK/1978 originally formed part of a shirt of size 37 or larger, which is consistent with it having come from a grey flannel Slalom brand shirt.

The Slalom label

7.49 Allegations that the investigating authorities have tampered with fragments of the clothing feature commonly in the submissions made to the Commission by MacKechnie and Associates. It is alleged throughout the submissions that manufacturer's labels or marks may have been added to fragments in order to fabricate a link between the items deemed to have been within the primary suitcase and those sold by Mr Gauci. It is in this context that the allegation concerning the proper colour of the Slalom label is made.

7.50 The RARDE report (section 5.1.3) and Dr Hayes' notes (CP 1497, p 155) both refer to the fact that the stitching of the word "Slalom" as it appears on the label attached to PK/1978 is brown in colour, whereas the same stitching on the label attached to the control sample grey shirt (DC/398) is blue. In his police statement, Mr Calleja explained that this may have occurred because the person who made the shirt was supplied with the wrong colour of label. A similar explanation was given by the former department manager of Alf Mizzi and Sons, Edward Gatt, who was interviewed by members of the Commission's enquiry team. According to Mr Gatt, as Slalom shirts were "down-market" he would not have been overly concerned about such production errors and would not have classed the shirt as a second on this basis.

7.51 Moreover, during the visit to Dumfries Police Station on 17 March 2005, members of the enquiry team examined DC/399, the size 41 grey Slalom shirt obtained by the police from Saviour Abela in January 1990. On inspection of the label attached to the pocket of DC/399, it was noted that, as with PK/1978, the stitching forming the word "Slalom" is brown in colour, as opposed to blue.

7.52 There are also numerous references to the Slalom label in records which pre-date the police enquiries in Malta in January 1990. For example, the Dexstar log (CP

114) contains a description of PK/1978, inserted on 1 February 1989, which specifically includes the word "Slalom". Likewise, the police Request for Forensic Examination form (known as an "LPS form") which accompanied PK/1978 to RARDE on 25 September 1989 (CP 288, LPS 417) makes reference to "Slalom", and a detailed description and drawing of the Slalom label is contained in Dr Hayes' examination note dated 10 October 1989 (CP 1497, p112). This timeline dispels any notion that the evidence linking the fragment of shirt to Malta was introduced retrospectively.

7.53 In the Commission's view the results of these enquiries serve to refute totally the allegation made by MacKechnie and Associates that the Slalom label was somehow fabricated in order to link PK/1978 to the items sold by Mr Gauci. Given this conclusion, the Commission does not consider it necessary to address the other matters raised by MacKechnie and Associates directed to casting doubt upon this item.

Conclusions regarding ground 2

7.54 The Commission is satisfied that fragments PI/995, PK/339, PK/1973 and PK/1978 originated from a grey Slalom shirt and sees no basis whatsoever for the allegation that these were somehow interfered with by the investigating authorities. While the Commission believes that the trial court may have misdirected itself in concluding that the Slalom shirt was of the size spoken to by Mr Gauci in evidence, it does not consider this sufficiently material to have led to a possible miscarriage of justice in the applicant's case.

Ground 3: issues regarding the provenance of PI/995

7.55 Various submissions were made regarding the police and RARDE records relating to PI/995 and the other fragments of the grey Slalom shirt. One aspect of this, the suggestion that photograph 116 of the RARDE report could not have been taken on or prior to 12 May 1989, has been addressed above. However, the submissions also contain various allegations about the provenance of PI/995 and the other fragments.

7.56 The first submission on this issue concerns the police label attached to PI/995 and the evidence at trial that the description on this had been changed from "Cloth" to "Debris". The submissions recount the evidence of DC Gilchrist, the recorded finder of PI/995, who was cross examined on the matter and whose position altered as to whether he had made the change. Reference is made to the court's conclusion that DC Gilchrist's evidence was "at worst evasive and at best confusing". At section 14.3(2) of volume A, the trial court is criticised for accepting that there was no sinister inference to be drawn from the change to the label. It is highlighted that the only reason given by the trial court for accepting the evidence was the fact that the officer who corroborated the find, DC Thomas McColm, was not cross examined about the change of label. The doubts about this evidence, it is suggested, arise not only because the officers concerned could have tampered with the label, but because "others unknown" might have done so.

7.57 The submissions also refer to information provided by the Golfer that,

7.58 Reference is also made in the submissions to an examination of a photograph of the label by a handwriting expert, whose preliminary conclusions were that the change was made by DC Gilchrist. The submissions suggest that there are other irregularities in the label, specifically the signature of the officer who corroborated the find, DC McColm, which, it is alleged, overwrites another signature on the label (that of DS Robert Goulding) and therefore must have been added long after the item was supposedly found. According to the submissions, DC McColm was precognosced by MacKechnie and Associates following the appeal and confirmed that, after his involvement in the Lockerbie enquiry had ended, he was recalled to Dumfries to sign various police labels.

7.59 In addition, various submissions are made which seek to cast doubt on the Dexstar log entry for PI/995, and the RARDE records relating to this item. In particular, the submissions revisit another issue raised at trial, namely page 51 of Dr

Hayes' notes dated 12 May 1989, which records his examination of PI/995 and the extraction of PT/35(b). At trial Dr Hayes was cross examined about changes made to the numbering of the pages of his notes which, it was suggested, demonstrated that page 51 had been inserted at a later date. Reference is also made in the submissions to Dr Hayes' failure to follow his normal procedures in that he did not draw the fragment of circuit board, as well as to the fact that he had no real recollection of finding the item, independent of his notes. The court's handling of this evidence is criticised in that it allegedly failed to address the difficulties presented by the evidence of Dr Hayes' notes, and simply referred to matters such as the miniscule size of the timer fragment, a fact which, it is submitted, has no bearing on Dr Hayes' handling of the item. The submissions suggest that the provenance of PI/995 is far from proved, and that further investigation is required of the forensic notes, particularly given Dr Hayes' description of the changes to the page numbers as an "unfathomable mystery".

Consideration of ground 3

Police label attached to PI/995

7.60 The trial court's position regarding the label attached to PI/995 is narrated at paragraph 13 of its judgment:

> *"We now turn to another crucial item that was found during the search of the debris. On 13 January 1989 DC Gilchrist and DC McColm were engaged together in line searches in an area near Newcastleton. A piece of charred material was found by them which was given the police number PI/995 and which subsequently became label 168. The original inscription on the label, which we are satisfied was written by DC Gilchrist, was "Cloth (charred)". The word 'cloth' has been overwritten by the word 'debris'. There was no satisfactory explanation as to why this was done, and DC Gilchrist's attempts to explain it were at worst evasive and at best confusing. We are, however, satisfied that this item was indeed found in the area described, and DC McColm who corroborated DC Gilchrist on the finding of the item was not cross-examined about the detail of the finding of this item."*

7.61 According to the submissions, the Golfer [redacted]

7.62 For the reasons given in chapter 5, the Commission does not consider the Golfer to be a witness capable of being believed by a reasonable court and accordingly is not prepared to accept what he has to say. Nevertheless, given the significance of PI/995 to the case, the Commission carried out a number of enquiries concerning the police label.

7.63 In his Crown precognition (dated 22 April 1999, see appendix), DC Gilchrist is recorded as saying the following about PI/995:

> *"I have signed the label and written on it that it relates to "debris (charred)" found at grid reference 502-858 on 13 January, 1989.*
>
> *I have no specific recollection of this piece of debris. It does not look familiar to me after this period of time.*
>
> *I am satisfied that this is a piece of debris that I was involved in finding. I would have no other reason to complete the production label bearing the reference PI995."*

7.64 The precognition also records that DC Gilchrist was shown a map which allowed him to confirm that the grid reference on the label related to a point south west of a forest near Newcastleton, an area DC Gilchrist could recall searching in January 1989. Nowhere in the precognition is there any reference to the change to the label. In the Commission's view if the issue had been raised with DC Gilchrist at all, one would have expected this to have been recorded in the precognition for the benefit of others, such as Crown counsel.

7.65 DC Gilchrist's initial position in evidence was consistent with his Crown precognition, namely that all the entries on the PI/995 label were completed by him (5/809). It was only after the change to the description was put to him in cross examination that he began to question this. His final position in re-examination was that although the other entries on the label were inserted by him, he could not be certain that the description of the item was in his handwriting. He did not recall making the change, and was not convinced that the word "Charred" had been written by him (5/861).

7.66 Given the importance of PI/995's provenance, the Commission instructed the forensic document and handwriting expert, John McCrae, to examine the label. For comparison purposes, he was provided with labels attached to other items which DC Gilchrist and DC McColm were recorded as finding.

7.67 A copy of Mr McCrae's report, dated 15 December 2005, is contained in the appendix. Mr McCrae concluded that the entries on the PI/995 label as to the date, the description of the item, the grid reference and the signature of DC Gilchrist were all in the same ink and by the same author. In particular, he found that the words "Cloth" and "Debris" were written by one person, in the same ink and by the same pen. He also considered it probable that the words "Cloth" and "Charred" had been written at the same time, prior to the insertion of the word "Debris". Mr McCrae concluded that the author of the entries on the PI/995 label and the author of the entries on two comparison labels, PK/1973 and PI/990, are one and the same. In his opinion, the ink used to insert the entries and DC Gilchrist's signature on the PI/990 label was the same as that used to insert the entries and DC Gilchrist's signature on the PI/995 label.

7.68 In both his Crown precognition and in evidence DC Gilchrist confirmed that he completed the entries on the labels for PI/990 and PK/1973. In evidence his final position was that that the entries on the PI/995 label, other than the description, had been written by him. Mr McCrae's conclusion that the entries on the labels for PI/990, PI/995 and PK/1973 were written by the same author supports the conclusion that it was in fact DC Gilchrist who wrote the description on the PI/995 label, and that it was he who changed the word "Cloth" to "Debris". In the Commission's view, this

finding refutes any notion that the label might have been altered by "others unknown", as suggested in the application.

7.69 It is also important in considering whether the change to the label might support a sinister inference as to the provenance of PI/995, to consider when the change might have been made. The evidence of Sergeant Kenneth Findlay is of some assistance here. He worked in the property store at the Dexstar warehouse during the enquiry and confirmed in evidence that the description of PI/995 in the Dexstar log was written by him (9/1071). He also confirmed that the description of PI/995 in the Dexstar log is the same as that recorded on the PI/995 label: "Debris (Charred)". There is no evidence that the entry in the Dexstar log originally read "Cloth". It is apparent from Sergeant Findlay's evidence that details inserted in the Dexstar log were taken from the police label attached to the item being logged. In the Commission's view, these factors support the conclusion that the change to the PI/995 label was made before the entry was inserted in the Dexstar log. As the entry in the log is dated 17 January 1989, it can therefore be inferred that the change to the PI/995 label was made on or prior to that date.

7.70 As indicated, Mr McCrae concluded that the same ink as was used to write the word "Debris" on the PI/995 label was used to write the original description, and that the same ink was also used to insert the entries in the PI/990 label. PI/990's label records that it was found at the same grid reference as PI/995, an area which DC Gilchrist confirmed in evidence he had searched on one occasion. The inference to be drawn is that PI/990 was found on the same date as PI/995. In the Commission's view, the facts that the labels for both items are written in the same ink, and that the change to PI/995's label was also made in that ink, support the conclusion that the alteration to PI/995 was made around the time when the label was completed, rather than at some unknown later date.

7.71 A separate allegation made about PI/995's label relates to DC McColm's signature which is alleged to have been written over the signature of DS Robert Goulding. According to the submissions, DS Goulding was the police liaison officer at RARDE, and therefore would only have signed the label once PI/995 had been

submitted there, which the records indicate was on 8 February 1989 (CP 288, LPS 305).

7.72 Mr McCrae's report refutes this allegation. In his view, DC McColm's signature on the PI/995 label was written before that of DS Goulding. In addition, the signatures of DC McColm on PI/995 and PI/990 were in the same ink, despite superficially appearing different, which offers further support for the conclusion that DC McColm did not sign the PI/995 label at a later date.

7.73 The process whereby officers obtained signatures on police labels, long after the items themselves were found, has been addressed in detail in chapter 6. As indicated, the majority of the labels signed during this exercise are recorded in DC Buwert's statements, and in various police messages. Several labels are listed as having been signed retrospectively by DC McColm, but PI/995 was not one of them. The only reference to PI/995 in DC Buwert's statements is in relation to DC Stuart Robertson, who is recorded as having signed its police label on 2 June 1992. DC Robertson's sole involvement with PI/995 was when he conveyed this and other items to RARDE along with DC McColm.

The Dexstar log entry

7.74 Certain observations are made in the submissions about the Dexstar log entry for PI/995. It is pointed out that in evidence Sergeant Findlay claimed the entry in the log was made by him. However, reference is then made to PC David McCallum's Crown precognition (see appendix) in which he states that the entry for PI/995 bears to have been made by him, but is not in his handwriting; and to the label for PI/995 which contains PC McCallum's signature but not that of Sergeant Findlay. It is submitted that while the explanation for the discrepancy in the log is that another officer made the entry in PC McCallum's presence, this does little to establish a proper chain of evidence. In particular, it is unclear to whom DC Gilchrist handed PI/995 which, according to the submissions, lay "unaccounted for" between 13 and 17 January 1989.

7.75 The fact that PI/995 was recorded as being found on 13 January 1989 but only logged at Dexstar on 17 January was addressed at paragraph 13 of the trial court's judgment:

> *"As far as the late logging is concerned, at that period there was a vast amount of debris being recovered, and the log shows that many other items were only logged in some days after they had been picked up. Again therefore we see no sinister connotation in this."*

7.76 The fact that items might only be processed days after first arriving at Dexstar is spoken to by Sergeant Findlay in evidence (9/1073) and is referred to in the HOLMES statements of various police officers (eg DC Ian Howatson's statements S4463O and S, see appendix). In the absence of any evidence to infer interference or bad faith in the handling of PI/995 the Commission, like the trial court, is satisfied that no sinister connotation can be drawn from this delay.

7.77 Although the entry in the Dexstar log for PI/995 is not in the handwriting of the officer recorded as having received that item, again this is not a situation unique to PI/995. In fact, of the seven items to which PC McCallum was referred in his Crown precognition as having been received by him, the entries in the log for four of them (PD/131, PI/1050, PI/1684 and PI/995) are not in his handwriting. A clear explanation for this is provided by PC McCallum is his Crown precognition. There he states that because officers would sometimes wear protective clothing when examining items they would be unable to complete the log entry, which would require to be inserted by another officer acting as a "scribe". According to the Crown's summary and analysis document for this chapter of evidence, normally the scribe would fill out his own details on the Dexstar sheet, but one officer, Sergeant Findlay, departed from this approach by recording the details of the officer who actually examined the item. In evidence, Sergeant Findlay confirmed that sometimes one officer would insert the log entry while another officer picked up the item, and that it was not necessarily the writer's details which were recorded in the log as receiver (9/1090). In the Commission's view, this explains how the discrepancy arose in the log entry for PI/995 and other items.

7.78 The submissions also refer to the record in the Dexstar log to the effect that PI/995 was taken to RARDE by an officer identified as "IH D/C". It is pointed out that this is inconsistent with LPS form 305 in Crown production 288, which records that PI/995 was taken to RARDE by DC McColm.

7.79 In fact, contrary to the submissions, it is apparent that the "Time/Date Out Purpose Officer" section in the log was not signed by the officer responsible for transporting the item to RARDE. Rather, it appears that this part of the log was completed by a productions store officer when the item was removed from its place in the store for transmission to RARDE. According to the HOLMES statements of DC McColm (S32DA), DC Stuart Robertson ((S2657AE), who accompanied DC McColm and the productions to RARDE on the occasion in question) and DC Brian McManus (S3070FE), it was DC McManus who passed PI/995 to DCs McColm and Robertson for transmission to RARDE. Copies of these statements are contained in the appendix.

7.80 The entry in the log "IH D/C" refers not to DC McManus, but most likely to DC Ian Howatson who, in terms of his HOLMES statements and other Dexstar entries, carried out duties in the productions store. There is clearly nothing sinister in this slight discrepancy in the records, and in fact the situation is not unusual. A large number of productions (listed in LPS forms 291 to 306) were provided to DC McColm on 6 February 1989 for transmission to RARDE and many of these are recorded in the Dexstar logs as having been removed by "IH D/C" (in particular, those recovered from sector I). Other officers are also identified in the logs as having removed some of the items. In the Commission's view, a perfectly reasonable explanation for this would be that the officers recorded in the logs as removing the items from the store were not responsible for handing the items directly to DC McColm for transmission to RARDE. Rather, it is likely that these officers removed the items and deposited them with DC McManus at the special interest section of the Dexstar warehouse, which was set aside for items identified as requiring forensic examination. Such an explanation is supported by the log entries for other items which were sent to RARDE: the "time/date out, purpose, officer" sections for items such as PI/917 and PI/952, for example, specifically state that these were sent "To SI Store for RARDE". This suggests that when an item was identified as requiring

forensic examination, a productions officer would fill out his details in the Dexstar log and then pass the item to DC McManus. DC McManus would then complete the LPS form for submission of the item and have the form signed by the officer responsible for transporting the items to RARDE. In a Crown precognition (see appendix), DC McManus confirmed that he had sole responsibility for the "SI store" and confirmed that property of "special interest" was usually brought to him by officers conducting searches of the debris in the Dexstar warehouse. According to the precognition, much of DC McManus' work in the early stages involved organising transportation of such items to RARDE.

7.81 It should also be noted that, contrary to the suggestion in a number of the submissions to the Commission, there was no separate "special interest log". It is apparent that, once items were submitted to the SI store, the only further records that were completed were the LPS forms and a separate consolidated list of movements kept by DC McManus (given police reference DP/29 and referred to above). The Commission has examined the entries in DP/29 relating to PI/995 and the various other fragments which are subject to submissions to the Commission, and is satisfied that they correspond with the other available records. Copies of the entries regarding the grey Slalom shirt fragments are included in the appendix.

7.82 In light of the explanation above, and given the complete absence of any evidence of malfeasance on the part of the investigating authorities, the Commission does not consider the matters raised concerning the Dexstar log give rise to any concern about the provenance of PI/995.

RARDE records and page 51 of Dr Hayes' examination notes

7.83 LPS form 305 records PI/995 as having been uplifted from the productions store on 6 February 1989 and delivered to RARDE on 8 February 1989 by DC McColm. The next record of the item is in Dr Hayes' examination notes (CP 1497) in which PI/995 is listed along with numerous other items as having been examined on 15/16 February 1989. Each item on this page of Dr Hayes' notes is marked with an "R" (indicating its "possible significance") or a "G" (indicating that that it was considered to be of "no significance"). It is clear from the movement records that

items considered to be of no significance were returned to the Dexstar store whereas items of possible significance were retained at RARDE. PI/995 is marked with an "R". Chronologically, the next record of PI/995 in the productions is at page 51 of Dr Hayes' examination notes, dated 12 May 1989, in which the examination of the item and extraction of various fragments are recorded.

7.84 One of the points made in the submissions is that there is no record in the examination which took place on 15/16 February 1989 of the various fragments said subsequently to have been extracted from PI/995. Again, the Commission does not consider that any sinister inference can be drawn from this. It is apparent that on 15/16 February 1989 a sifting exercise of numerous items took place in order to identify those which appeared to warrant further examination. This is borne out both by Allen Feraday's recollections when interviewed by members of the Commission's enquiry team, and by William Williamson's defence precognition (which reflects the terms of his HOLMES statement S872W, see appendix). Of the items listed in this section of Dr Hayes' notes, it was not only PI/995 from which items of significance were subsequently extracted. For example, according to Dr Hayes' notes (CP 1497, p53), PK/1455, which was examined on 15/16 February 1989 and marked "R", was subsequently examined on 15 May 1989 when various fragments were recorded as having been removed from it.

7.85 The submissions also revisit the matter explored at trial concerning the changes to the page numbering of Dr Hayes' examination notes and, in particular, the submission that pages 52 to 56 were originally numbered 51 to 55. In cross examination of Dr Hayes, the suggestion was made that the original page 56 of his notes had been removed and pages 51 to 55 renumbered as 52 to 56 in order to create space for a new page 51 to be substituted. It was suggested that the entry on the original page 56 had then been inserted, out of sequence, at the bottom of page 49 (17/2582 et seq). Reference is made in the submissions to Dr Hayes' response that the matter was an "unfathomable mystery". In re-examination, however, Dr Hayes explained that he had numbered the pages at a later stage and had made an error by numbering two pages as page 51. He had realised his mistake after numbering a few more pages, and corrected it.

7.86 The possibility that page 51 of the notes was inserted at some later stage was considered by the forensic document examiner instructed by the Commission, Mr McCrae. In particular, he obtained ESDA tracings of various pages of Dr Hayes' notes, including page 51 and those surrounding it, to detect indented writing. His report, dated 26 April 2005, is contained in the appendix to chapter 6.

7.87 It is apparent from Mr McCrae's findings in relation to the pages surrounding page 51 that, in the main, the indentations taken from one page match the writing on the preceding page. Thus most detail from the writing on page 52 is visible in the ESDA trace of page 53; most detail from page 53 can be seen in the trace for page 54; most detail from page 54 is visible in the trace of page 55; most detail from page 55 is visible on the trace of page 56; most detail from page 56 can be seen in the trace of page 57; most detail from page 57 can be seen in the trace of page 58; and most detail from page 58 is visible in the trace of page 59. The inference to be drawn from these findings is that, for these pages, the entries have been made on the same pad of paper and have been completed in the sequence in which they appear in Dr Hayes' file.

7.88 As regards the indentations recovered from page 51, Mr McCrae's finding was that much of the detail from page 50 was visible on the trace of page 51. The Commission considers this to be a strong indication that page 51 was not inserted into Dr Hayes' notes at a later date, but rather was completed in sequence after page 50 (pages 50 and 51 are both dated 12 May 1989). No indentations from the entries on page 50 were found in the trace of page 52 (which might have supported the contention made in cross examination that page 52 had originally been page 51, and had been renumbered as 52 to create space for a new page 51). There is also an absence of any indentations on page 52 that might correspond to the examination of another item from the Lockerbie enquiry (which might have supported the more straightforward contention that an original page 51 of the notes was removed to allow the present page 51 to be inserted).

7.89 In the Commission's view, these findings greatly assist in rejecting any sinister inference sought to be drawn from the changes made to the page numbers of Dr Hayes' notes.

7.90 Given the pattern of indentations on the other pages of the notes, one might have expected that the trace of page 52 would contain details from the entries on page 51. In fact it does not: the indentations recovered from page 52 appear to relate to a matter unconnected to the Lockerbie enquiry. Specifically, the trace of page 52 revealed what appeared to be a number, "PP 8922", and part of a date, "17/ /89". A trace of the words "…bag with ---label marked…" was also found.

7.91 Mr Feraday confirmed at interview with members of the Commission's enquiry team that numbers with the prefix "PP" were RARDE references relating to possible terrorist cases (the case reference for the Lockerbie enquiry was PP8932). It appears from the photograph log books that the case with reference PP8922 was dealt with by Dr Hayes in the period March to May 1989 (see appendix to chapter 6). In particular, there is a record in one of the log books of photographs for case PP8922, taken at Dr Hayes' request, being returned from developing on 25 May 1989.

7.92 A possible explanation for the indentations on page 52 is that, between finishing the examination recorded on page 51 on 12 May and commencing the examination on page 52 on 15 May 1989, Dr Hayes used the same pad of paper to record examinations he carried out relating to PP8922. This would not, however, be consistent with the contents of a memo recorded on the HOLMES system dated 5 April 1989 (D4008, see appendix) which indicates that as of that date Dr Hayes was to work exclusively on the Lockerbie enquiry.

7.93 The above matters were explored with Dr Hayes at interview. While Dr Hayes' memory of events from his time at RARDE was very limited, he maintained that there was nothing sinister in the changes to the page numbers, which he described as a "rotten coincidence". Despite the terms of the memo of 5 April 1989, he accepted that he might have worked on the case numbered PP8922 between his examinations on 12 and 15 May 1989, although he was unable to offer any explanation regarding the partial date found in the trace of page 52 of his notes. In any event, the Commission does not consider the indentations found on page 52 relating to case PP8922 undermine its conclusion as to the validity of page 51 of Dr Hayes' notes.

7.94 Three further points in the submissions require to be addressed. Firstly, it is said that Dr Hayes did not follow his normal procedures in that he did not make a drawing in his notes of the fragment, PT/35(b). Secondly, it is highlighted that Dr Hayes had no memory, independent of his notes, of having extracted PT/35(b). Thirdly, the trial court's approach to the provenance of PI/995 is criticised and it is submitted that the "combination of oddities" called for greater scrutiny than was given.

7.95 The first and second points were raised with Dr Hayes in cross examination (16/2596 and 2607). As regards the second point, Dr Hayes acknowledged that after the lapse of time he was heavily dependent on his notes and the photographs for virtually all his recollections, and not only the discovery of PT/35(b). In the Commission's view, one could hardly expect anything else in the circumstances. It is worth noting, however, that while Allen Feraday was not specifically asked in evidence about PT/35(b)'s discovery, he is recorded in a Crown precognition dated 30 March 2000 (see appendix) as specifically recalling the dissection of PI/995. Although Dr Hayes had carried out the examination, Mr Feraday recalled being invited in to see the pieces embedded in PI/995 before Dr Hayes removed them. In particular, he recalled the extraction of PT/2 (the fragments of Toshiba manual) and PT/35(b).

7.96 As regards Dr Hayes' alleged failure to draw PT/35(b) in his examination note, this point loses any possible sinister connotation if one accepts (as the Commission does) that the photographic logs accurately record photograph 117 of the RARDE report as having been taken on or before 22 May 1989. The fragment of circuit board is clearly depicted in that photograph.

7.97 Given its findings, the Commission sees no basis for the criticism levelled at the trial court's approach to the provenance of PI/995.

Conclusions regarding ground 3

7.98 In the Commission's view, based on the enquiries narrated above, there is nothing in the police label, the Dexstar log entries, the RARDE records or Dr Hayes' notes which leads it to doubt the provenance of PI/995.

Overall conclusions

7.99 It is clear that the police and RARDE records do not record perfectly every aspect of the handling of items of debris, including PI/995. In the Commission's view, given the scale of the investigation and the number of items involved, this is hardly surprising and does not, in itself, provide a basis for doubting the integrity of those involved in the original investigation. In particular, there is nothing in the submissions on this topic which leads the Commission to suspect that police officers, forensic scientists or anyone else were involved in somehow manipulating or fabricating evidence relating to the fragments of grey Slalom shirt. On the contrary, evidence such as the photographic log books has assisted in satisfying the Commission as to the provenance of these items. Accordingly the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 8
THE TIMER FRAGMENT PT/35(b)

Introduction

8.1 In chapter 7, the Commission addressed a number of submissions which sought to raise doubts about the provenance of PI/995, the fragment of grey Slalom brand shirt from which was extracted the piece of circuit board designated PT/35(b). As explained, PT/35(b) was a pivotal piece of physical evidence in the police enquiry. Its identification as part of the circuit board of an MST-13 timer made by MEBO turned the investigation towards Libya.

8.2 Four further submissions were made to the Commission specifically regarding PT/35(b). Three of these are essentially an extension of the submissions about PI/995 in that they seek to undermine the provenance of PT/35(b) or the date of its discovery. The first relates to a memorandum from Allen Feraday dated 15 September 1989 regarding that fragment and the allegation is made that this memorandum might have been "reverse-engineered" to refer to PT/35(b). The second submission points to evidence that the fragment was recovered in January 1990, contrary to the evidence at trial that it was discovered by Dr Hayes in May 1989. The third refers to an expert report commissioned by MacKechnie and Associates about PT/35(b), in which a number of issues are raised about the fragment.

8.3 The fourth ground of review relates to various papers provided to the Commission by MacKechnie and Associates regarding cases in which convictions based on Allen Feraday's evidence were quashed at appeal. Given Mr Feraday's close involvement with investigations into PT/35(b), the Commission considered that this chapter of the statement of reasons was the most appropriate one in which to address the issues raised in these papers.

8.4 Given the contents of the various submissions to the Commission and the particular importance of PT/35(b) to the case against the applicant, especially in light of the speculation that has persisted in the media about its provenance, the

Commission considered it appropriate to review all aspects of the evidence regarding the MST-13 timers and MEBO (i.e. chapter 10 of the Crown's case). Accordingly this chapter of the statement of reasons deals not only with the submissions made on behalf of the applicant but also a number of other issues which arose as a result of the Commission's examination of the evidence.

8.5 Lastly, the Commission also received a number of submissions about PT/35(b) from Edwin Bollier (see chapter 4). To the extent that the Commission considers it necessary, his submissions are also addressed below.

Ground 1: memorandum of 15 September 1989

8.6 After the extraction of PT/35(b) from PI/995 on 12 May 1989, as recorded in Dr Hayes' notes (CP 1497), chronologically the next reference to the timer fragment in the productions at trial is a memorandum from Allen Feraday to Detective Inspector William Williamson dated 15 September 1989 (CP 333). This memo refers to a "fragment of green circuit board," although no reference number for the fragment is recorded. Accompanying the memo are Polaroid photographs of the fragment (CP 334), and in the memo Mr Feraday states of these photographs, "Sorry about the quality but it is the best I can do in such a short time." The memo came to be known as "the lads and lassies memo" because Mr Feraday went on to write, "I feel that this fragment could be potentially most important so any light your lads/lassies can shed upon the problem of identifying it would be most welcome."

8.7 Mr Feraday was not cross examined about the memo at trial. However, as the trial court acknowledged (paragraph 13 of its judgment), Dr Hayes was asked why it was that four months after he had extracted PT/35(b) Mr Feraday was referring to a shortness of time in providing photographs to the police and that Polaroids were the best that could be done. Dr Hayes accepted in evidence that Mr Feraday would have had access to any photographs of PT/35(b) taken at RARDE after its extraction from PI/995 and he stated that these photographs would not be Polaroids. He could not explain Mr Feraday's position that he had to rely upon Polaroids because he was "short of time" (16/2602-7).

8.8 In an appendix to the Slalom shirt submissions there is an internal report of MacKechnie and Associates which revisits the lads and lassies memo (the report was copied to the Golfer and a copy of it is contained in the appendix to chapter 5). Reference is made there to a memorandum dated 19 December 1989 from Mr Williamson to Stuart Henderson, then deputy senior investigating officer, in which Mr Williamson summarises the position regarding a piece of circuit board that was of interest. The memorandum states the following:

> *"... during examination of production PK 2128 (part of severely explosive damaged American Tourister suitcase) at RARDE on 18 June 1989, Dr Allen Feraday recovered and identified a small piece of 'high quality' circuit board. Dr Feraday describes this find as 'potentially most important'. It has been given Production No. PT 30. In view of this photographs and a description of the circuit board were supplied to the Productions/Property Team to allow a full search to be carried out Property Store Dexstar for any similar material.*
>
> *On his visit to Dexstar on 14 September 1989 Dr Feraday viewed a large number of items of circuitry which had been withdrawn for his examination, none of these items was a match for PT 30.*
>
> *Dr Feraday has on a number of occasions repeated his keen interest in any items of circuitry, or indeed in any digital clocks or other similar items which could contain a circuit board: for examination and comparison at RARDE against Production PT 30."*

8.9 According to the report by MacKechnie and Associates the source of this quote from the memo of 19 December 1989 was the book "On the Trail of Terror" by David Leppard. The Commission obtained a copy of the memo from D&G (HOLMES document D5428, see appendix), the terms of which reflect those quoted in Mr Leppard's book.

8.10 Two allegations are made about the lads and lassies memo, based on the contents of Mr Williamson's memo of 19 December 1989. First, it is suggested that Dr Hayes' notes were fabricated, as they record the extraction of PT/30 in June 1989

but they also record that it was identified at that time as a piece of Toshiba circuit board from the radio cassette recorder, which would be contrary to Mr Williamson's memo that PT/30 remained unidentified in December 1989. Secondly, given the similarity between the events described in Mr Williamson's memo and the contents of the lads and lassies memo, the submission is made that the lads and lassies memo originally referred to PT/30 but was subsequently "reverse-engineered" to represent an early reference to PT/35(b). In seeking to support these contentions the submissions point out that the date on the police label attached to the memo has been altered and they also revisit the evidence at trial about the Polaroids attached to the memo having been taken at "short notice".

Consideration

8.11 For the reasons given in chapter 7, the Commission is satisfied that there is no reason to doubt that PT/35(b) was extracted by Dr Hayes in May 1989. In addition, leaving aside the inherent unlikelihood of the allegation that the lads and lassies memo was fabricated, there are a number of specific reasons why the Commission does not believe there to be any merit in the submission that it might originally have referred to PT/30.

8.12 For example, although there is no mention in the lads and lassies memo of any reference number for the fragment to which it relates, the fragment is described in the memo as green. There is little doubt that PT/35(b) is green (on one side at least: see RARDE report, CP 181, photo 333) whereas PT/30 is an unmistakeably orange colour (CP 181, photo 265). It was suggested by MacKechnie and Associates that the reverse side of PT/30 was green but in fact the green lacquer on that side of the fragment had been removed when the whole of that surface was "ripped away" in the blast (CP 181, p 112).

8.13 Moreover, the lads and lassies memo describes a curve on the fragment in question and indicates that the curve forms part of a circle of diameter 0.6 inches. Whilst both PT/35(b) and PT/30 feature a curve at one corner, the measurement given in the memo is consistent with the curve on PT/35(b) but the dimensions of PT/30 are much smaller.

8.14 More generally, as the submission by MacKechnie and Associates acknowledges, the distinctive orange colour and white writing on PT/30 mean that it would be very surprising if the fragment had not been identified as part of the Toshiba circuit board immediately upon its extraction in June 1989, given that previously very similar fragments (AG/145) had been identified as such (CP 181, p 106). That of itself casts doubt on the suggestion in Mr Williamson's memo that it was PT/30 which remained unidentified in December 1989.

8.15 Mr Williamson and Mr Feraday were interviewed by the Commission's enquiry team (see appendix of Commission interviews) and both expressed the view that Mr Williamson's memo was mistaken. Mr Feraday's position was that, contrary to the suggestion in Mr Williamson's memo, he did not visit the police to compare PT/30 and did so only in relation to PT/35(b). Mr Williamson stated that he had nothing to do with PT/30 or any fragments of the Toshiba radio.

8.16 As regards the shortage of time referred to in the lads and lassies memo, and the fact that supposedly PT/35(b) had been extracted from PI/995 four months previously, Mr Feraday stated in a Crown precognition (see appendix) that initially it had been the fragments of Toshiba manual found in PI/995 which had been the principal concern. According to the precognition it was only subsequently that the significance of PT/35(b) became apparent. Mr Feraday explained to the Commission at interview that prior to sending the lads and lassies memo to Mr Williamson he had kept attempts to identify the fragment "in-house". However, as he was unsuccessful in these attempts he had sought help from the police. That account assists in explaining the gap of four months between extraction of the fragment and the notification to the police. Both Mr Feraday and Mr Williamson told the Commission they thought the shortness of time referred to in Mr Feraday's memo could be attributable to a request by the police to have photographs of the fragment immediately on being notified about it in order to allow them to commence a search for items that might match it.

8.17 Mr Williamson's memorandum, quoted above, refers to a visit by Mr Feraday to Dexstar on 14 September 1989. Further details of that visit are contained

in another police memorandum, dated 15 September 1989, a copy of which is contained in the appendix of protectively marked materials (see fax 749). It is clear from both memoranda that Mr Feraday had communicated to the police his interest in items with circuit boards prior to 14 September 1989, as on that date Mr Williamson had set aside items containing circuit boards for Mr Feraday to examine. It is stated in the memorandum of 15 September 1989 that further items would be examined by Mr Williamson and his officers after a briefing by Mr Feraday as to what he was trying to locate in respect of the circuit board fragment. As the lads and lassies memorandum was sent the day after Mr Feraday's visit, that might also explain the reference to the shortness of time.

8.18 It is worth noting that, based on the RARDE photograph records (see appendix to chapter 6), the close-up photographs of the fragment that are contained in the RARDE report (CP 181, photos 333 and 334) were not returned from the photographic laboratory until 22 September 1989. Accordingly, they would not have been available at the time the lads and lassies memo was sent. The Commission can identify only one photograph of PT/35(b) which pre-dates the lads and lassies memo (namely CP 181, photo 117), but as that photograph does not show the fragment in close-up and depicts only one side it may not have been considered a suitable photograph to allow the police to make detailed comparisons.

8.19 As regards the alleged alteration of the date on the police label attached to the lads and lassies memo, it appears that the year written on the label may have been changed from 1990 to 1989. Mr Williamson was asked about this at interview and accepted that he had completed the label. He confirmed that there was much coming and going between the police and RARDE and that it was likely the label was only attached to the memo at a later date. He considered it "very possible" that he had added the label in 1990, and had initially recorded that year on the label by mistake. In the Commission's view while any unacknowledged alteration to a police label cannot be condoned, in light of the other evidence about the memo it is difficult to draw any sinister inference from this particular change, especially as Mr Williamson's account offers a plausible explanation for it.

8.20 Returning to Mr Williamson's memo of 19 December 1989, the Commission accepts that the circumstances described in this appear to relate to PT/35(b) but that the reference is to PT/30. Moreover, the specific (and accurate) reference to PT/30 as having been extracted from PK/2128 indicates that this is more than merely a typographical error. Indeed, the Commission uncovered a further memo of the same date (HOLMES document D5441, see appendix) from Brian McManus to Mr Williamson which also refers to the circuit board fragment of uncertain origin as PT/30. However, it is worth noting that both memos refer to the proposal that the fragment in question be compared with items recovered by the BKA during the Autumn Leaves operation. Mr Williamson and Mr Feraday travelled to West Germany in January 1990 to conduct such a comparison exercise, a fact they both spoke to in evidence (18/2950-2 and 20/3181-2 respectively), and all the documents the Commission has seen relating to that enquiry refer to the unidentified fragment in question as being PT/35 rather than PT/30. Taking that fact into account along with the other finding described above, the Commission is satisfied that both Mr Williamson's memo and that of Mr McManus are in error when referring to PT/30 as the unidentified circuit board fragment of interest.

Ground 2: evidence that the date of PT/35(b)'s discovery was January 1990

8.21 On 2 February 2005 MacKechnie and Associates provided further submissions to the Commission which expanded upon the allegation that PT/35(b) was not extracted in May 1989 (see appendix of submissions). The submissions referred to four documents which were said to support the contention that the fragment was discovered in January 1990, and copies of these documents are contained in the appendix to this chapter.

8.22 The first two documents are BKA reports. One, dated 14 May 1990 and authored by a BKA officer, KOK Tepp, refers to certain investigations conducted in Germany regarding the circuit board fragment. It then refers to information which had been provided by Det Supt Ferrie of the Scottish police and concludes "When questioned, [Det Supt] Ferrie also said that this fragment of a circuit board had been found in the cuff of a "SLALOM SHIRT" in January 1990." The other BKA document, dated 8 August 1997, is described as a final report and under the heading

"Statement of Facts" states "On 22-01-1990 Scottish scientists of [RARDE] found a fragment of a green circuit board lodged in the cuff of a 'SLALOM' shirt which was identified as 'PT 35', and could have possibly been part of the detonator release delay."

8.23 The third document is a letter from the US Department of Justice to the Swiss authorities dated 18 October 1990 seeking assistance under the Treaty on Mutual Legal Assistance in Criminal Matters (police reference DP/133). Under its narration of facts, the letter states "In January, 1990, a forensic scientist working at RARDE discovered that trapped in the Slalom brand shirt… were several fragments of black plastic consistent with the case of the Toshiba radio, a piece of a green circuit board, and fragments of white paper bearing black printing."

8.24 Copies of the above documents were extracted by MacKechnie and Associates from the papers the BKA had provided to the defence prior to trial. The fourth document referred to in the submissions is Crown production number 1761, a memorandum dated 22 January 1990 which was faxed from Allen Feraday and addressed to "Det/Supt Ferrie via SIO". The submissions suggest this memo may be the source of the information Mr Ferrie provided to the BKA, as quoted in KOK Tepp's report. In the memo Mr Feraday narrates that the fragment of green circuit board was found trapped in PI/995 and explains the importance of the item, given that it was found along with pieces of the IED and the instruction manual, and that it might be part of the IED mechanism or circuitry itself. The submissions refer to a passage in the memo which, having listed the items extracted from PI/995, states "Sub-items (a) (b) and (c) above are now isolated from PI/995 and are collectively now identified as item PT 35." The submissions suggest that the terms of the document, and in particular the use of the word "now" in the passage quoted, would indicate to a lay person that the items had only recently been identified.

8.25 It is also suggested that Mr Ferrie and Mr Henderson would both have been privy to all previous intelligence and reports regarding PT/35(b) including the lads and lassies memo, if any such reports actually existed, in which case they should already have been aware of the finding and evidential significance of PT/35(b).

Consideration

8.26 In the Commission's view the results of enquiries detailed in chapter 7 and ground 1 above undermine the submission that PT/35(b) was first extracted in January 1990. In particular, the RARDE photographic records indicate that photograph 117 of the RARDE report was taken on or before 22 May 1989; and that photographs 333 and 334 were taken on or before 22 September 1989.

8.27 As regards the specific submissions made here, the Commission is not persuaded that the correct interpretation of Mr Feraday's memo of 22 January 1990 is that PT/35(b) had only recently been extracted. In the Commission's view, the use of the word "now" in the memo simply means that *since* its discovery the fragment had been isolated from PI/995 and given the designation PT/35(b). Mr Feraday confirmed at interview that his memo set out the history of the fragment and that it was not intended to convey that the fragment had only recently been discovered. In the Commission's view this is supported by the terms of a message Mr Feraday sent to the SIO on 5 December 1990, in which he stated his opinion to be that PT/35(b) came from the same manufacturing source as control sample circuit boards the police had obtained from MEBO. In referring to the fragment he stated "I have compared these circuitboards with the fragment of circuitboard *now* marked as production PT 35 which was previously recovered at this laboratory from production PI 995…" (Commission's emphasis added). A copy of this message is contained in the appendix of protectively marked materials (fax 1339).

8.28 Moreover, although Mr Feraday's memo refers to a fax of the same day from the SIO (D&G indicated that they were unable to locate any such fax), it appears in fact to have been a response to a letter from Mr Ferrie (HOLMES document D5598, see appendix) the date of which is unclear but which appears to be 20 January 1990. In that letter Mr Ferrie referred to Mr Feraday's recent visit to Germany with Mr Williamson during which they failed to identify the circuit board in question. According to the letter Mr Ferrie requested that "in an effort to consolidate matters" Mr Feraday submit to the SIO a report on the "circumstance and importance of this particular item and the conclusions you have drawn that it formed part of the IED" so that consideration could be given as to what further enquiries should be conducted.

8.29 In the Commission's view it is possible that confusion might have arisen as a result of the fact that, although the fragment was discovered in May 1989, substantive police enquiries to identify it only commenced in January 1990 upon receipt of Mr Feraday's memo (a fact confirmed in the police report and also in the HOLMES statement of Stuart Henderson, the SIO (S4710J), see appendix). Another possibility was suggested by Mr Williamson at interview. According to Mr Williamson if Mr Ferrie told third parties that January 1990 was the date of discovery of the fragment, he must have done so deliberately as Mr Williamson's memory was clear that Mr Ferrie was aware of investigations regarding the fragment prior to January 1990.

8.30 In any event, standing the weight of evidence to the contrary, the Commission does not consider the BKA and US documents can be taken as accurate in their references to January 1990 as the date of discovery of PT/35(b).

Ground 3: expert report by Major Owen Lewis

The applicant's submissions

8.31 In chapter 16.5 of volume A it is stated that prior to trial Edwin Bollier alleged that PT/35(b) did not originate from a MEBO made timer and that a section purportedly removed from PT/35(b) and given police reference DP/31 did not originate from PT/35(b). The submissions state that these claims have not been substantiated but reference is then made to a report by Major Lewis, a retired officer of the Royal Corps of Signals, who as an independent consultant provides expert witness services on the application of electronics to improvised explosive devices. He was instructed by MacKechnie and Associates to review the evidence relating to PT/35(b). A copy of his report is in the appendix.

8.32 The submissions refer to Major Lewis's conclusion that the fragment "appears quite differently in different photographs" and to his suggestion that an application be made to examine the fragment and control samples in order to remove all reasonable doubt. The submissions point out that Major Lewis is potentially open to criticism because of what he had said in a television documentary broadcast prior to

the trial. There he stated that a photograph of PT/35(b) did not match a control sample, but he was not aware that the photograph in question had been taken after removal of certain sections from the fragment during scientific testing. According to the submissions the differences highlighted by Major Lewis were explained by that process. It is submitted, however, that the opinions contained in his report are not subject to the same criticism and that if examination of the various pieces of PT/35(b) was to establish that they do not originate from the same source, or cannot be matched to photographs purportedly of the fragment, the whole chapter of evidence about PT/35(b) would be "seriously undermined."

8.33 A separate submission originating from Major Lewis is detailed at chapter 16.6 of volume A. There it is submitted that, according to Major Lewis, the CIA and FBI would have had access to a "counter-terrorism database" which would have contained details of MEBO and MST-13 timers at a time prior to the alleged discovery of the fragment and the attempts to trace the manufacturer. It is suggested in particular that the database would contain details of the timers recovered in Togo in 1986 and the timer examined in Senegal in 1988 (see below). It is also suggested that, if Mr Bollier and MEBO were well known to the FBI and the CIA, this would contradict the position of Thomas Thurman of the FBI and William Williamson that they spent months tracing the manufacturer of MST-13 timers. Proof of such prior knowledge would, it is suggested, undermine the "already suspicious" evidence about the timer fragment.

Consideration

8.34 The Commission has examined the submissions made under this ground of review in some detail.

(1) Major Lewis's report

8.35 Major Lewis's report is dated 18 February 2003 and begins by listing his relevant qualifications and experience. Although not specifically mentioned in the report, which refers only generally to him having provided expert witness services in criminal proceedings, the Commission notes that Major Lewis's opinions have in the

past been accepted by the Court of Appeal in England. In particular, he was one of the experts whose reports undermined Allen Feraday's evidence in two trials relating to electronic timers allegedly designed for improvised explosive devices ("IEDs"), resulting in the quashing of the convictions in both cases (see the relevant section below). As such the Commission has no reason to doubt his expertise in assessing matters relating to items such as PT/35(b).

8.36 In his report Major Lewis raises four broad issues. First, he states that on the basis of the materials he viewed, the chain of handling and testing of the fragment is unclear, and he suggests that a full and clear evidential chain be obtained. Secondly, he states that the various photographs he has seen of PT/35(b) are not of the requisite quality to allow a detailed comparison and as such it is not possible to be certain that the same object has been photographed in every case. Thirdly, he refers to the various scientific examinations of the fragment and he suggests that the results of this work are inconclusive and in one instance contradictory. Lastly, he questions the evidence at trial that the bomb travelled from Malta via Frankfurt and Heathrow.

8.37 The Commission has addressed each of these matters below. It is important to note, however, that Major Lewis's report is based on limited information and, as the report acknowledges, he did not have access to PT/35(b) itself or any of the other Crown label productions. Nor did he have access to original photographs or negatives.

(a) Evidential chain of PT/35(b)

8.38 In paragraphs 8 to 11 of the report Major Lewis briefly summarises the evidence about the finding and handling of PT/35(b). He notes from the papers he was provided that it is not clear who recovered PI/995 from the crash site, nor how and when the identification of the fragment as part of a MEBO timer was made. He refers to the fact that the fragment was divided into five discrete items at various times and by various individuals, and he refers to a number of aspects of this process which are not fully recorded in the papers he had seen, from which only three divisions of the fragment could be identified. His conclusion at paragraph 11 and again at paragraph 27.4 is that the evidential chain should be established.

8.39 As indicated, Major Lewis had access only to limited materials in compiling his report. For example, the finders of PI/995 are readily identifiable from the trial court's judgment and various other sources, yet this was not apparent to him from the documents he had been provided. As explained in chapter 7 above the Commission has examined the chain of handling of PI/995 from its recovery to the extraction from it of PT/35(b), and is satisfied with the records and with the provenance of the fragment up to that stage.

8.40 In addressing Major Lewis's report, and generally in reviewing chapter 10 of the Crown's case, the Commission has examined in detail the evidential chain of PT/35(b) throughout the police enquiry and during the preparations for trial, including the various enquiries made with scientific and circuit board industry experts and the testing which was conducted on the fragment. The results of these enquiries are detailed in a working document which was produced by the Commission's enquiry team during the review (an updated copy of which is contained in the appendix**)**. It is sufficient to note here that, having conducted this exercise, the Commission is satisfied that the police records and the accounts of witnesses comprise a sufficient evidential chain in respect of the fragment, including the removal of samples from it. Moreover, the Commission is satisfied that all the information about these enquiries which was of evidential significance was available to the defence at trial in the form of Crown productions and defence precognitions. Nothing has arisen in this exercise which leads the Commission to suspect that the item handled at each stage of the process was not the same item discovered by Dr Hayes in May 1989.

(b) Unsatisfactory photographs of PT/35(b)

8.41 In paragraphs 12 to 14 of Major Lewis's report he states that the photographs he has seen which depict the whole fragment are not of the requisite quality for him to make a detailed comparative examination and confirm that the same object has been photographed in every case. He lists a number of specific aspects of the fragment which he was unable to compare satisfactorily. At paragraphs 27.1 to 27.3 he reiterates that the fragment appears quite differently in different photographs and that the quality of the photographs, at least as supplied to him, is insufficient to confirm

that the same item was photographed in all of them. He recommends that access be sought to the fragment and samples taken from it and the control samples in order to remove any doubt.

8.42 None of the matters listed in Major Lewis's report was mentioned by him during the television documentary programme in which he had participated. The documentary in question was an edition of Dispatches and was broadcast on Channel 4 on 17 December 1998. During the documentary Major Lewis pointed out three specific differences between the fragment and the control sample, based on photographs he had been shown.

8.43 The submissions suggest that the differences highlighted by Major Lewis in the documentary were attributable to the removal of samples from the fragment, about which Major Lewis was at the time unaware. In fact that explanation accounts for only one of the three differences Major Lewis noted, namely the one regarding the top edge of the fragment. He also highlighted what he considered to be differences between the fragment and the control sample in respect of the shape of the curved edge and the proportions of the "relay touch pad", neither of which was affected by the alterations to the fragment. Nevertheless he did not reiterate these observations in his report for MacKechnie and Associates. A possible reason for this is that in a report by Allen Feraday and another scientist at RARDE (CP 185) the matters raised by Major Lewis in the documentary were addressed and it was demonstrated in what the Commission considers to be a convincing manner that in fact all Major Lewis's observations were unfounded. That report was one of the items to which Major Lewis had access when drafting his report for MacKechnie and Associates.

8.44 In fact, notwithstanding his recommendation that access be sought to the control units, Major Lewis does not make any suggestion in his report to the effect that PT/35(b) did not originate from a MEBO MST-13 timer. On the contrary, at paragraph 17 he states that it is "probable" that the fragment came from such a timer which had been destroyed in an explosion. He refers to the matching of tracking inaccuracies found on the fragment with inaccuracies in the circuit board photo masks obtained from MEBO (which are used to etch the copper tracks on circuit boards) and states that this match "should assure" that the fragment came from a circuit board

made from those masks or others made from the same prototype layout that Mr Lumpert of MEBO had designed. This accords with the conclusions of the RARDE report (CP 181, section 7.2.1), and was spoken to by Mr Feraday in evidence (20/3172-4; 3190-1).

8.45 Thus Major Lewis's concern is not that the fragment might not have originated from an MST-13 timer, but rather that he cannot be sure from the photographs he has seen that the same item is depicted in each case. As explained above, the Commission has examined the chain of evidence and is satisfied that there is nothing which suggests that the item appearing in each of the photographs in question is not that which was originally extracted by Dr Hayes.

8.46 The suggestion that somehow the fragment or parts of it might have been changed or replaced during the investigations originated from Edwin Bollier, an individual whose evidence was largely rejected by the trial court (paragraphs 44 to 54 of its judgment) and whose credibility Major Lewis questioned (paragraph 15 of his report). However, Major Lewis also stated that Mr Bollier's claims that he was shown different fragments on different occasions "cannot be ignored" (paragraph 21). As indicated, Mr Bollier made a number of submissions to the Commission, including detailed allegations about fragments being swapped and altered, but the Commission is not persuaded that there is merit in any of them (see below).

8.47 It is also important to note that the matters raised by Major Lewis were investigated on behalf of the defence prior to trial. The Forensic Science Agency of Northern Ireland ("FSANI") was instructed to consider various aspects of the forensic evidence. Its report is defence production number 21. At page 6, the report confirms that PT/35(b) originated from a MEBO MST-13 timer and that the damage to the fragment is entirely consistent with it having been closely associated with an explosion.

8.48 There is no specific mention in the report of the various photographs of the fragment. However, in a file note of a meeting which took place on 20 December 1999 between three of the FSANI scientists and members of the defence teams, including the applicant's trial solicitor, a number of important comments are recorded

(see appendix). One scientist referred to the photographs in "the report" (which, from the context, it seems refers to the RARDE report, CP 181) and stated that they were of varying quality and taken at different angles and different lighting. The scientist is noted as stating that even if the angle of the lighting was changed by 45 degrees it could "alter the appearance of the fragment dramatically", which reflects Major Lewis's position that the fragment appears differently in different photographs. The file note also records that Allen Feraday made available to the defence experts enlargements of some photographs. Furthermore, records examined by the Commission at the Forensic Explosives Laboratory also suggest that the defence examined negatives of at least some of the RARDE photographs of the fragment. The file note goes on to record that the experts "are satisfied that it is the same fragment in all cases". It is clear from the file note and from the final FSANI report that the experts had access to and conducted detailed examinations of the fragment and the control sample circuit boards. The file note also specifically records one expert as saying that he was satisfied that the fragment examined was the same one as was photographed in the RARDE report. Neither the FSANI report nor the file note was provided to Major Lewis when he prepared his report for MacKechnie and Associates.

8.49 In summary, prior to trial the experts instructed by the defence noted the differing appearance of the fragment in various photographs and, unlike Major Lewis, had access not only to photographs but also to the fragment itself, the control sample boards and apparently also photographic negatives. They were satisfied that all the photographs related to the one fragment and that the fragment in question originally formed part of an MST-13 timer. In these circumstances, and in light of the findings detailed elsewhere in this chapter of the statement of reasons and in chapter 7, the Commission did not consider it necessary to instruct a further forensic examination of the fragment.

(c) Inconclusive and contradictory findings of scientific enquiries

8.50 The third matter raised by Major Lewis relates to the results of the scientific enquiries instructed by the police in relation to the fragment (further details of which are contained in the working document included in the appendix). According to his report, the sum of the experts' work "is inconclusive but, in one particular, is

contradictory" which he suggests increases the concern to ensure that a good evidential chain exists.

8.51 The matter Major Lewis considers contradictory relates to whether or not the fragment had solder mask on one side or on both, solder mask being a green coloured finish often applied to one or both sides of a circuit board for protective and aesthetic reasons. At paragraph 20 of his report Major Lewis refers to the accounts of the MEBO witnesses that some MST-13 timers were made with circuit boards which had solder mask on only one side, whereas others had solder mask on both sides. He points out that Mr Feraday of RARDE asserted that the fragment was solder masked on one side only. However, one of the experts whom the police instructed to examine the fragment, Mr Worroll of Ferranti International, asserted that the fragment was masked on both sides. Another expert instructed by the police, Mr Rawlings of Morton International Ltd, was not clear in his report as to whether the mask was applied on one or both sides. Lastly, Dr Reeves of Edinburgh University said that it was possible that mask had been applied to both sides but had been substantially removed from one side.

8.52 Having considered all materials available to it in respect of the evidential chain for PT/35(b), the Commission is satisfied that for the following reasons the inconsistencies highlighted by Major Lewis are not significant.

8.53 In the first instance, Allan Worroll of Ferranti was the only expert consulted by the police who stated positively that PT/35(b) was solder masked on both sides (CP 357). William Williamson, the police officer who was responsible for instructing the various tests and examinations of PT/35(b) in 1990, is recorded in a Crown precognition (see appendix) as stating that none of the other scientists who carried out examinations of the fragment agreed with this assessment. In the Commission's view this is borne out by its examination of the evidential chain. At interview with the Commission Mr Williamson stated that he had been surprised when Mr Worroll had committed himself in writing to the opinion that the solder mask was on both sides, as Mr Williamson recalled that Mr Worroll had not been certain of this fact during his examinations of the fragment. Moreover, in Mr Worroll's Crown precognition (see appendix) his position altered. He examined PT/35(b) again and his opinion is

recorded as being that the fragment was solder-masked only on the side without the copper tracking. This view is in line with the other experts who examined the fragment in 1991, and with the experts instructed by the defence prior to trial (see McGrigors file note of 20 December 1999 meeting, referred to above and included in the appendix).

8.54 In 1999 Dr Reeves of Edinburgh University was instructed on behalf of the Crown to examine PT/35(b) and a section which had been removed from it, DP/31. The purpose of this instruction was to address allegations made by Edwin Bollier to the Crown at precognition, including that the section DP/31 had not been cut from PT/35(b). Dr Reeves report on the matter is Crown production number 1585.

8.55 At paragraph 3.1 of his report Dr Reeves states that the side of the fragment with copper tracking was "generally clear of solder resist material". He was asked about this at defence precognition (see appendix), and explained that on first appearances there was only solder mask on the side of the fragment which had no copper tracking, but that during examination he saw some small areas on the track side of the fragment which could have been consistent with the track side also having been solder masked. He suggested two other possibilities for the areas he had seen, namely that pieces of solder mask from the non-track side of the circuit board could have landed on the track side during an "extreme event", or that pieces of solder mask could have been transferred to the track side when sections of the fragment were removed with a saw. He stated that there was evidence of solder mask material in the saw cuts.

8.56 In the Commission's view, given Mr Worroll's change in position at Crown precognition and the fact that Dr Reeves found only traces of solder mask on the track side of the fragment, which he thought could have been transferred there during an extreme event (such as an explosion) or during sawing of the fragment, the differences of opinion referred to in Major Lewis's report do not amount to much, and the weight of evidence points firmly to the fragment being solder-masked on one side only.

8.57 Perhaps more importantly, there does not appear to be any specific significance in establishing whether the fragment was solder masked on one side or both. In evidence Mr Bollier confirmed that timers containing both types of circuit board were supplied to Libya (23/3797), a fact about which the trial court in its judgment considered he "may well have been correct" (paragraph 50). Indeed, according to Mr Bollier, the timers supplied to the Stasi were prototypes without solder masking, which would rule them out as the source of PT/35(b) (although Mr Bollier makes various allegations about fragments having been planted and fabricated, see the relevant section below).

(d) The route of the IED

8.58 The final matter raised by Major Lewis in his report is what he described as "a consideration of practicality" (paragraphs 22 to 26). This amounted to doubts about the route supposedly taken by the IED (from Malta via Frankfurt and London) based on the heavy reliance on variables beyond the control of those who planted the device. He suggested that London would be the "preferred" point of ingestion for the bomb but that if for some reason it had to go on at Malta a two stage device should have been used incorporating a barometric device which actuated a timer. According to Major Lewis an MST-13 timer would be unsuitable for this purpose because it was designed to be set manually. He expresses the view that "To argue that one or other of these options would not have been used would seem perverse. The risks in such an enterprise would be quite large enough without wilfully compounding them" (paragraph 26). At paragraph 27 he recommends that research be undertaken into the feasibility of the device having been placed on PA103 at Heathrow; and that the development and use of barometric triggers for terrorist purposes also be researched.

8.59 In the Commission's view the matters raised by Major Lewis, which were not addressed in any of the papers provided to him by MacKechnie and Associates and therefore appear to go beyond the scope of his instruction, add nothing new to the information available to and relied upon by the defence at trial and appeal.

Conclusion regarding Major Lewis's report

8.60 For the reasons given, the Commission is satisfied with the provenance of PT/35(b) and with the records of its handling. As such, the Commission does not believe that the matters contained in Major Lewis's report are capable of having a material bearing on the determination by the court of a critical issue at trial.

(2) Counter-terrorism database

8.61 The submissions refer to Major Lewis having stated that the FBI and CIA would have had access to a database containing information about Mr Bollier, MEBO and MST-13 timers, including information about the Togo and Senegal timers. It is said that this contradicts the suggestion that months of the investigation were spent trying to identify the manufacturer of the timers.

8.62 The matters raised in this submission overlap with a number of issues which arose during the Commission's examination of the provenance of PT/35(b) and the role of the US authorities in this part of the investigation. These issues are detailed in a later section of this chapter. In short, there is no doubt that the CIA was aware of MEBO and its connections to Libya as early as 1985, and that by March 1988 the CIA had made a connection between MEBO and the timers examined in Togo and Senegal. Of themselves these facts are by no means revelatory, as they were accepted by the relevant witnesses during their Crown precognitions and in any event were discernible from documents lodged by the Crown as productions at trial. Given that the American authorities were not furnished with details of PT/35(b) until 1990, it was only at that stage that any connection could be made to PA103. There is no doubt that there was a delay of over two months until that connection was actually made, at least as regards the Scottish police investigation, and the possible reasons for and implications of that delay are discussed later in this chapter. It is sufficient to say, however, that the Commission does not consider any sinister inference can be drawn from these matters, or that they have any material effect on the evidence led at trial.

Ground 4: previous cases involving Allen Feraday

8.63 In May 2005 MacKechnie and Associates informed the Commission of an impending decision of the English Court of Appeal in the case of Hassan Assali, whose conviction in May 1985 under the Explosive Substances Act 1883 had been based primarily upon the evidence of Allen Feraday. Mr Assali's case had been referred to the Court of Appeal by the Criminal Cases Review Commission ("the English Commission").

8.64 In the course of June and July 2005 MacKechnie and Associates provided the Commission with various papers analysing Mr Assali's case and two others, *R v Berry* and *R v McNamee*, in which Mr Feraday had given evidence and in which the Court of Appeal had subsequently set aside the convictions. A paper addressing Mr Feraday's involvement in the inquest into the shooting of three members of the IRA in Gibraltar was also provided. It appears that these papers had been prepared by John Ashton, an investigative journalist employed by MacKechnie and Associates. Copies are contained in the appendix.

8.65 The Commission also obtained a number of documents from Mr Assali's solicitors in London, including a copy of the English Commission's statement of reasons and the report by Major Lewis and others upon which the referral to the Court of Appeal was based. On 19 July 2005 the Court of Appeal quashed Mr Assali's conviction, the Crown not having opposed the appeal. The Commission obtained a copy of the court's opinion, which is included in the appendix.

8.66 In the following months a number of television and newspapers reports referred to the decision in *Assali* and the two previous cases in which convictions based on Mr Feraday's evidence had been quashed. There was much speculation on the impact these cases would have on the applicant's case, given that he too was convicted at least partly on the basis of expert testimony by Mr Feraday.

Summaries of the cases and submissions

8.67 Before addressing the submissions it is appropriate to outline the circumstances of the three cases to which MacKechnie and Associates referred. The nature of Mr Feraday's evidence in the various proceedings and the criticisms of that evidence in the submissions often involved technical matters which for present purposes it is unnecessary to address in great detail.

R v McNamee

8.68 On 27 October 1987 Gilbert "Danny" McNamee was convicted of conspiracy to cause explosions. His case was referred to the Court of Appeal by the English Commission and the conviction was quashed on 17 December 1998. The court's opinion is reported at *R v McNamee* 1998 WL 1751094.

8.69 Mr McNamee was alleged to have been responsible for designing circuit boards for use by the IRA in explosive devices. He accepted that he worked on circuit boards for games machines at premises where the IRA made explosive devices but his position was that he had not known the premises were used for terrorist purposes.

8.70 A significant aspect of the evidence against Mr McNamee consisted of what were said to be his finger and thumb prints. They were recovered from three separate finds made by the British authorities, namely an explosive device and two caches of arms which included circuit boards. At appeal, expert evidence was heard which cast some doubt upon the identification of a thumbprint impression found on the explosive device, and the Court of Appeal held that they could not say the jury would necessarily have accepted that the print was readable had they heard this evidence at trial. The Court also considered significant the failure to disclose to the defence reports by an anti-terrorism police officer in which he named known terrorists, not Mr McNamee, as responsible for the majority of the circuit boards found in the arms caches referred to at the trial.

8.71 Mr Feraday's evidence at the trial was that the tracking pattern on fragments of circuit board found in a bomb which exploded in Hyde Park in 1983 matched the

tracking pattern on circuit boards in one of the caches on which, according to other evidence, Mr McNamee's fingerprint had been found. Mr Feraday's conclusion was that both circuit boards came from the same master artwork. Other experts at trial agreed with that conclusion, which therefore linked Mr McNamee to the Hyde Park bomb. The Crown invited the inference that he was responsible for the master artwork of these circuit boards. According to the trial judge's summing up, Mr Feraday also testified that the tracking pattern on the circuit boards was especially devised for bombs, but another expert disagreed and stated that the pattern was originally devised for some other, innocent purpose.

8.72 At appeal, evidence was heard from a different expert, Dr Michael Scott, who also indicated that the circuit boards were originally for an innocent purpose. More significantly, he testified that whereas the tracking pattern on the Hyde Park fragments and the circuit boards in the arms cache on which Mr McNamee's fingerprints were found did indeed match each other, the same pattern also matched various other circuit boards found in other arms caches. These included some found in Dublin and Northern Ireland which were not referred to at trial. Evidence indicated that other terrorists, not Mr McNamee, were responsible for making those circuit boards. As such, the similarity spoken to at trial could no longer be said to stand alone like a fingerprint, as had been emphasised by the Crown at trial on the basis of Mr Feraday's evidence. In light of this new evidence and the undisclosed reports referred to above, the Court of Appeal concluded that it could no longer be inferred that Mr McNamee had been responsible for the master artwork of the circuit boards, as the Crown had alleged at trial.

R v Berry

8.73 John Berry was convicted on 24 May 1983 of an offence under section 4 of the Explosive Substances Act 1883, namely the making of a number of electronic timers in such circumstances as gave rise to a reasonable suspicion that they were not made for a lawful object. After a reference by the Secretary of State for the Home Department, the Court of Appeal quashed the conviction on 28 September 1993. The decision is reported at *R v Berry (No.3)* [1995] 1 WLR 7.

8.74 At the trial the Crown had alleged that the timers were designed and intended for use by terrorists to construct time bombs but Mr Berry claimed they had been supplied to the Syrian government and that they had numerous uses including for landing lights.

8.75 Of the four grounds argued before the Court of Appeal, the most relevant to Mr Feraday's involvement in the trial was that relating to fresh evidence. It was agreed that Mr Feraday's evidence had effectively been unchallenged at trial, as the only defence expert had accepted that he lacked experience in terrorist weaponry. It was Mr Feraday's testimony that the timers made by Mr Berry could have been designed only for use by terrorists to cause explosions and as such it was critical to the conviction. He excluded non-explosive uses such as surveillance and lighting and suggested that legitimate armies would not use such timers because of the lack of an inbuilt safety device. However, the Court of Appeal heard fresh evidence from four experts, including Major Lewis and Dr Michael Scott, and stated that each of them disagreed with Mr Feraday's "extremely dogmatic conclusion" about the timers, which they each felt were timers and nothing more, and which could be put to a variety of uses. In particular, whereas the absence of an inbuilt safety device in the timers might exclude their use by Western armies, the same could not be said of armies in the Middle East. Accordingly the verdict could not be considered safe.

R v Assali

8.76 As indicated, the Commission obtained a number of papers in relation to Mr Assali's case. The case mirrors that of John Berry, in that Mr Assali was convicted under the Explosive Substances Act 1883 as a result of timers he produced, which in evidence Mr Feraday said had been specifically designed for terrorist use and which he could not contemplate being used other than in bombs. The English Commission referred the case to the Court of Appeal on the basis of an expert report by Major Lewis and others in which Mr Feraday's conclusions were challenged and it was submitted that in fact the design of the timer was not suited for use in IEDs e.g. it was designed for repeated use and was difficult to set.

8.77 In June 2005 the Crown submitted a document to the Court of Appeal indicating that it would not resist Mr Assali's appeal. It stated that, taking into account the new expert report, there was "a reasonable argument to suggest that" Mr Feraday's evidence might well have been "open to reasonable doubt". The Crown emphasised that it was not conceding the correctness or otherwise of the fresh evidence and that its decision was made on the particular facts of the case and was not to be taken as having any wider significance. It stated that the decision was based on the perceived impact that the new material would be likely to have had on the jury and the inability to call evidence to contradict the new material. A copy of this document is included in the appendix.

8.78 In setting aside the conviction, the Court of Appeal referred to the decision in *R v Berry* and suggested that the implications for Mr Assali's case were "obvious". It referred to the position adopted by the Crown but made no further findings, other than to state that on the basis of the expert evidence now available, the appeal had to be allowed.

Gibraltar inquest

8.79 In relation to the Gibraltar inquest, the following information was obtained from a paper submitted by MacKechnie and Associates and the relevant judgment of the European Court of Human Rights (*McCann and Others v United Kingdom* (1996) 21 EHRR 97).

8.80 In September 1988 an inquest was held by a Gibraltar coroner into the shooting there of three members of the IRA by British armed forces personnel. Mr Feraday provided a statement to the inquest and also gave evidence. The matter to which he spoke was whether, theoretically, a radio-controlled device such as was known to be used by the IRA could have detonated a bomb in a car the IRA members had left parked in one part of Gibraltar, by a transmission from the area in which they were shot dead. Mr Feraday's position was that he could not rule out the possibility that a bomb could have been detonated, and another expert also gave evidence about trials which had been conducted in which some signals could be received between the relevant places. Dr Michael Scott, however, gave evidence that based on trials he had

conducted his professional opinion was that a bomb could not be detonated in such circumstances.

8.81 The ruling of the inquest was that the killings had been lawful. In support of the subsequent application to the European Court of Human Rights Dr Scott challenged Mr Feraday's evidence and reiterated his own conclusions. The decision of the European Commission on Human Rights was that there was no violation of the Convention and, according to the paper submitted by MacKechnie and Associates, that it was not unjustified for the British authorities to have assumed that detonation was possible. The European Court, however, found there to be a violation of article 2 of the Convention on the basis of a lack of care and control on the part of the British authorities in carrying out the operation. The question of whether or not detonation would have been possible was described in its judgment (in particular paragraph 112 et seq) but did not play a significant part in its findings.

Summary of submissions

8.82 The various papers submitted by MacKechnie and Associates contain long and detailed analyses of and comparisons between Mr Feraday's evidence in the proceedings summarised above and make a number of criticisms of him. Again, for the present purposes it is necessary only to summarise briefly a number of those submissions.

8.83 In relation to the Gibraltar inquest reference is made in the submissions to Mr Feraday's lack of qualifications and it is alleged that he made a number of technical errors in his description of radio wave propagation. Reliance is placed upon Dr Scott's opinions which contradict much of Mr Feraday's account. It is pointed out that despite his experience in examining terrorist devices and their remains, Mr Feraday had no specialist knowledge in radio communications and, in contrast to Dr Scott, failed to undertake any tests with the relevant equipment in Gibraltar. According to the report, rather than admit ignorance, Mr Feraday made factually inaccurate claims and also claimed that the "vastly more qualified" Dr Scott was wrong in his conclusions. Dr Scott's view was that Mr Feraday's conduct was "quite astonishing".

8.84 As regards *Berry* and *Assali*, the papers submitted to the Commission (which pre-date the Court of Appeal's decision in *Assali*) again make detailed criticisms of Mr Feraday's conclusions and refer to contradictions which are apparent between his accounts in each case. The point is made that in each case Mr Feraday said the timer in question was specifically designed for terrorist purposes, yet the actual timers were quite different to each other in a number of respects including their size and the length of time for which they could be set.

8.85 Moreover, it is submitted that in *Berry* Mr Feraday testified that timers with inbuilt safety devices were not normally used by terrorists, who preferred to use some external visual safety mechanism, like a warning bulb. It is submitted that the absence of an inbuilt safety device in the timers produced by Mr Berry was regarded by Mr Feraday as an important factor in establishing its terrorist purpose. It is suggested that Mr Feraday further testified that he had never come across terrorists using timers which had inbuilt safety devices and that they would instead apply their own safety circuit, yet the *Assali*, IRA and MST-13 timers all had inbuilt safety mechanisms, such as an LED which would illuminate when the switch was closed. In *Berry* Dr Scott's opinion was that terrorists would always require a built in safety device, but Major Lewis disagreed and suggested that although such a device was evidence that the timer was to be used for a hazardous purpose, terrorists generally chose simple, general purpose timers which lacked such a circuit, because they could be acquired innocently. It is pointed out that in *Assali* Mr Feraday suggested that the LED on the timer would act as an extra safety device in the event of a failure in the terrorist's own safety apparatus, such as an external circuit and bulb, which they tended to use because they did not trust inbuilt devices.

8.86 A further matter raised in relation to *Berry* is Dr Scott's opinion that Mr Feraday's testimony about the amount of current the timer in question could handle was "utterly dishonest". As regards *Assali,* reference is made to various aspects of Mr Feraday's testimony which were contradicted in the subsequent expert reports, such as Mr Feraday's assertion that the repeat mode on the timer was not an intentional part of its design, a fact refuted by the other experts. It is suggested that in *Assali* Mr Feraday was every bit as "dogmatic" as he had been in *Berry*, and the suggestion is made that

Mr Feraday may not have been competent, given that he failed to identify various features of the timers which were referred to by the other experts. The submission is also made that Mr Feraday gave evidence in bad faith, particularly in light of the contrasting positions he adopted in *Berry* and *Assali* as regards the use by terrorists of timers with inbuilt safety devices.

8.87 Some specific comparisons with the applicant's case are also made in the papers. With regard to Mr Feraday's testimony in *Berry* that all terrorists like to have an external safety feature in their IEDs, the point is made that the devices recovered in the Autumn Leaves operation did not contain such safety features, and neither did Mr Feraday's reconstruction of the device used to destroy PA103. It is suggested that the absence of an external safety circuit in Mr Feraday's reconstruction is implicit acceptance that the terrorists would have considered the MST-13's inbuilt warning light sufficient.

8.88 As regards *McNamee*, the submissions make reference to various aspects of Dr Scott's opinions in which the evidence of Mr Feraday is criticised. Specific mention is also made of the fact that, as in *Assali* and *Berry*, Mr Feraday concluded that the circuit boards in question were designed for terrorist bombs, a fact with which another expert at trial, and Dr Scott at appeal, disagreed.

Mr Feraday's position at interview

8.89 At interview with the Commission's enquiry team on 7 March 2006 Mr Feraday was asked about the cases of *Berry, Assali* and *McNamee*. His statement is contained in the appendix of Commission interviews. In brief, his view was that there was no connection between those cases and that of the applicant. He maintained that his opinion in *Berry* had been correct, and he disputed a number of the allegations made about his testimony in that case. He felt aggrieved at the Crown's approach to the appeals in *Berry* and *Assali* and he produced photographs which he suggested proved that the *Berry* timers had been used in terrorist devices but which the Crown failed to rely upon at either appeal. He was of the view that his evidence in *McNamee* was irrelevant to the Court of Appeal's decision that the conviction in that case was unsafe.

Consideration

8.90 The Commission notes that at the applicant's trial Mr Feraday spoke to a number of critical issues including the identification of the Toshiba RT-SF16 radio cassette recorder as the device which contained the explosives, the identification of the fragment PT/35(b) as having come from an MST-13 timer which initiated the explosion and the reconstruction of the IED and its positioning within the baggage container. Accordingly, evidence which raises significant doubts about the credibility or reliability of Mr Feraday's conclusions in the applicant's case would potentially undermine the basis of the court's verdict. On the other hand, as was acknowledged by MacKechnie and Associates in the letter of 14 June 2005 which enclosed the submissions on this point, "it does not follow that, even if Mr Feraday's evidence in other cases was misguided, overstated or even false, that his evidence in the Lockerbie case should be open to question for that reason alone."

8.91 As indicated, prior to trial the applicant's defence team instructed forensic experts from FSANI to examine a number of areas of the case. It is clear from their final report (DP 21) and from file notes of meetings that the defence experts agreed with the majority of Mr Feraday's conclusions. Crucially, in respect of the timer fragment the experts were satisfied that it had suffered damage consistent with it having been closely associated with an explosion (DP 21, p 6) and that it had come from an MST-13 timer (as described in the relevant section above).

8.92 Moreover, where Mr Feraday testified about matters with which the defence experts disagreed, such as the possible positioning of the primary suitcase in the baggage container, Mr Feraday was cross-examined about them in some detail (21/3278 et seq).

8.93 In these circumstances, and having considered the matters raised under this ground of review, the Commission does not believe that the information about previous cases involving Mr Feraday undermines his conclusions at the applicant's trial. As regards the Gibraltar inquest, the issues in question were quite different, relating as they did to the possible detonation of explosives by radio transmission.

Although Dr Scott clearly disagreed strongly with Mr Feraday's evidence at the inquest, another expert at least partly supported Mr Feraday's position and there was no judicial criticism of him in any of the subsequent proceedings. Nor was there any direct judicial criticism of Mr Feraday in *McNamee*. His conclusion that the Hyde Park fragments matched a circuit board in one of the arms caches was not in itself disputed, and was spoken to by another expert at the trial. It was the revelation that those fragments also matched a number of other circuit boards, some of which had not been led at trial, which contributed to doubts about the safety of the conviction. There was also a suggestion that the undisclosed police report had been provided to RARDE but it was not suggested that Mr Feraday himself had had access to that report or had failed to disclose it.

8.94 *McNamee* reflects *Berry* and *Assali* to the extent that Mr Feraday concluded in all three cases that the items he examined were specifically designed for use in terrorist devices, conclusions which were challenged by fresh expert evidence at appeal and which in the latter two cases directly led to the convictions being overturned. However, in the applicant's case Mr Feraday did not assert that MST-13 timers were designed specifically for use in terrorist devices. On the contrary, the RARDE report describes the timer as "specifically designed and constructed as a versatile programmable electronic timer capable of firing any electronic detonator connected to its terminal block after a preset period of delay" (CP 181, section 7.1.1).

8.95 Given the lack of any direct correlation between Mr Feraday's findings in the applicant's trial and his opinions in the previous cases, what remains is a general criticism that he may in the past have expressed unjustifiably definite (and incriminating) conclusions about matters with which more technically qualified experts have disagreed. However, as stated above, his conclusions in the applicant's case, including the conclusion that PT/35(b) came from an MST-13 timer that initiated the explosion, were largely supported by the defence experts.

8.96 It is also important to note that, with the exception of the Court of Appeal's decision in *Assali*, all the cases in question were concluded prior to the applicant's trial. Indeed, it is clear from a number of papers contained in the McGrigors electronic files that the defence was well aware of Mr Feraday's role in all those

proceedings (including *Assali*, which at the time was under review by the English Commission). Accordingly, little of what is raised in the papers submitted to the Commission constitutes new information or fresh evidence. Indeed, at trial counsel for the co-accused cross examined Mr Feraday about the events in *Berry*, including the Court of Appeal's description of his opinion in that case as "extremely dogmatic". Counsel also referred Mr Feraday to the passage in the Court of Appeal's opinion in *Berry* in which it was suggested that he had "partially conceded" that his conclusions at trial had been "open to doubt at the very least" (21/3270 et seq).

8.97 Accordingly it cannot be said that the trial court in the applicant's case reached its verdict in ignorance of the judicial criticisms to which Mr Feraday had been subjected. Given that at the time there was an absence of similar criticism in the other cases, the Commission does not believe that there would have been much value to the defence in also raising those cases during cross-examination.

8.98 The Commission acknowledges that the position now is somewhat different as regards *Assali*, the Court of Appeal having quashed the conviction under reference to *Berry*. Had that outcome occurred prior to the applicant's trial it is possible that counsel might have referred to *Assali* as well as *Berry* in an attempt to cast further doubt upon Mr Feraday's evidence. However, in light of its conclusions above, the Commission is not persuaded that such a reference to *Assali* would have added anything of significance. In particular, the issues in that case and in the other cases were different in nature to those about which Mr Feraday gave evidence at the applicant's trial.

Conclusion in relation to ground 4

8.99 In light of the findings here and in the rest of this section of the statement of reasons, the Commission does not believe that Mr Feraday's involvement in the previous cases referred to above may have given rise to miscarriage of justice in the applicant's case.

The Commission's review of chapter 10 of the Crown case

8.100 As indicated, the importance of PT/35(b) to the case against the applicant prompted the Commission to conduct a review of all aspects of that chapter of evidence i.e. chapter 10 of the Crown case. This encompassed the evidence relating to (1) the MST-13 timers recovered in Togo in 1986 and the timer seized in Senegal in 1988; (2) the enquiries with various scientists and experts in the circuit board industry in 1990, 1992 and 1999; (3) how and when PT/35(b) was first identified as originating from an MST-13 timer and how the connection was made to MEBO; and (4) the enquiries at MEBO and the accounts of Messrs Bollier, Meister and Lumpert.

8.101 In general the Commission is satisfied that the evidence it has reviewed supports the provenance of the fragment and the conclusions reached by the trial court, and therefore it is unnecessary to set out in their entirety the Commission's findings in each of these areas. However, certain specific issues arose which the Commission considered warranted further investigation. Although ultimately the Commission's view was that these matters did not give rise to a possible miscarriage of justice in the applicant's case, the Commission considers it appropriate to include details of a number of them here.

(1) The timers recovered in Togo and Senegal

Introduction

8.102 At trial, evidence was led from various witnesses about the MST-13 timers found in Togo and Senegal and the trial court made reference to those timers in its judgment (paragraphs 51 and 52). In particular, one of the two timers discovered by the Togolese authorities was taken by officials of the US Bureau of Alcohol, Tobacco and Firearms in September or October 1986. Subsequently it was passed to the CIA and then to the FBI. This timer was designated "K-1" by the FBI and it was the comparison between it and PT/35(b) in June 1990 that formally identified an MST-13 timer as having been used in the bombing of PA103 (a matter which is addressed in further detail below). The timer was lodged as Crown label production number 420.

8.103 The second Togo timer was obtained by the French authorities and was recovered from them by Mr Williamson in 1999 (18/2988). It was lodged as Crown label production number 438.

8.104 The two Togo timers were of the un-housed variety, i.e. the corners had not been cut to allow them to be fitted into casings. In that respect they differed from the timer of which PT/35(b) had originally formed part, as the curve on that fragment indicated that the corner of the circuit board had been cut to allow the timer to be boxed.

8.105 As regards the timer found in Senegal, evidence was led from a number of witnesses and joint minute number 5 was read out at trial (18/2904-9). The joint minute narrates the circumstances surrounding the discovery of the Senegal timer which are broadly repeated in the trial court's judgment at paragraph 52. The joint minute also records that the timer and various other items recovered with it, including explosives and armaments, are depicted in Crown production number 255. This timer was of the boxed variety and in that respect, unlike the Togo timers, it matched the timer of which PT/35(b) had originally formed part. It is worth noting that in terms of paragraph 52 of its judgment the trial court appears to have confused the Senegal timer, which was never recovered by the investigating authorities (as explained below), with the second Togo timer obtained from the French authorities in 1999. However, the Commission does not consider this apparent error by the trial court to have had any material effect on the verdict.

8.106 The joint minute goes on to state that on the basis of documents obtained from the Senegalese authorities (CP 258) the explosives recovered with the MST-13 timer were destroyed. It is also stated that, although the pistol and ammunition found with it were retained, the documents do not refer to the timer itself. The joint minute concludes that, according to the documents available, the timer was not destroyed.

8.107 The timer in question was not a production at the trial. Indeed, given that it was never recovered by the authorities investigating PA103 and its whereabouts remain unknown (as described below), the suggestion that the Senegal timer was in fact the timer of which PT/35(b) originally formed part cannot, in theory at least, be

discounted. It is clear, then, that any information about its fate is of potential importance to the case against the applicant.

8.108 During its review of the documents relating to the Senegal timer the Commission noted that certain confidential notes contained in the relevant section of the police report revealed further information about the possible fate of the timer. This information emanated from Jean Collin who at the time of the seizure of the timer in February 1988 was Secretary General to the President of Senegal and was responsible for co-ordinating the Senegalese intelligence services. He had since retired. He was interviewed by a French police officer**,** apparently on 5 February 1991 (although certain records suggest the interview was in January of that year), in the presence of Scottish police officers William Williamson and Michael Langford-Johnson, pursuant to a Commission Rogatoire from the Lord Advocate (CP 1587). FBI agents and representatives of the French authorities were also present. A statement was compiled which Mr Collin signed (CP 1588) and there follows a summary of it.

The formal statement of Jean Collin

8.109 Mr Collin's statement explains that, on the basis of intelligence he had received, he instructed the interception of three individuals at Dakar airport and witnessed their arrest. One individual was a Senegalese national named Ahmed Khalifa Niasse, the other two were Libyans (namely Mohammed El Marzouk and Mansour Omran Saber). According to the statement Mr Collin was informed the following day that baggage had also been seized which contained sophisticated equipment (including the MST-13 timer). He went on to give details about the eventual release without charge of all three individuals. The two Libyans were deported.

8.110 Mr Collin confirmed that he later wrote the letter to the Senegalese army authorising destruction of the explosives and retention of the pistol and ammunition which had been confiscated (the letter is referred to in joint minute number 5, and is reproduced in CP 258). It was pointed out to him that the timer seized during the operation was not listed as one of the items destroyed and he was asked if he knew

where the timer was. He replied that he did not know. He said he did not know if other Senegalese or foreign services had access to the timer. He was asked if, given his position, it would be unusual for him not to be told what happened to the timer, to which he replied, "I would answer that question if it were put to me by my superior at the time." He denied that the Libyans took the timer with them to Libya and his response indicated that he thought that proposition was fanciful.

8.111 It was explained to Mr Collin during the interview that the fragment recovered during the investigation of the bombing of PA103 matched the Senegal timer and that it was possible that the latter was used to initiate the explosion on PA103. Mr Collin replied that he had no further information which might help the enquiry but that he was "convinced that the timer discovered in Senegal could not have been used for terrorist purposes." He was asked if he knew where the timer was and whether it was still in Senegal and he replied that he did not know. He was asked if he had had cause to raise the matter with representatives of other governments since the deportation of the Libyans. In response he said that the matter had never been raised after the deportation but that foreign delegations friendly to Senegal were kept informed during the investigations and were notified in good time of the Libyans' deportation.

Further comments allegedly made by Jean Collin

8.112 According to the police report, Mr Collin imparted little information in his interview that had not already been obtained during earlier police enquiries in Senegal (when a number of officials had said that the timer was destroyed along with the other confiscated items, despite the absence of any reference to it in the records of destruction). The police report then states: "It is the opinion of the enquiry officers that Collin has failed to tell the whole truth in relation to the ultimate destination of the MST 13 boxed timer." Following this comment in the report there is a section containing confidential notes, a number of which are quoted here (see appendix of protectively marked materials):

"1. Despite the police enquiries to date, the present whereabouts and/or disposal of the MST 13 boxed timer recovered in Senegal… remains unclear. While it

is possible it was destroyed by the Senegalese the documentation does not support this. Also the possibility that this was the timer used to destroy PA 103 can not be discounted.

2. *From the evidence and information available, there was clearly CIA involvement in Senegal following this incident in examining the recovered items including the timer… Clarification of CIA involvement is required.*

3. *There is no doubt in the minds of the investigating officers that the witness Jean Collin has much more information on this matter but chooses not to disclose it. In the course of his interview he stated angrily that he did not think the presence of American FBI personnel was proper and inferred that the Americans knew the whole story. That* [two named individuals]*, Americans were in Senegal at the time and were given all information…"*

8.113 The confidential notes go on to record that it also became known to D&G that Mr Collin had commented that the timer had been given to "an intelligence agency". The Commission requested from D&G consent to disclose that section of the confidential notes but this was refused.

8.114 Clearly the comments attributed to Mr Collin in the confidential notes contradict the account he gave during the formal interview process. Given his position of authority in Senegal in 1988, and his involvement in the operation during which the timer was recovered, the Commission considered it important to establish whether the investigating authorities had reached any conclusion about the suggestion apparently made by him that the timer had been given to an intelligence agency and that the US authorities had been provided with all the information about the timer. The Commission considered this to be especially important since it does not appear that the defence were aware of Mr Collin's comments. Mr Collin died prior to the applicant's trial and the Crown served notice under section 259(5) of the Act that it intended to apply for his formal statement to be admitted in evidence (although in the event it did not feature at trial). However, no notice was given regarding the comments he apparently made.

The Commission's enquiries

8.115 A member of the Commission's enquiry team examined a number of protectively marked materials in relation to this matter at Dumfries police station. The notes taken of the items on that occasion are currently in the possession of the Security Service. The materials refer to certain investigations carried out by the authorities into Mr Collin's comments. The Commission's request for consent to disclose the relevant materials was not granted. However, the outcome of the investigations referred to in these materials does not support the suggestion apparently made by Mr Collin that an intelligence agency received the timer.

8.116 Moreover, the Commission notes that the involvement of the US authorities with the Senegal timer was clarified in the preparations for trial, when two CIA agents were precognosced by the Crown and the defence and subsequently gave evidence under the assumed names, Kenneth Steiner and Warren Clemens (18/2908 and 18/2929 et seq respectively). Mr Steiner had been based in West Africa in 1988 and was in attendance at Dakar airport when the two Libyans and Mr Niasse were arrested. He liaised with Mr Collin both before and after the arrests, and arranged for access to the ordnance that had been seized. Mr Clemens was subsequently sent to Dakar to examine and photograph these items and the photographs he took were contained in Crown production number 272. CIA cables relating to the activities of both agents were lodged as productions (CPs 273-281).

8.117 Crown Office confirmed to the Commission that the two individuals named by Mr Collin as having been given all the information about the timer (as stated at point 3 of the police report confidential notes quoted above) were the same two individuals who gave evidence at trial under the pseudonyms Steiner and Clemens. According to their respective Crown precognitions (see appendix) although they were granted access to the timer, they did not take possession of it. In one of his Crown precognitions Mr Steiner stated that he had no direct knowledge of what happened to the timing device but that based on remarks made to him by Mr Collin's successor (in 1990), he believed it had been returned to Libya. In another Crown precognition Mr Steiner stated that although Mr Collin had promised to allow a further analysis of the timer after the trial of the Libyans (as was anticipated at the time) Mr Steiner never

saw it again and the US Government never received access to it. This reflects the testimony of another CIA agent who gave evidence at trial, namely John Orkin, a technical expert in the CIA who stated that since 1983 he had examined all timers that had been recovered by the CIA and that the only MST-13 timers he had examined were the Togo timer and the photographs of the Senegal timer (71/8804, 8822).

8.118 According to Babacar Gueye, a Colonel in the Senegalese Gendarmerie, who was interviewed by the Scottish police in Senegal in July 1990 (HOLMES document D6444, see appendix), it was not only the CIA but also the French authorities who examined the items that had been recovered in February 1988. However, the Security Service confirmed to the Commission that the DGSE (the French external security agency) has never been in possession of the timer that was seized.

8.119 One further matter that should be noted in relation to this issue is the suggestion in Harry Bell's diaries that Mr Collin may have been interviewed in the US on or around 3 December 1990, i.e. prior to the formal interview in France described above. In an entry for Tuesday 4 December 1990 in volume 11 of the diaries regarding a meeting in the deputy SIO's room with other officers (see appendix), it states "John Collier and wife, apparently in the USA for interview, advised at 1630 hours on Monday 3rd December 1990. Detective Inspector McAteer and Detective Sergeant Langford-Johnson on standby regarding our side of the interview. Question – what contact did he have with either Nayil/Marsouk/Saber and Megrahi/Baset." Although the reference is to "John Collier" the Commission considers it reasonable to assume that the entry relates to Jean Collin.

8.120 The enquiries conducted by the Commission have not revealed any further information about the interview referred to in the diary entry. D&G were unable to find any records relating to such an interview, and the Commission found no further reference to it during any of its other enquiries. Mr Bell was asked about it at interview but stated that he had no involvement with that aspect of the case and probably just noted what was said at the meeting (his statement is in the appendix of Commission interviews). Mr Williamson knew nothing of any such interview of Mr Collin. The transcript of the Commission's interview of Mr Williamson is included in the appendix of Commission interviews. He was also asked about matters relating to

the confidential notes in the police report referred to above. As the Commission's request for consent to disclose the relevant information in its statement of reasons was refused, the Commission required to redact the transcript of Mr Williamson's interview where reference was made to this information. However, Mr Williamson did not add anything to what was already known to the Commission.

The significance of Jean Collin's comments

8.121 As stated above, the Commission considers any information about the fate of the Senegal timer to be of potential importance. However, for the following reasons the Commission does not believe the comments attributed to Mr Collin to be of sufficient materiality that their non-disclosure breached the applicant's right to a fair trial.

8.122 In the Commission's view doubt is cast upon Mr Collin's credibility and reliability because the comments attributed to him conflict with his signed statement. It is also clear from the Crown precognitions of Mr Steiner and other witnesses that, at best, Mr Collin's formal statement does not represent his full knowledge of the events surrounding the confiscation of the timer.

8.123 Moreover, although Mr Collin apparently indicated that the timer had been given to an intelligence agency, the Commission has found no evidence to support that suggestion. A protectively marked document dated 18 April 1991 (classified document 1135 in appendix of protectively marked materials) recorded that there were "conflicting intelligence reports" regarding the disposal of the Senegal timer, "the latest suggesting that it may have been given back to the Libyans." It was also suggested by certain witnesses, including Mr Steiner, that the timer might have been given to Libya. However, the Commission has found no firm support for that proposition either. Likewise there remains an absence of evidence to confirm that the Senegalese authorities retained or destroyed the timer, despite a number of witnesses in Senegal suggesting that it had been destroyed.

8.124 Thus, despite the comments attributed to Mr Collin, the evidential position is substantially the same as it was at trial, in that the fate of the Senegal timer remains

unknown. This reflects the position of D&G and Crown Office, who after being referred to the comments attributed to Mr Collin, maintained to the Commission that they had been unable to establish what happened to the timer.

(2) The enquiries with scientists and experts in 1990, 1992 and 1999

8.125 The police conducted various enquiries in 1990 with scientists and experts in the circuit board industry. The objective of these enquiries was to identify the source of PT/35(b) from its constituent parts, such as the copper tracks, the solder mask and the resin that bonded the circuit board. In the end these enquiries did not lead to PT/35(b)'s identification, which was achieved by other means (described below). In 1992, after the fragment had been identified as part of an MST-13 timer, a number of the experts consulted by the police in 1990 were revisited and were asked to carry out on a control sample MST-13 circuit board similar tests and examinations to those which they had previously conducted on PT/35(b). During the preparations for trial in 1999 and 2000 a number of further enquiries were made by the Crown, the purpose of which was to address issues raised about the fragment PT/35(b), in particular by Mr Bollier.

8.126 As indicated, the Commission conducted a review of documentation relating to these enquiries. In part the purpose of this exercise was to address the issues raised by Major Lewis about the need for the evidential chain of PT/35(b) to be established (see above).

8.127 The working document contained in the appendix contains details of the Commission's findings in respect of all these enquiries. As stated above, it is unnecessary to repeat these in detail here. It is sufficient to note that the Commission is satisfied that there is an adequate evidential chain in relation to the fragment and that all information of evidential significance was known to the defence at trial. Although certain inconsistencies were noted by the Commission, such as that which was identified by Major Lewis in relation to the solder mask on the fragment, the Commission is satisfied that none of these inconsistencies casts doubt upon the provenance of PT/35(b) or suggests that it was not the same fragment examined in each case.

(3) The identification of PT/35(b) as originating from an MST-13 timer and the identification of MEBO as the manufacturer

8.128 Evidence was led at trial to the effect that the US authorities took possession of an MST-13 timer found in Togo in 1986, and it was the comparison between it and PT/35(b) on 22 June 1990 that formally identified the MST-13 timer as the source of that fragment and therefore as the device which had initiated the explosion on PA103.

8.129 Mr Williamson spoke to that comparison in evidence (18/2956 et seq). He testified that along with Stuart Henderson (senior investigating officer at the time), Mr Feraday and another police officer, he travelled to the FBI headquarters in Washington. The reason for this visit was that FBI Special Agent Tom Thurman had told Mr Williamson by telephone that he had a timer which required urgent comparison with PT/35(b). Mr Williamson testified that he believed Mr Thurman had received a photograph of the fragment some time in the first half of 1990. According to Mr Williamson's evidence, on examining the Togo timer the designation MST-13 was visible and he also observed partially eradicated letters which at the time he thought read "MEBQ". His evidence was that thereafter enquiries were conducted in Togo and Senegal and that those enquiries did not lead the police to the source of the MST-13 timer but that subsequently further information was received which led to the enquiries at MEBO in Switzerland. In cross examination Mr Williamson was asked what the source was of the information suggesting that MEBO might be the manufacturers of the MST-13 timer and he stated that he had been informed of this fact by Det Supt James Gilchrist, then deputy senior investigating officer, although he did not know where Mr Gilchrist had obtained the information (18/3003-4).

8.130 As part of its review of chapter 10 of the Crown case, and in light of comments attributed to Major Lewis about the existence of a "counter-terrorism database" (see above), the Commission sought further information regarding how the link was first made between the Togo timer and PT/35(b), and how these enquiries then led to MEBO. Although in general the Commission remains satisfied as to the provenance of the timer fragment and the conduct of the investigating authorities, a small number of issues arose out of this review which, given the attempts in the

submissions and at trial to cast suspicion upon the conduct of US authorities, are worth addressing here.

The connection between the Togo timer and MEBO

8.131 As indicated above, it is apparent that by March 1988 the CIA could have connected MEBO to the MST-13 timers found in Togo and Senegal. In particular, a CIA cable dated March 1988 relating to the Senegal timer (CP 280, which at Crown precognition (see appendix) the CIA agent Warren Clemens confirmed had been authored by him) refers to "another MST-13 circuit board… recovered during 23/24 Sept 1986 attempt to overthrow Government in Lome, Togo". Moreover, the cable reports that attached to the Senegal timer was a "unique stereo wire connector" and that the same connector was found in a "Libyan-attributed radio control firing device" recovered in Chad in 1984. The cable also describes the red LED on the "stereo-connector" (referred to elsewhere as the "terminal block") as being identical to the modification in the Chad device.

8.132 It is clear from the aforementioned cable that in March 1988 the CIA had associated the Togo and Senegal timers with each other and with a device found in Chad, all of which were considered to be attributable to Libya. The significance of the link between the timers and the Chad device is that a CIA technical report on that device expressly names MEBO as responsible for supplying it to the Libyan Office of Military Security (CP 285, pp 14 and 41), thus establishing a link between MEBO and the MST-13 timers.

8.133 John Orkin, the CIA technical expert who prepared the report on the Chad device, confirmed in his Crown precognitions (see appendix) that a connection was indeed made between MEBO and those timers at that stage. He was also responsible for a report on the Togo timer (CP 284). He stated in his Crown precognitions that he received the Togo timer some time after 1 October 1987 and completed his report possibly in February 1988. Shortly thereafter he received copies of photographs of the Senegal timer which he placed in the file along with the Togo timer report. He stated that:

"*as a result of the unusual similarities between the* [Senegal timer] *and the Chad pageboy devices, as early as March 1988 I was of the view that the MST-13 timers were also constructed by* [MEBO]. *Given the known circumstances of the recovery of the Chad devices and the Senegalese timer, I was also of the view that both devices were used in Libya*."

The connection between PT/35(b) and the Togo timer

8.134 Despite that prior knowledge of MEBO and the timers, it is obvious that the CIA could not have made any connection between MEBO and the PA103 bombing until it received details of PT/35(b). The HOLMES statement of Stuart Henderson (S4710J, see appendix) suggests that a photograph of the fragment was first handed to the US authorities at the international Lockerbie conference held in Washington on 12 and 13 June 1990. However, the indications in the Crown precognitions of Mr Henderson, Mr Gilchrist and Mr Thurman (see appendix; see also Mr Thurman's Grand Jury testimony, CP 1743, pp 31, 33) are that a photograph of the fragment was in fact provided to the FBI as early as February 1990.

8.135 According to Mr Gilchrist's Crown precognition, so far as he was concerned no restriction was placed on the dissemination of the photograph when it was passed to the FBI and he fully expected them to circulate a copy to the CIA. If that were the case one might reasonably have expected a link to have been made to the Togo timer before June 1990. However, in Mr Henderson's Crown precognition he stated that he did place a "verbal caveat" on the circulation of the photograph, requesting that the FBI should not provide the photograph to the CIA, and he stated that he did not supply a copy of the photograph to the British Security Service at that time either. His Crown precognition states "There was nothing sinister in this action. I merely felt that the [CIA] had repeatedly carried out its own enquiries prior to sharing information with us, rather than allowing the investigation to proceed in partnership. On a number of occasions Scottish investigators arrived only to discover that agency staff had pre-emptied [sic] the visits…" Mr Henderson indicated that at the international case conference in Washington DC he withdrew the caveat.

8.136 Mr Henderson's account reflects that of Mr Thurman in his Crown precognition and in his Grand Jury testimony (CP 1743, p 42). Mr Thurman also stated that during the months prior to Mr Henderson lifting the restriction on dissemination of the photograph he conducted his own searches of the internal records held by the FBI but failed to find a match for PT/35(b).

8.137 The Commission was unable to find any other references to the provision of the photograph to the FBI in February 1990 or the caveat imposed regarding its dissemination, although it is clear that the French authorities were shown the fragment by the Scottish police that month and that it was discussed again with the French in March 1990 (see documents D8924 and D8925 in the appendix of protectively marked materials). Moreover, D&G informed the Commission that the only indications on the HOLMES system were that the photograph was first provided to the US at the international conference in June 1990. However, D&G did not rule out that a photograph might have been provided on an informal basis before that time. In the Commission's view, given the direct involvement of Mr Henderson and Mr Thurman in this matter and the concurrence of their accounts at Crown precognition, there is no reason to doubt their position, which assists in explaining why the similarity between PT/35(b) and the Togo timer was not noted until June 1990.

8.138 In his Crown and defence precognitions (see appendix) Mr Thurman stated that, having received permission from Mr Henderson at the international conference in Washington to take the enquiries outside the FBI, he contacted John Orkin at the CIA. Both Mr Thurman and Mr Orkin confirmed in their precognitions that when they met together to discuss PT/35(b) they reviewed Mr Orkin's technical reports and noted the similarity between the fragment and the Togo timer. Thereafter Mr Orkin provided Mr Thurman with the timer itself and his report on it (CP 284).

8.139 A matter which remains somewhat unclear is why, given that the fragment itself had been compared with the Togo timer at the meeting with the Scottish police and Mr Feraday on 22 June 1990 and that the link between the two had been confirmed, investigations did not immediately focus upon MEBO. In fact enquiries in Switzerland did not commence until September 1990, over two months later.

8.140 According to Mr Orkin's Crown precognitions, when he noted the similarity between PT/35(b) and the Togo timer at the meeting he had with Mr Thurman he specifically told Mr Thurman to investigate MEBO. Mr Thurman's response was said to be that this information was "not good enough to go to trial" and that he would do his own investigation with particular reference to the components on the Togo timer. Mr Orkin stated that he believed Mr Thurman carried out enquiries and established, by reference to deliveries of the crystal component in the timer, that the device had indeed been manufactured by MEBO.

8.141 In Mr Thurman's Crown precognition he stated that he did not recall Mr Orkin mentioning MEBO at their meeting (although in his defence precognition he said MEBO was discussed) but he said that he had seen the report on the Chad device (CP 285) and considered that MEBO might be a lead. He stated, however, that he decided not to go directly to MEBO and instead investigated the suppliers of the components of the Togo timer in order to establish whether such components were delivered to the same manufacturer, particularly MEBO.

8.142 Although in the Commission's view it is somewhat surprising that Mr Thurman apparently chose not to instigate enquiries directly with MEBO, there is support for the fact that the FBI proceeded with an investigation into the Togo timer's components. For example, an FBI report dated 20 August 1990 (see appendix), a copy of which was obtained by the Commission from papers held at the Forensic Explosives Laboratory, lists a number of the components on the timer (the crystal, the integrated chips and the relay) and names the companies believed to have manufactured them. There are also references to such enquiries in precognitions of FBI agents.

8.143 In the Commission's view it is more notable that despite Mr Thurman's apparent knowledge of the possible connection to MEBO, he made no mention of it at the meeting with Scottish officers on 22 June 1990, even during the discussions about the lettering on the timer which it was suggested might read "MEBQ". At interview with the Commission Mr Feraday expressed the strong view that Mr Thurman had known more at that meeting than he had disclosed and in the Commission's view Mr

Feraday's impression may well have been correct. (See also the police memorandum dated 15 July 1991 in the appendix.)

8.144 There are indications, however, that despite Mr Thurman's apparent awareness of MEBO he may nevertheless have believed at that time that the marking in question read "M580". He made that assertion in his Grand Jury testimony (CP 1743, p 42) and he acknowledged in his Crown precognition that at one stage he had investigated the possibility that the lettering might have read M580.

8.145 Whilst on one view it might be difficult to accept that, given what he already knew, Mr Thurman would have failed to recognise the markings in question as MEBO, there is evidence to confirm that the FBI did actively pursue investigations into M580. The FBI report dated 20 August 1990 (mentioned above) refers to special photographic techniques having been used to recover what are said in the report to be the "partially eradicated letters/numbers combination, 'M580'". The report then states that investigations determined that M580 could possibly be associated with a Japanese company, Meiko Industries, in as much as that company identified its products by a three digit number preceded by an M.

8.146 According to Mr Gilchrist's Crown precognition it was as a result of the US authorities' belief that the marking read M580 and the view of the Scottish police that it read MEBQ that it took some time before the marking was correctly identified as MEBO. He believed that it was the British Security Service who suggested that MEBO be investigated, and thereafter Mr Gilchrist met Swiss officials in Berne on 13 September 1990 and obtained further information about MEBO. This led to the issuing by the Lord Advocate of a Commission Rogatoire to the relevant authorities in Switzerland to allow formal enquiries to be made with MEBO.

8.147 Mr Gilchrist's account is reflected in protectively marked materials. In a fax dated 28 August 1990 (classified document 989, see appendix of protectively marked materials), the Security Service queried how clear the designation was on the timer and asked whether, rather than reading "M580", the designation might comprise the letters "MEBO". It was suggested that if that were the case it might relate to Meister and Bollier of Zurich, described as "a company known to be involved with others in

the provision of electronic devices to Libya." In a subsequent fax dated 31 August 1990 (classified document 997, see appendix of protectively marked materials) reference is made to Mr Thurman having re-examined the timer and, although he thought it possible that the third character was a "B", he doubted this. The fax also states that Mr Thurman was "clearly aware of Meister and Bollier and made a cryptic reference to the company already being of great interest to the investigation." It is in this document that the suggestion is made to the police by a member of the Security Service that enquiries be carried out regarding MEBO.

8.148 These matters tie in to some extent with a letter from Crown Office to the defence dated 23 April 2000 (see appendix) in which it was disclosed that in early September 1990 members of the Scottish police and British Security Service were making arrangements to travel to Switzerland to meet the Swiss police and intelligence with a view to pursuing enquiries at MEBO. According to the Crown's letter, prior to their departure a request was made from the CIA to the British Security Service to deter the Scottish investigators from making the visit, or at least to delay it. The request was refused and the visit proceeded as planned. Separately the CIA met the Swiss police and intelligence service the day before the visit by the Scottish team.

8.149 Evidently the Crown considered this information sufficiently relevant and significant to warrant disclosure to the defence. The matter was put to Mr Williamson in cross examination (18/3004 et seq) but he had no knowledge of the events described in the letter. He did, however, confirm that as regards investigations he conducted in Senegal, American personnel had arrived there and conducted enquiries before him (18/3003).

8.150 It is apparent from the matters above that there were difficulties in the relationship between the British and American investigating authorities. As stated above, Mr Henderson said in his Crown precognition that the reason he initially barred disclosure of the photograph of PT/35(b) to the CIA was that the CIA had conducted its own enquiries on a number of previous occasions without sharing information and had pre-empted Scottish enquiries abroad. He went on to state that it was his belief that the Americans simply wanted to be first in obtaining key

information in the case, in order that they could be credited by their superiors. He stated that he did not believe they had any sinister motive.

8.151 FBI Special Agent Richard Marquise stated in a Crown precognition (see appendix) that from August to early October 1990 there were "political differences" between the agencies in the US and those in the UK. He stated that eventually it became necessary to hold a meeting, which he thought took place on 2 October 1990, to discuss these matters with the CIA, and that following the meeting the CIA "backed off" the enquiry.

8.152 A member of the Commission's enquiry team examined protectively marked materials relevant to this issue at Dumfries police station. The notes taken of these items are currently in the possession of the Security Service. The Commission's request for consent to disclose the relevant documents was not granted. However, the documents reflect the fact that there were certain difficulties between the UK and US. One document for which consent to disclose was granted is fax 1268 (see appendix of protectively marked materials). This consists of a letter from Mr Henderson to the deputy Crown Agent in which Mr Henderson referred to a meeting of 9 October 1990 at FBI headquarters and stated that "There is no doubt in my mind that the meeting was a success. It brought the agencies much closer together and helped all concerned to appreciate each others problems and restrictions… I am confident that any unfounded suspicions and doubts which may have lurked in the minds of some of the participants now appear to be eradicated."

Consideration

8.153 In the Commission's view the findings above are of assistance in clarifying when and how PT/35(b) was linked to MEBO. As indicated, the Commission considers it surprising that despite prior knowledge of a connection between MEBO and the Togo timer the FBI did not instigate enquiries directly with MEBO and instead investigated not only the components attached to the timer but also the possibility that the markings on it read M580. On the other hand, that approach explains why enquiries in Switzerland only commenced over two months after the link was made between the fragment and the Togo timer. It is clear that the Scottish

police believed the US authorities had been attempting to pre-empt enquiries in order to claim credit for breakthroughs in the case, which if true might explain the apparent failure of Mr Thurman to mention the link to MEBO at the meeting on 22 June 1990. It is possible that a desire to retain that information might also have contributed to the somewhat oblique way in which the FBI first approached its investigations into the timer's manufacturer.

8.154 In any event the Commission does not believe that the crucial evidence against the applicant is undermined by these issues, or that they may have led to a miscarriage of justice in his case. In particular, the Commission does not consider that doubt can be cast upon the evidence relating to the recovery of PT/35(b), the assessment of it as having been intimately involved in the explosion, its identification as part of an MST-13 timer produced by MEBO, or the supply of such timers to Libya.

(4) Enquiries at MEBO and the accounts of Messrs Bollier, Meister and Lumpert

8.155 The final aspect of the Commission's review of chapter 10 of the Crown case was to examine the materials relating to the enquiries at MEBO. This included a review of all the accounts given by Messrs Bollier, Meister and Lumpert with particular reference to their opinions as to whether or not PT/35(b) had originally formed part of an MST-13 timer and their accounts regarding the supply of these timers by MEBO to Libya and elsewhere. The Commission also examined all the evidence at trial in relation to the MEBO enquiries, and materials relating to the supply to MEBO of the components used in the MST-13 timers.

8.156 As before, it is unnecessary to spell out in detail all the Commission's findings. Indeed, given that all the relevant information reviewed by the Commission in relation to MEBO was available to the defence at trial, the Commission considers it sufficient simply to note that it found nothing in its review of these materials that caused it to believe that a miscarriage of justice may have occurred in the applicant's case. This conclusion is unaffected by the submissions the Commission received from Mr Bollier, which are addressed below.

Submissions by Edwin Bollier

8.157 As explained in chapter 4, Mr Bollier made a large number of submissions to the Commission. For the reasons given in that chapter, not least Mr Bollier's obvious self-interest in undermining any connection between MST-13 timers and the destruction of PA103, the Commission has considerable doubts about his credibility. However, the Commission took the view that his unique position of knowledge in relation to the production and supply of the timers justified consideration of the matters he raised in relation to PT/35(b). Having reviewed those submissions, as described below, the Commission is satisfied that they do not disclose a possible miscarriage of justice in the applicant's case. In light of this conclusion, the Commission has not included Mr Bollier's submissions or the translations of them in the appendix.

Summary of Mr Bollier's submissions

8.158 Broadly, Mr Bollier's allegation is that the evidence regarding PT/35(b) was fabricated. He alleges that no such fragment was recovered from PI/995 in May 1989, contrary to the handwritten notes of Dr Hayes. He submits that at a meeting in June 1989, when Peter Fluckiger, a Commissioner of the Swiss federal police, visited MEBO's premises, Ulrich Lumpert, the technician at MEBO responsible for designing the MST-13 timer, gave Mr Fluckiger a brown coloured prototype MST-13 circuit board**.** Mr Bollier alleges that Mr Lumpert later lied when he stated that he had discarded the circuit board in question because it was broken. Mr Bollier also refers to a post-trial "affidavit" of Mr Lumpert in which Mr Lumpert said he had been confused at trial and that in fact the timers which were supplied to East Germany by Mr Bollier contained brown prototype boards, rather than the green Thuring machine-made boards Mr Lumpert had suggested at trial.

8.159 According to Mr Bollier, the brown prototype circuit board obtained by Mr Fluckiger from Mr Lumpert in June 1989 was then passed to the authorities investigating PA103 and was subjected to an explosion during the US test explosions (see chapter 11 below). A fragment from it was then introduced into the evidence as PT/35(b). Mr Bollier asserts that photograph 117 of the RARDE report (CP 181) was

taken in September 1989 and depicts this prototype fragment. He states that Mr Lumpert confirmed this and said that he had been responsible for scratches visible on the fragment in this photograph, which were caused when he removed excess solder from the prototype boards, there being no excess solder on the green machine-made Thuring boards. The curve on the fragment in the photograph is said by Mr Bollier to be irregular, as it was cut by a fretsaw, whereas the green machine-made Thuring boards were milled smoothly at the corner.

8.160 Mr Bollier suggests that in December 1989 the investigating authorities realised that the brown prototype fragment did not provide the desired link to Libya because only timers with the green coloured machine-made Thuring boards were supplied to Libya. Therefore, a new green coloured fragment was procured to replace the brown prototype fragment. According to one of his reports, this fragment was obtained from the MST-13 timer which had been recovered by the US authorities in Togo.

8.161 Mr Bollier further alleges that this green circuit board was then taken to various private companies (the details of which are contained in the Commission's working document in the appendix) as part of the attempt to cover up the introduction of the fragment into evidence. He states that a strip was cut from the green fragment because the Thuring machine-made boards were slightly larger than the prototype boards. He states that DP/31, the corner section of the green fragment, was also removed and that it was realised that the original brown prototype fragment depicted in photograph 117 had a unique burn mark on the area corresponding to DP/31. Therefore that area was cut from the brown prototype fragment and was exchanged with DP/31 in order that when Mr Bollier examined the fragments during his Crown precognition he would observe the unique burn mark as present on the corner section, just as it was in photograph 117. However, at precognition Mr Bollier also noticed that the corner section was from a brown prototype board whereas the main portion was from a green Thuring board. He alleges that when he was then shown the fragments in evidence the corner section had been obliterated by fire so that it could no longer be discerned that it had come from a prototype board rather than a green machine made board. He also noticed at precognition that the main portion of the

fragment had not had any components soldered to it and therefore it could not have come from a functioning timer.

8.162 In support of his claims Mr Bollier refers to various alleged inconsistencies and anomalies in the records relating to the fragment, including the changes to the page numbers in Dr Hayes' notes, the change to the date on the label attached to the "lads and lassies" memorandum, the fact that at different stages the fragment was given different designations e.g. PT-35, PT/35(B), PT35/b and the fact that the fragment was never tested for explosives residue. He also refers to "pyrotechnic tests" he conducted on sample fragments which were subjected to flames of 600 degrees centigrade. According to the results of his tests, after two seconds the solder mask had melted off and owing to the size of the fragment it was not possible for three of the four edges to be burnt but for the fourth, curved, edge to remain clean. He suggests that the results of his tests indicate that PT/35(b) was not damaged in the explosion but was subjected to deliberate manipulation, as the green solder mask remains on the fragment and the curved edge is not charred.

8.163 Lastly, Mr Bollier also alleges that there was a conspiracy not only to plant the timer fragment, but also to implicate him in the bombing of PA103. He suggests that Mr Lumpert and Badri Hassan were somehow involved in this plot, and that intelligence services from the US were behind it, with the connivance of Swiss intelligence. He refers to the order for further timers placed by Badri Hassan in December 1988 and his own subsequent trip to Libya, the return journey for which originally coincided with the flight of the applicant and co-accused to Malta on 20 December 1988. It is suggested that all these circumstances were contrived to put Mr Bollier in the frame for the bombing along with the applicant, and in particular that he was not informed of a direct flight from Tripoli to Zurich on 20 December 1988 so that he would have to travel via Malta on the applicant's flight. However, he discovered that the direct flight had been available when he arrived at Tripoli airport so did not travel via Malta.

Consideration

8.164 As indicated, the enquiries conducted by the Commission have satisfied it as to the provenance of PT/35(b). In any event Mr Bollier's credibility was already so suspect that he would have had to produce compelling submissions supported by evidence in order to persuade the Commission of his view that this chapter of evidence might be open to doubt. On the contrary, however, his grounds of review are by their nature inherently implausible and where any evidence is relied upon in support of them that evidence is often tenuous at best. In these circumstances, the Commission does not consider it necessary to address in detail each of the many points raised by him. A number of the matters which he raises, such as in relation to Dr Hayes' notes, the lads and lassies memo, the date on which photograph 117 was taken and the evidence about the removal of samples from PT/35(b) have been addressed in previous chapters of the statement of reasons and in the working document contained in the appendix**,** and it is unnecessary to repeat those findings here. In the following paragraphs some of his other allegations are addressed. Although not exhaustive, in the Commission's view its consideration of these matters is sufficient to reject all his submissions as lacking in credibility.

8.165 Much is made in Mr Bollier's submissions of the "affidavit" purportedly sworn by Mr Lumpert in which he retracted his evidence that the timers supplied to the Stasi contained green Thuring circuit boards and stated instead that they contained brown prototype boards. However, the Commission is not persuaded that, even if genuine, the affidavit is of any significance. The questioning of Mr Lumpert at trial in relation to the supply of timers to the Stasi appears straightforward so there is little scope for any confusion. Accordingly, the affidavit would be unlikely to meet the test in section 106(3C) of the Act, which requires a reasonable explanation for a change of evidence, supported by independent evidence. The trial court noted the difference of opinion between the MEBO witnesses as to the colour of circuit boards in the timers supplied to the Stasi but did not choose one account over another. Therefore the affidavit would not alter the basis for the court's verdict. If anything, it would have been detrimental to the defence, as it would have countered the suggestion that the timer which caused the explosion on PA103 had been one of those supplied to the Stasi. In any event, the affidavit does not contain any support for Mr Bollier's

suggestion that Mr Lumpert provided a prototype circuit board to Mr Fluckiger in June 1989. In fact Mr Lumpert consistently maintained that he discarded one prototype board because it was broken. Nor does the affidavit support the contention that Mr Lumpert was part of a conspiracy to implicate Mr Bollier in the bombing.

8.166 As regards the appearance of PT/35(b) in photograph 117, this allegation overlaps to some extent with the matters raised in the section above dealing with Major Lewis's report. As explained, the experts instructed by the defence were content that the item photographed in the RARDE report was the same one examined by them, a position which does not support Mr Bollier's contention that what is depicted in photograph 117 is a fragment from a prototype board. Mr Bollier's observation that the curve on the fragment was irregular as it had been made by hand using a fretsaw (as opposed to having been milled like the green machine-made Thuring boards) was a matter he raised when interviewed for the Dispatches documentary referred to above. The point was addressed in a subsequent report by Mr Feraday (CP 185).

8.167 As regards the marks visible on the fragment in photograph 117, Mr Bollier suggests that these marks were made by Mr Lumpert when he scratched off excess solder. According to him this supports the contention that the fragment was from a prototype. However, there is no mention of this matter in the purported affidavit of Mr Lumpert and there is no other evidence to confirm his view of the marks. A member of the Commission's enquiry team examined the fragment at Dumfries Police Station and had photographs taken of it, but the marks referred to by Mr Bollier were not visible during that examination. However, in the Commission's view the same marks may be visible on the fragment in photograph 334 of the RARDE report, which even Mr Bollier accepts is a photograph of a fragment from a green machine-made Thuring board. It is also worth noting that Mr Feraday was asked about the marks at interview. He considered it possible that they were dirt or scratches which had been incurred during the explosion but his view was that simply enlarging the digital image of the fragment as it appeared in photograph 117 (as Mr Bollier had done) was not "good science".

8.168 As regards the "pyrotechnic" tests which Mr Bollier conducted, even if these were comparable to the effects of the detonation of high explosive, Mr Bollier accepted in his submissions that the conclusions he reached about the burning of the fragment do not apply to full size circuit boards but only to fragments of a similar size to PT/35(b). This fails to take account of the fact that the MST-13 timer it was established had initiated the explosion on PA103 would have contained a full-size circuit board and not simply a fragment of the size tested by Mr Bollier. If further proof were needed that Mr Bollier's conclusions are invalid, one could note the condition of the Toshiba circuit board fragments comprising AG/145, which retained their green solder mask despite their proximity to the explosion. The experts instructed on behalf of the defence, and even to some extent Major Lewis, accepted that PT/35(b) was consistent with having been in close proximity to an explosion, and a number of experts who examined the item during 1990 were similarly of the view that it had been subjected to an extreme event (as described in the working document contained in the appendix).

8.169 Mr Bollier asserts that in December 1989 a green fragment from the Togo timer replaced the brown prototype fragment in the chain of evidence. In fact both Togo timers were recovered and were Crown label productions at trial. There was no evidence that any fragment had been removed from either timer, which in any event were of the un-housed variety, unlike PT/35(b).

8.170 As regards Mr Bollier's allegation that the fragment he was shown at Crown precognition comprised a main portion from a green machine-made Thuring board and a small part (DP/31) which originated from a brown prototype board, this issue was addressed in what the Commission considers to be a convincing manner by two expert reports commissioned by the Crown (CP 1585 and CP 1816). The conclusions that can be taken from these reports are that DP/31 came from the same physical circuit board as the main portion of PT/35(b) and that DP/31 had been cut from PT/35(b). In fact Mr Bollier's belief that DP/31 came from a brown prototype board, based on its colour and thickness when examined by him at Crown precognition, can be explained easily by reference to the scientific examination conducted on DP/31 by Ferranti International in May 1990, when the green solder mask was removed from it (as described in the working document contained in the appendix). As the report by

experts at Dundee University (CP 1816) indicates, that process would account for the difference in colour as between DP/31 and the remainder of the fragment (which is depicted vividly in CP 1756, photograph 5), and it would also account for the difference in the thickness of the two parts of the fragment.

8.171 As regards Mr Bollier's submission that the main fragment he was shown at trial (i.e. PT/35(b)) had been treated with fire, and that the smaller fragment (i.e. DP/31) had become a carbonised block from which its colour and the number of layers of which it was comprised could no longer be discerned, the Commission has found no evidence to suggest that any form of destructive testing or treatment was applied to these fragments after Mr Bollier's Crown precognition. A member of the enquiry team examined them at Dumfries Police Station and had photographs taken of the items. The appearance of the fragments during these examinations does not accord with Mr Bollier's description of what he was shown in evidence.

8.172 Lastly, the suggestion by Mr Bollier that there was a conspiracy involving Mr Lumpert, Badri Hassan, the Swiss and the US authorities with the aim of incriminating him in the bombing of PA103 is fantastic and, like the majority of his submissions, is unsupported by evidence.

Conclusions regarding Mr Bollier's submissions

8.173 For the reasons stated above, the Commission does not believe that any of the matters raised by Mr Bollier are evidence of a possible miscarriage of justice in the applicant's case.

Overall conclusion in relation to PT/35(b)

8.174 In conclusion, the Commission has examined for itself all aspects of the chapter of evidence relating to PT/35(b), and has considered in detail the various allegations raised about the fragment. Even when these matters are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 9
THE TOSHIBA MANUAL

Introduction

9.1 Detailed submissions were made to the Commission regarding the provenance of the fragments of paper which the RARDE report (CP 181, section 6.2.2) concluded had formed part of a manual for a Toshiba RT-SF16 radio cassette recorder ("RCR") which itself was contained within the primary suitcase. The manual was particularly important as it was relied upon by RARDE and by the trial court to establish the precise model of cassette recorder used in the improvised explosive device ("IED"). Evidence that one of the incriminees, Marwan Khreesat, never converted twin speaker RCRs (such as the Toshiba RT-SF16) into explosive devices was relied upon by the Crown, and by the court (at paragraph 74 of its judgment), as a factor in undermining the incrimination defence.

9.2 In volume A it is suggested that the Golfer (see chapter 5 above) had information to the effect that there had been "interference" with PK/689, the main fragment of the Toshiba manual recovered from the crash site. The application also refers to the evidence of the finder of this item, Mrs Gwendolyn Horton, and to more recent precognitions obtained from her and her husband, Robert, in support of the suggestion that when the manual was originally found, it was intact rather than fragmented.

9.3 On 21 June 2004 MacKechnie and Associates lodged with the Commission substantial further submissions regarding the fragments of Toshiba manual. These submissions expanded upon the allegations made in volume A, and introduced new grounds regarding the provenance of PK/689 and the other fragments of manual found. Copies of these submissions are contained in the appendix of submissions.

9.4 The central assertion in the submissions is that what was found at the crash site was an intact and complete Toshiba manual, rather than the explosion damaged item described in the RARDE report; and that the change in its condition was the

result of intervention by the police and/or forensic scientists. The reason for this alleged interference, it is submitted, was to make it appear that the manual had suffered blast damage because it had been in the primary suitcase and so to bolster the link between the PA103 bombing and the Autumn Leaves terrorist cell. Evidence to support this is said to come from three main sources: (1) the Golfer; (2) the Hortons; and (3) a police officer named Brian Walton.

9.5 This central allegation is addressed in ground 1, below. Other issues raised in the submissions in support of this central allegation, or more generally to cast doubt on the provenance of the manual fragments, are addressed later under ground 2.

Ground 1: possible interference with PK/689

(1) The Golfer

9.6 According to the submissions, the Golfer knew that certain evidence had been "engineered" by the Scottish police in order to persuade the German authorities to permit access to materials relating to the Autumn Leaves operation. In relation to PK/689, the Golfer's position was said to be that the fragments presented at trial bore no resemblance to the manual originally found. It is alleged that when he was an officer engaged in the original investigation the Golfer came across the Toshiba manual in the Dexstar store after his attention had been drawn to a rare golf club stored next to it. According to the submissions, the Golfer alleged that the manual comprised several pages, was rectangular and was only slightly singed in one corner. It is alleged in the submissions that the Golfer thereafter attended a meeting of "senior" police officers at which an agreement was reached to "engineer" evidence to convince the German authorities of a connection between the Autumn Leaves terrorist cell and the Lockerbie bombing. The Golfer allegedly informed the officers of the Toshiba manual he had seen, and a plan was put in place to "introduce" this into the evidence.

9.7 The submissions also refer to two police memoranda (see appendix), dated 14 July and 4 August 1989 respectively, in which the similarities between the Lockerbie and Autumn Leaves incidents are highlighted. In particular, reference is

made in the memoranda to the use of "Bombeat" radios in both incidents. The submissions suggest that these memoranda reflect the Golfer's allegation that the police were trying to convince the German authorities of a link between the PA103 bombing and the Autumn Leaves cell.

(2) The Hortons

9.8 The submissions seek to support the allegation of interference with PK/689 by reference to the accounts given by the finder of the item, Mrs Gwendolyn Horton, a Crown witness at trial. Asked in evidence if she recognised PK/689, Mrs Horton responded, "Well, not in its present state. I'm sure when I handed it in, it was in one piece". She also estimated the size of the item to have been around eight inches square (6/965). It is suggested in the submissions that the Crown "side-stepped" this issue, and the submissions point out that Mrs Horton was not cross examined about it, and that her husband, Robert, who was also present when the item was found, was not called to give evidence.

9.9 It is also submitted that when Mrs Horton was interviewed by MacKechnie and Associates in September 2003 she stood by her evidence; and that Mr Horton thought the item his wife had found was almost A4 sized. Both are said to have recalled the manual as having been rectangular and un-fragmented, but to have noticed during a number of visits by police over the subsequent years that it had become smaller and more fragmented. It is alleged in the submissions that the Hortons' daughter, Fiona Johnstone, claimed also to have seen the item her parents had found and that she too recalled that it was intact at that time. Mrs Johnstone is also reported as saying that Mrs Horton had voiced concerns over the years at the apparent changes to the appearance of the item.

(3) Brian Walton

9.10 Reference is also made in the submissions to the accounts given by Brian Walton, the police officer who received PK/689 from Mrs Horton at Alnwick Police Station. In particular, it is suggested that at trial the Crown avoided questioning Mr

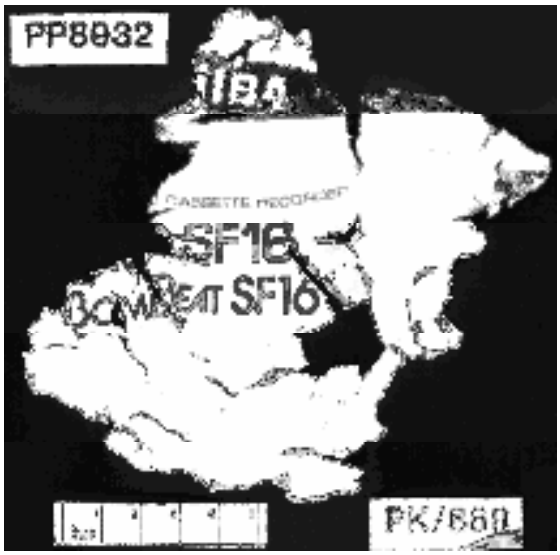
Walton as to the condition of the item when he received it from Mrs Horton, despite the contents of his Crown precognition in which he raised doubts about this.

Consideration of ground 1

9.11 The RARDE report records that, when first submitted by the police for forensic examination, PK/689 was:

> *"apparently an irregularly shaped single fragment of paper, shown in photograph 266, which measured approximately 135mm x 125mm. Detailed examination revealed the fragment to consist of two overlaid sheets lightly adhering together having the same irregular shape… The sheets appeared to have been violently impacted and disrupted and bore localised areas of blackening and scorching consistent with their close explosives involvement."*

9.12 A close-up of photograph 266 is reproduced below.



Close up from photograph 266 of RARDE report

9.13 The question raised by the submissions is whether the item recovered from the crash site by Mrs Horton was indeed in the condition depicted above, or whether what was originally found was a complete and intact Toshiba manual with a small amount of singeing, as alleged by the Golfer and, seemingly, the Hortons.

9.14 During the course of the police investigation, a control sample manual for a Toshiba RT-SF16 RCR was obtained, and was designated PT/1. This item is described in the RARDE report in the following terms:

> *"a white paper booklet measuring 26cm x 19cm and incorporating three complete sheets of paper which are folded and stapled together in the centre to produce a booklet of twelve sides of paper. The booklet contains user instructions and diagrams in several different languages. The front cover of the booklet bears the title 'OWNER'S MANUAL TOSHIBA STEREO RADIO CASSETTE RECORDER RT-SF16 BOMBEAT SF-16'."*

(1) The Golfer

9.15 The Golfer maintained during the interviews with the Commission that he had seen a Toshiba manual next to a rare golf club in the Dexstar store, that the manual was three quarters the size of A4 or smaller and that it comprised a number of pages. It also had what looked like singeing to one of the corners but was otherwise intact. The Golfer also alleged that during a discussion about the need for evidence to connect the Lockerbie disaster to the Autumn Leaves suspects he had informed senior officers of the manual's existence. On being shown photograph 266 of the RARDE report he confirmed that this was not the same as the item he had seen, which had no holes in it and was rectangular in shape and on which the word "Toshiba" was intact. He added that if PK/689 had come from any part of the manual he had seen then "there must have been some jiggery pokery". Given its condition, he found it difficult to believe that the item he had seen had been within the primary suitcase. The Golfer's statements are contained in the appendix of Commission interviews.

9.16 It should be noted that, according to D&G, there is no record of any Toshiba manuals other than item PK/689 having been recovered during the searches. It follows that, assuming one accepts his account, the manual which the Golfer alleges he saw in the Dexstar store must have been PK/689.

9.17 For the reasons stated in chapter 5 the Commission does not consider the Golfer to be a witness capable of being believed by a reasonable jury or court, and

accordingly is not prepared to accept what he has to say. Like many of his other allegations, the Golfer's descriptions of the circumstances in which he encountered the manual contain inconsistencies of detail. In his second statement, for example, the Golfer asserts that he did not touch the manual although he could see clearly that it was a manual when he returned the club to its position. In his third statement, however, he said that he first had to move the manual in order to look at the golf club.

9.18 The Golfer's account of seeing the manual is also not supported by other evidence. Specifically, if the manual was indeed stored next to a golf club, one would expect reference to be made to a golf club in the sector K production logs, yet there is no such entry there. More significantly, when the Golfer was asked at interview whether he had attended a meeting of senior officers at which it was agreed that evidence would be "engineered", he denied that such a meeting had occurred or that he had told MacKechnie and Associates that it had.

9.19 Moreover, the Commission considers the allegation that the manual was deliberately fragmented to provide a connection to the Autumn Leaves terrorists to be inherently improbable. As demonstrated in the police memoranda referred to in the submissions, the manual was merely one of a range of factors relied upon to suggest such a link. There was also the forensic evidence of blast-damaged circuit board fragments, which indicated that the RCR was one of only six possible models, five of which were made by Toshiba. Further, there was the airport evidence and forensic evidence which suggested the bomb was contained in baggage which had been interlined at Frankfurt airport; there was the use of Semtex H or a similar explosive; and there was the similarity between the Lockerbie bombing and the modus operandi of previous PFLP-GC attacks. To suggest that the police, in collusion with the forensic scientists, co-ordinated a sophisticated conspiracy to add further detail to the evidence incriminating the terrorist cell in Germany is, in the Commission's view, difficult to believe.

9.20 Despite its rejection of the Golfer's allegations, the Commission considered that the issues raised in the statements of the Hortons and of Brian Walton warranted further enquiries, particularly in light of the importance of PK/689 to the case against the applicant.

(2) The Hortons

9.21 The precognitions obtained from Mr and Mrs Horton by MacKechnie and Associates in 2003 ("the 2003 precognitions") are contained in the appendix. According to these, both witnesses recalled that Mrs Horton, in the presence of Mr Horton, found what could have been a manual for an electrical item in the field opposite their house. Both believed that the item comprised only one sheet, although Mr Horton said it might have consisted of two. Although neither witness could remember the word "Toshiba", Mrs Horton recalled that the item related to a cassette recorder. Both recalled the presence of some kind of electrical diagram on the item, which they described as "intact" and not torn. Neither could recall seeing any burning or charring on the item.

9.22 Mr and Mrs Horton went on in their 2003 precognitions to describe the police visiting them some time after the find and bringing with them what both accepted could have been a photocopy of the item they had found. The Hortons were satisfied that what they were shown by the police at that stage was consistent with what they had found. Both considered what the police showed them on this occasion to be around the size of PT/1, the control sample Toshiba RT-SF16 manual (a scale mock-up of which was shown to them by MacKechnie and Associates). They described the police as having pointed out a small area of charring at one of the corners of the item. Both witnesses maintained that they did not recall any charring on what they had found, but accepted that there might have been some present.

9.23 The 2003 precognitions go on to record a second visit from the police, during which both witnesses noticed that the condition of the item had changed. Mr Horton is recorded as stating that he could not tell that what the police showed to him on this visit was the same as the item his wife had found because "it had become little bits." Mrs Horton similarly described being shown something that was in pieces, and when asked by the police to identify this replied that she could not, as the sheet that she recalled finding had become "little bits". Both witnesses recalled in their precognitions that the explanation offered by the police was that the item had been subjected to forensic testing which must have caused it to disintegrate. The witnesses

were concerned by the changes. Mrs Horton said that in evidence she had explained that what she had found was in one piece, and that she simply could not recognise what she was shown in court as it was in bits. She had assumed, however, that it must be the same thing and that what she had been told about the forensic testing having changed the appearance of the item was the truth.

9.24 MacKechnie and Associates showed both witnesses photographs of PK/689 obtained from the Crown productions. Mrs Horton said that what was depicted was not what she had found, and that it had "changed from being at least an intact piece or pieces of paper into being bits of paper not joined together at all. There are ragged edges. There were no ragged edges that I can recall. I am sure of this."

9.25 In her 2003 precognition (see appendix), Fiona Johnstone recalled seeing the instruction manual after it had been found, and that it was "more whole" than other items found and was "intact". She did not think it was very big and she supposed it was rectangular in shape.

9.26 Aspects of the descriptions recorded in these precognitions, such as the absence of tears, ragged edges or scorching, and the recollection that what was found was intact and was closer in size to the control sample instruction manual, would appear to support the proposition that what the Hortons found was a complete manual. On the other hand, the recollection that the item found comprised only one or perhaps two sheets, is more consistent with the item found having been PK/689 as depicted in photograph 266 of the RARDE report.

9.27 In order to address the concerns raised by the Hortons about the apparent changes to the appearance of the manual, the Commission reviewed all the previous accounts given by them, copies of which are contained in the appendix.

9.28 In their initial police statements, obtained by DCs Carr and Barclay on 10 May 1989, Mr and Mrs Horton (S4345 and S4344, respectively) consistently describe the item they found as a "piece" of radio cassette manual, but provide no further details as to its appearance. The statements confirm that during this visit by police the Hortons were shown only a photocopy of the item. (Note that certain issues raised in

the submissions about these police statements are addressed under ground 2. In the submissions, the Commission is urged to obtain the photocopy in question, as the Hortons maintained that it depicted the item in the condition in which they had found it. In the event, D&G informed the Commission that it could not be located.)

9.29 The second police visit took place on 8 July 1991 when DC Gillan showed Mr and Mrs Horton the item itself. Again, the description in their statements (S4345A and S4344A, respectively) is that the item is a "piece" of a radio cassette instruction manual. There is no record in either statement, or in the statement of DC Gillan (S2727BM, see appendix), of any concerns on the part of Mr and Mrs Horton as to the condition of the manual, albeit the statements are generally lacking in detail. However, the description of the item in question throughout the police statements as being a "piece" of instruction manual is not consistent with the proposition that what the Hortons found was a full and intact manual, whereas it is consistent with PK/689 as depicted in photograph 266 of the RARDE report.

9.30 Chronologically, the next recorded account by the Hortons is in their Crown precognitions, taken on 28 July 1999. In her Crown precognition Mrs Horton is recorded as stating:

> *"I have looked carefully at the item which is now labelled PK689. I can recall finding this item down by the Raeburn. I can recall that it was more intact when I found it than what it is now. I see that it is a piece of paper not cardboard as I remember. Despite this, I can confirm that it is the item that I found…"*

9.31 Mr Horton's precognition includes the following passage:

> *"I have looked carefully at the item which is now labelled PK689 I can recall finding this item near to the Raeburn following the Lockerbie Air Disaster in 1988. My memory recalls that it was in one piece when I found it, but it had the appearance of having been partially shredded. The item now labelled PK689 is in several pieces and has deteriorated through the passage of time. Notwithstanding this, I can confirm that this is the item that I found."*

9.32 The Hortons' Crown precognitions are therefore the first recorded accounts of any concerns on their part as to the condition of PK/689, Mrs Horton stating that the item was "more intact" when she found it and Mr Horton stating that the item when found was "in one piece". However, it is not possible to take from these descriptions that what the Hortons recalled finding was a full and complete instruction manual. Moreover, it is clear that, even by that stage, neither witness's memories of the item were perfect: both, for example, acknowledged in their Crown precognitions that they had wrongly recalled that the item was cardboard rather than paper, and notes attached to the precognitions by the Crown precognoscer described the witnesses' memories as "vague".

9.33 On 9 August 1999, shortly after they had given their Crown precognitions, the Hortons were precognosced by the defence ("the pre-trial precognitions"). Despite the fact that all other accounts given by both witnesses were lodged with the Commission in connection with the Toshiba manual submissions, MacKechnie and Associates omitted to include the pre-trial precognitions. In the event, they were handed over to the Commission by MacKechnie and Associates following a specific request to do so. Their contents are clearly of assistance in assessing the Hortons' perceptions of the appearance of PK/689 at the time of its discovery.

9.34 Mrs Horton's pre-trial precognition includes the following passages:

> *"There was one particular piece of paper I remember that I found… When I picked it up I saw it had writing on it, something to do with cassettes or a cassette recorder.*
>
> *The paper measured about 5 inches square, I think the edges were uneven. It wasn't like a page, there were ragged edges. I found it strange and obviously remembered it…*
>
> *I cannot remember a single word on that piece of paper except "cassette" and that it was instructions of some sort. I don't remember any serrations or something like that…*

I can't remember any diagram, but I remember the word "cassette" and smaller writing giving instructions."

9.35 Despite the fact that it was given over ten years after its discovery, this is the first account by Mrs Horton in which she describes the fragment in any detail. Not only is her description entirely inconsistent with a complete and intact manual, her recollection of its dimensions (which, converted to inches, are 4.9 x 5.3 inches) and its uneven, ragged edges reflects PK/689's appearance as depicted in photograph 266 of the RARDE report.

9.36 Mrs Horton also recalls in her pre-trial precognition that when she was precognosced by the Crown she had been shown the item itself. At that time she noticed that it was in two pieces and she had informed the Crown precognoscer that the item she had lifted consisted of one piece of paper. According to her defence precognition, the Crown precognoscer had explained to her that the paper had split as a result of testing. The defence precognition continues: "I have been asked if the paper had changed in any way. It was originally white, but I think it had yellowed with age." Thus, Mrs Horton's only concerns about changes to the appearance of the manual are, first, that it was in two pieces when she was shown it at Crown precognition; and, secondly, that its colour had changed. As to the former, this could be explained by the passage in the RARDE report in which PK/689 is described as initially appearing to be one piece of paper, but being in fact two pieces of paper lightly adhering together which were teased apart during the examination.

9.37 In the Commission's view, the contents of Mrs Horton's defence precognition cast significant doubt upon the reliability of her more recent descriptions, and upon the submission that what she found was a complete, intact manual.

9.38 Likewise, Mr Horton's pre-trial defence precognition is not consistent with his more recent descriptions of the item. There, he described the item as being:

"a piece of paper measuring 7 inches by 4 inches…

The paper was strange, because the centre of it had been scored, like it had been through a shredder that had not worked…

I have been asked to describe the edge of the paper. I would describe it as a jagged piece of paper, or it could have been torn off something."

9.39 Again, such a description is consistent with PK/689 as depicted in photograph 266 of the RARDE report, rather than with a complete and intact manual. According to Mr Horton's pre-trial defence precognition, he too had been shown the item during Crown precognition and, after he had commented to the precognoscer that it was in a number of bits, he had been told that it had disintegrated because of forensic testing.

9.40 It appears therefore that at that time the principal concern of the witnesses as to the condition of the manual was that while they recalled picking up one single piece of paper, the item they were shown at Crown precognition (and which Mrs Horton was shown in evidence) consisted of more than one piece. During a visit to D&G on 17 March 2005, members of the Commission's enquiry team examined PK/689 and arranged for it to be photographed by a scenes of crime officer. As is demonstrated by the following photographs, PK/689 has considerably fragmented since it was photographed at RARDE, and is now in ten or more separate pieces.

Close ups of PK/689 from photographs taken at Dumfries Police Station on 17 March 2005: on the left, still in its production bag and, on the right, spread out over a sheet of A4 paper.

9.41 In the Commission's view, it is little wonder that when the witnesses who found PK/689 were faced with the bag of fragments on the left above, they questioned whether it was the same item they had found.

9.42 Mr and Mrs Horton were interviewed separately by members of the Commission's enquiry team (see appendix of Commission interviews) and the issues concerning PK/689 were discussed with them in detail. It was apparent from this exercise that the passage of time had rendered their memories somewhat unreliable, a fact which they themselves acknowledged on several occasions. Both emphasised that they could not be certain of their recollections and that what they said nearer the time was more likely to be accurate.

9.43 Both witnesses believed that the item they had found was larger and possibly more rectangular than PK/689 as it appears in photograph 266 of the RARDE report, and that it perhaps had more writing on it. However, in various ways their descriptions were not consistent with that of an intact manual. For instance, as in their police statements, both witnesses considered the item to have been a "piece" of manual, rather than a complete one. Moreover, they both maintained that the item consisted of a single sheet of paper, a feature of their description in which they have been relatively consistent throughout their accounts, and which does not support the proposition that what they found was a complete, multi-paged manual. While at interview both witnesses seemed certain that the item bore signs of charring or blackening, this is inconsistent with their previous accounts in which they were unable to recall any charring.

9.44 As regards Mrs Horton, at interview she described the edges of the item she found as having been "tatty", by which she meant ragged. When her pre-trial defence precognition was read to her, she agreed with its contents. In contrast, she disputed the contents of her 2003 precognition, in which she is recorded as recalling no ragged edges. Mrs Horton's principal concern remained that what had been a single item at the time of its discovery had subsequently deteriorated into several fragments, and she referred to the item she had been asked to identify at trial as a plastic bag containing "a heap of rubbish". Ultimately, when it was put to her that the evidence suggested

she had found PK/689 as it appears in photograph 266 of the RARDE report, that forensic scientists had, upon examination, split this into two separate sheets and that these sheets had deteriorated into a number of fragments, Mrs Horton accepted that this might account for her concerns about the item. Although she maintained that she thought there had been more to what she had found than what was depicted in photograph 266, she was not certain of this.

9.45 As regards Mr Horton, when his previous accounts were read to him he accepted that the item could have been jagged or dog-eared round the edges, although he did not remember the item having appeared "shredded". Although initially he indicated that the item was more similar to the front page of PT/1, the control sample Toshiba manual, his final position was that he believed that it might have been the same shape and condition as PK/689 as depicted in photograph 266, only larger in size.

9.46 The Hortons' daughter, Fiona Johnstone, was also interviewed (see appendix of Commission interviews). She too recalled only one sheet of paper having been found, which she believed was a piece of manual rather than a complete one. While she was more insistent than her parents that the item was rectangular in shape, and more similar to the control sample Toshiba manual than to PK/689, she also believed that her mother was best placed to remember this. Contrary to what is recorded in her 2003 precognition, Mrs Johnstone said that she had seen the item in the field, rather than in the kitchen of her house. Like her parents, she emphasised that she could not be certain of her memory after the passage of time.

9.47 It is clear that the accounts obtained from the Hortons over the years as to their recollection of the appearance of the item they found are often different and conflicting. Given the passage of time, coupled with the fact that each of them saw the item only fleetingly, this is hardly surprising, particularly as at the time of its discovery they were not to know the significance that would later be attached to the item. Moreover, on any view, the item has in fact altered from its condition as found.

9.48 In the Commission's view, while it is beyond doubt that the Hortons and Mrs Johnstone were being entirely honest and credible in all their accounts, it is

impossible to select one particular account over another in determining the condition of the item at the time of its discovery. While it is true that some of their recorded accounts are not wholly consistent with PK/689 as depicted in photograph 266 of the RARDE report, others (the earlier ones) clearly are. Assuming that each account obtained from them has been accurately recorded, it is difficult to avoid the conclusion that neither witness could be regarded by a reasonable jury as reliable in his or her various recollections of the item found.

9.49 In these circumstances, the Commission is not persuaded that the item discovered by the Hortons was different in appearance from PK/689 as depicted in photograph 266. In the Commission's view, its conclusion is this respect gains support from the contents of the following section.

(3) Brian Walton

9.50 As explained, Mr Walton was the police officer who received PK/689 from Mrs Horton. According to the submissions, when Mr Walton gave evidence at trial the Crown avoided asking him about the condition of PK/689, despite the fact that in his Crown precognition he had expressed doubts about its condition.

9.51 In evidence, Mr Walton was shown PK/689 which he confirmed had been handed to him by Mrs Horton at Alnwick police station. Asked by the Crown what struck him about the item, Mr Walton referred to it as having "tiny bits of singeing on some of the edges of the pieces" (6/969). Contrary to the suggestion in the submissions, it is not clear from the transcript whether, in making this comment, Mr Walton was referring to the item as it appeared to him in court or at the time it was handed to him by Mrs Horton.

9.52 As to his Crown precognition (see appendix), what Mr Walton is recorded as saying is this:

> *"I can remember that one particular item* [handed in to him at Alnwick police station] *was a piece of Toshiba Radio Instruction Manual.*

This item was a piece of paper, which had different languages on it, and was singed at the edges. It was quite distinctive. That's why I can remember it…

[On being shown PK/689] *I have looked carefully at the item which is labelled PK689. The item is in a worse condition than what I remember, it is in several pieces, as opposed to being more intact when I received the item. Despite this fact, I can say without contradiction that this is the piece of Toshiba Instruction Manual I received at Alnwick Police Station in December 1988. I can also see that the edges are singed, consistent with my memory."*

9.53 Mr Walton's recollection, in his Crown precognition and in evidence, that there was singeing at the edges of the item which was handed in to him is consistent with PK/689 as depicted in photograph 266 of the RARDE report. His sole concern was that it was in several pieces whereas, when he received it, it was more intact. In the Commission's view there is no evidence to suggest that this fragmentation was caused by anything other than its forensic examination coupled with its subsequent deterioration into ten pieces.

9.54 The Commission has examined all the accounts given by Mr Walton over the years (see appendix). The first of these is the entry inserted in an extract from the "Property Other than Found Property" ("POFP") register for Alnwick police station, which the Commission obtained from D&G. This register is used to record any property which is not simply lost property (such as suspected stolen property, or property recovered from a fatal accident), and the extract recovered by the Commission includes details of the items handed in by Mrs Horton. Mr Walton confirmed at interview with the Commission (see below) that the entry in the extract was completed by him upon receipt of the items from Mrs Horton on 23 December 1988, and that he signed and dated it. The third item listed in the entry is: "Piece of cassette recorder instruction manual". Mr Walton's handwritten police statement (S1319B), which he wrote and signed on the date of receipt of the item, also describes the item in those words. In his pre-trial defence precognition he described the item as having been "a Toshiba Cassette Radio handbook which was approximately 6" x 4" and it was all singed around the edges." Again, these descriptions do not support the submission that the item was a complete and intact manual. In the Commission's

view the POFP register entry is particularly significant as it is the first written description of the item.

9.55 Mr Walton was also interviewed by members of the Commission's enquiry team (see appendix of Commission interviews). He specifically recalled noticing when he first received the item at Alnwick that it was brittle and appeared to have been near a source of heat. It was singed and uneven, or jagged, around the edges, and was around three and a half to four inches square. It was not a complete manual but was recognisably from a manual. Mr Walton also recalled the word "Bombeat".

9.56 These descriptions are clearly consistent with PK/689 as depicted in photograph 266 of the RARDE report. However, when shown a scale mock-up of PK/689 as depicted in photograph 266, Mr Walton's recollection was that there was more to what had been handed in, and that it was perhaps two thirds the size of the control sample manual (although this would be inconsistent with the dimensions he previously estimated). He also remembered the word "Toshiba", and that the item had comprised more than just one sheet of paper. It was, he recalled, more recognisably from an instruction manual than was represented by the mock-up of PK/689. Despite this, after it was explained to him that the evidence suggested that photograph 266 depicted what the forensic scientists received, and that it had been two sheets stuck together, he conceded that his own memory might be inaccurate and he accepted the scientists' accounts.

9.57 In the Commission's view, while Mr Walton's accounts generally appear more consistent than those of Mr and Mrs Horton, caution is still required in relying on the contents of his recent interview. This is not only because of the lapse of time but also Mr Walton's acceptance that his memory might not be accurate and that his accounts nearer the time are more likely to be correct. Nevertheless, his recollections at interview were that he received a charred portion of manual, rather than one which was complete and intact. In these circumstances, and given that his previous accounts also point away from the item having been a complete and intact manual, the Commission does not consider that Mr Walton offers any support for the allegations set out in the submissions.

Conclusions regarding ground 1

9.58 The submissions rest on the allegation that an intact Toshiba manual was found by Mrs Horton and was subsequently fragmented by the authorities to assist in proving a connection to the Autumn Leaves terrorist cell. In respect of the first aspect of that allegation, the Commission is satisfied that the accounts given by the Hortons, Mrs Johnstone and Mr Walton provide no reliable support for the assertion that the item discovered by the Hortons was a complete and intact Toshiba manual. It might be said that aspects of the more recent descriptions offered by these witnesses coincide with the Golfer's description of the item he claimed to have seen in the Dexstar store. However, in the Commission's view when these apparent similarities are viewed in the context of the varying accounts given by the witnesses, the Golfer's inherent lack of credibility and the evidence which contradicts his account of seeing the manual, the consistencies, such as they are, do not constitute persuasive evidence in support of the assertion in the submissions. Indeed, the description in the signed and dated entry in the POFP register for the day the item was handed in provides strong evidence to refute that assertion (as do a number of the records referred to in ground 2, below).

9.59 According to MacKechnie and Associates the allegation that an intact manual was fragmented by the investigating authorities and somehow deployed in the evidence to provide a link to the Autumn Leaves suspects is based upon information provided to them by the Golfer. The Commission has already set out its conclusions in respect of the credibility and reliability of this witness. In any event, while at interview the Golfer faintly suggested that the authorities had interfered with the manual, he provided no basis for this and specifically denied the allegation attributed to him in the submissions, namely that he had attended a meeting of senior officers when such a matter was discussed.

9.60 Looking at the allegation of tampering in isolation, if it were true there would require to have been a coordinated and sophisticated conspiracy among several police officers and forensic scientists which involved the latter deliberately fragmenting PK/689 and either inserting these fragments into other items connected to the primary suitcase, or else fabricating their examination notes to convey the same impression. If

the submissions are to be believed, the motive behind such a conspiracy was not to fabricate evidence against a particular suspect, but simply to persuade the BKA to allow access to the materials they held in respect of the Autumn Leaves operation. In the Commission's view, not only is such a scenario implausible, there is no credible evidence to suggest that it occurred.

Ground 2: other issues regarding the provenance of the manual fragments

9.61 The submissions raise a number of other issues regarding the provenance of PK/689, and in relation to the other fragments of Toshiba manual. These issues are said to provide further support for the central proposition addressed under ground 1, or more generally to raise doubts about the provenance of the fragments. Given the Commission's conclusions in ground 1, these further points lose much of their force. Nevertheless, the following section summarises a number of the issues raised, and the Commission's responses to them.

Issues regarding the Hortons' police statements

9.62 The submissions refer to photocopies of the handwritten police statements of Mr and Mrs Horton (S4344 and S4345, see appendix), obtained by DC Carr in respect of his visit to them on 10 May 1989, when a photocopy of the item they had found was shown to them. The submissions suggest that the statement of Mr Horton is simply Mrs Horton's statement with a number of key words substituted, to give the appearance of it being an independent statement. The submissions refer to the Crown precognitions of both witnesses, which it is suggested disclose that the Crown intended to use the Hortons' handwritten statements to reinforce the suggestion that their memories had faded but that the statements made at the time were the truth.

9.63 The Commission has examined the statements in question and accepts that Mr Horton's statement appears simply to be a photocopy of Mrs Horton's statement with a number of words changed to make it read as if it were a statement by Mr Horton. The Commission's conclusions as to the Hortons' memories, and the condition of the item they found, are explained in detail under ground 1. The only aspect of their police statements that relates to the appearance of the item is its

description as a "piece" of cassette recorder instruction manual, a description that matches the handwritten statement of Brian Walton, which he completed on 23 December 1988, and the POFP register entry completed the same day, when the item was first handed in by Mrs Horton. The description is also consistent with the accounts of the witnesses in their Crown and pre-trial defence precognitions, and with their position at interview with the Commission. The Commission is therefore not persuaded that the method of completing the statements can be taken as evidence of any conspiracy to manipulate or misrepresent the true recollections of the witnesses, particularly when they were afforded the opportunity at Crown precognition to approve the contents of the statements. The most likely explanation for the matter raised in the submissions is that when he submitted the statements for typing into the HOLMES system, DC Carr copied and amended a few words in Mrs Horton's statement to avoid the need to write out in full a near identical statement for Mr Horton.

9.64 The submissions also refer to the fact that according to their first statements the Hortons signed a police label for PK/689 on 10 May 1989, but that according to their subsequent statements of 8 July 1991 (S4344A and S4345A), when they were shown the item itself, they again signed a label. The submissions suggest that the original police label should be obtained. The Commission is satisfied that, in fact, the label now attached to PK/689 is the same label as was signed by the Hortons on 10 May 1989. During a visit to the Forensic Explosives Laboratory ("FEL") in Kent members of the enquiry team recovered a photograph of PK/689 which is similar in appearance to photograph 266 of the RARDE report but in which the police label is also pictured (see appendix). The label is the same as that which is presently attached to PK/689, and the signatures of Mr and Mrs Horton are visible on the label in the photograph, as are the signatures of DCs Carr and Barclay. The negative number on the back of the photograph is F7384. According to the photograph log book number 2, also recovered from FEL, the photograph was returned from developing on 12 May 1989 (see appendix to chapter 6), and therefore the signatures must have been inserted in the label before then. This is consistent with the witnesses having signed the label on 10 May 1989, and suggests that the passages in the statements of 8 July 1991, which indicate that the witnesses signed labels on that date, are in error.

9.65 The typed HOLMES versions of the Hortons' first statements (see appendix) also include a note inserted by the police which assists in explaining the reasons for the second visit to the Hortons on 8 July 1991. The note states that due to the fragile condition of the manual it was retained for forensic examination and conveyed directly to RARDE on 11 May 1989. The note then states: "It is proposed to have the Instruction Manual (Label No. PK689) shown to this witness on its release from RARDE."

Police records of PK/689

9.66 The submissions narrate the chain of handling of PK/689, and highlight a number of issues in this regard.

9.67 The first matter raised is that although PK/689 was processed at Hexham, it was not flagged up as being an item of potential interest, despite there being a procedure whereby officers at Hexham would identify such items. It is suggested that this is surprising given the significance subsequently attached to the item. The Commission has considered this issue and is not persuaded that it is of any moment in light of the conclusions in respect of ground 1. In any event, the situation was by no means unique to PK/689: a number of items subsequently identified as being blast damaged and of significance to the police enquiry were not identified as of interest during the initial sifts of debris at Hexham including, for example, PK/1376, a burnt fragment of Abanderado T-shirt, and PK/339, a charred fragment of grey Slalom shirt.

9.68 The submissions also refer to the Dexstar log entry for PK/689. The only issue specifically raised about this is that in the description section the original wording, "Paper Debris", has had added to it in different ink and handwriting a much more detailed description of PK/689: "Remains of Toshiba BomBeat SF 16 Instruction Manual. Charred at edges & in crevices. Appears to have been in IED case." Given that there has been no attempt to hide the fact that this description has been an addition to the Dexstar entry, the Commission is satisfied that nothing sinister can be read into it. Indeed, the practice of adding information to the descriptions of items found to be of significance is not unusual, and can be seen in other Dexstar entries including, for example, those for PD/761, PI/403 and PK/722.

9.69 The submissions also refer to LPS form 394, the form that accompanied PK/689 to RARDE, which records that it was uplifted from Lockerbie on 10 May 1989 and delivered to DS Goulding at RARDE the following day. The submissions point to the fact that the item was transported by DCS Stuart Henderson and DCI Henry Bell, and question why such senior officers chose to carry out such a menial task. In response, it might be speculated that the seniority of the officers reflected a belief that the item they were transporting was potentially of great evidential significance, given that by that stage it was known that a Toshiba radio cassette recorder formed part of the IED. In any event, given the conclusions reached under ground 1, the Commission's view is that it is impossible to read any sinister connotation into the mere fact that senior officers were involved in transporting the item.

RARDE records of PK/689

9.70 The submissions go on to examine the RARDE records relating to PK/689. Reference is made to page 61 of Dr Hayes' notes, dated 16 May 1989, which records his examination of this item. In particular, the submissions refer to handwritten entries at the top of that page which record that PK/689 was received at RARDE on 11 May 1989, that it was "Passed to D/C Jordan on the same date for non-destructive fingerprints", and then "Returned to RARDE on 16/5/89" and "Passed to D/C Jordan on 16/5/89 for chemical treatment after photography." The submissions refer to the evidence of Dr Hayes (17/2687 et seq) and Mr Feraday (18/3030 et seq) about these entries, and to the inconsistency between the entries and the RARDE report (CP 181, section 6, p107) which indicated that the fragments of manual that assisted in identifying the radio cassette recorder (i.e. PK/689) were not received at RARDE until 30 June 1989. Mr Feraday's testimony was that the RARDE report contained an error, which arose from his misreading of records of the fragment's movements, 30 June 1989 being a subsequent date on which PK/689 was submitted to RARDE rather than the first date. The submissions point out that there are no LPS forms corresponding to a submission of the item on 30 June 1989, and suggest that the records referred to by Mr Feraday be obtained.

9.71 During a visit to FEL, members of the Commission's enquiry team obtained what Mr Feraday subsequently confirmed at interview were the movement records to which he had referred in his evidence. There is, as Mr Feraday had suggested in evidence, an entry recording PK/689's return to RARDE on 30 June 1989 (see appendix). Other records uncovered at FEL confirm that PK/689 was returned from fingerprinting on that date, and this corresponds with the police statement of DC Jordan (S5410, see appendix). The movement records also note the receipt of the item at RARDE on 11 May and its despatch to DC Jordan the same day, but they do not record the return of the fragment to RARDE on 16 May or its further despatch to DC Jordan that day. DC Jordan's statement likewise does not refer to his having returned the fragment to RARDE on 16 May, but refers only to his receiving it on 11 May and returning it to RARDE on 30 June 1989. In short, there are inconsistencies in the records at RARDE of exactly what happened to the fragment after its receipt on 11 May 1989. It is clear from other papers recovered by members of the enquiry team from files held at FEL that the precise timing and circumstances of PK/689's submission for fingerprinting was a source of some confusion. However, there is no doubt that fingerprint testing was carried out on the item, a fact confirmed in various papers, including DC Jordan's statement and also the statement of DC John Irving (S4587, see appendix) which states that PK/689 was processed for finger and palm marks with a negative result.

9.72 During the Commission's enquiries, one further issue arose regarding Dr Hayes' notes detailing his examination of PK/689. Page 61 of his notes records an examination of the fragment on 16 May 1989. As explained in chapter 6, ESDA traces of various pages of Dr Hayes' notes were made by the forensic document examiner John McCrae. One of the pages examined was page 42(a) (see the Yorkie trousers submissions at chapter 10). Page 42(a) is dated 4 July 1989. However, the trace of this page showed indentations that appear to correspond to parts of the examination of PK/689 on page 61 (although this fact is not specifically referred to in Mr McCrae's report). All other things being equal, one would expect there to have been over forty sheets of examination paper between page 61 of Dr Hayes' notes, dated 16 May 1989, and the notes he made on 4 July 1989. The fact that a trace of the former appears on the latter is therefore difficult to explain. Dr Hayes was questioned in detail about this issue at interview, but was unable to offer any explanation for it.

He resisted the suggestion that he might have used more that one pad of examination paper.

9.73 Although the preceding paragraphs highlight a number of difficulties in the RARDE records relating to PK/689, as explained in chapter 6 above, in themselves they provide no support for the allegation that the investigating authorities conspired to fabricate evidence. For the reasons stated under ground 1, the Commission is satisfied that there was no such conspiracy in relation to the Toshiba manual. In addition, the police records that precede RARDE's involvement with the item support the view that the item submitted for forensic examination was not, as the submissions would have it, an intact manual. For example, LPS form 394, which was completed prior to PK/689's submission to RARDE, contains the following description of PK/689: "Torn remains of what appears to be multi-lingual instruction manual of a Toshiba BomBeat SF16 radio/cassette player. White with black print. English instructions on reverse. ? Arabic on inside. Slight charring around edges & in some crevices."

9.74 Moreover, the photographs and photograph log books obtained from FEL record that a photograph of PK/689 was taken on or before 12 May 1989 (referred to above, see appendix), which would correspond with the item's arrival on 11 May. The Commission's enquiry team recovered this photograph at FEL. The photographic records (see appendix to chapter 6) also reveal that photographs 266 to 268 of the RARDE report, which depict the item first in its original form and then in two pieces after the pages had been teased apart by the scientists, were taken on or before 17 May 1989. This corresponds with the item having been returned to RARDE on 16 May 1989 and having being examined by Dr Hayes on that date, in spite of the evidence of the ESDA trace and the gaps in the RARDE movement records.

The number of pages comprising PK/689

9.75 As explained above, the RARDE report described PK/689 as having initially appeared to be one sheet of paper which was subsequently found to be two sheets stuck together. The submissions refer to certain sources which it is suggested contradict that position. Reference is made to a description of the item in DC Carr's

defence precognition in which he gave an account of finding the item in the Dexstar store and stated that it was "like several pages that had been compressed together" (see appendix). The submissions also refer to the RARDE report describing PK/689 as "some explosively damaged paper fragments" (CP 181, section 6, p 107). Reference is also made to a memorandum of 8 May 1989 by FBI Special Agent Harold Hendershot, a copy of which is included in the appendix, in which he described the item as having two outside sheets of paper and further pages sandwiched in between.

9.76 The Commission is satisfied that the issues raised here do not affect its conclusions under ground 1. It should be noted that although the RARDE report recorded PK/689 as being two pieces of paper adhering together, these sheets were both double sided, comprising four pages of information (as depicted in photographs 267 and 268 of the RARDE report). More significantly, the references in the submissions in this regard are extremely selective. DC Carr's description of the item in his defence precognition also referred to the item being *part* of a manual, with scorch marks. SA Hendershot's memorandum describes PK/689 as "a section of an instruction sheet for a Toshiba Radio Model Bombeat SF16… approximately 4 inches square, and exhibits blast damage around the edges." This part of SA Hendershot's description of the item could hardly have better corresponded to PK/689 as depicted in photograph 266 of the RARDE report. In the Commission's view the accounts of SA Hendershot and DC Carr, read as a whole, cannot be regarded as supporting the allegations in the submission.

Other fragments of manual

9.77 According to the RARDE report, fragments of the Toshiba manual were extracted from a number of blast damaged fragments of clothing. The presence of manual fragments within such items was one of the factors relied upon by the forensic scientists to conclude that the clothing fragments had originally been in the primary suitcase. The submissions raise issues about three of these groups of manual fragments, namely PT/2, PT/34(c) and PT/31(a).

9.78 PT/2, the submissions point out, was alleged to have been recovered from PI/995. The submissions raise the issue that, contrary to his normal practice, Dr Hayes chose to designate the items recovered from PI/995 as PT/35(a), (b) and (c), but referred to the fragments of paper from the manual as PT/2, rather than PT/35(d).

9.79 Matters regarding the provenance of PI/995, the timing of its examination by Dr Hayes, and the extraction of material from it, are addressed at chapter 7, above. It is of significance that the FEL photographic records confirm that by 22 May 1989 PT/2 had been photographed alongside PI/995 and the items comprising PT/35. This assists in dispelling any doubts about the provenance of PT/2 and the other fragments, despite the supposed anomaly in the PT numbering.

9.80 The forensic scientists were asked about the allocation of PT numbers during interview with members of the Commission's enquiry team. As regards PT/2, Mr Feraday suggested that these paper fragments might have been allocated the reference PT/2 in order to associate them with the control sample Toshiba manual, which was designated PT/1. Dr Hayes suggested at first that the PT numbers had been allocated in sequence, and therefore that PT/35 might have been extracted from PI/995 at a later date than PT/2, but this explanation is inconsistent with the photographic records mentioned above. Generally, it is clear that the sequence of PT numbering for many items does not correspond to the date order in Dr Hayes' notes. In the Commission's view it is not possible to draw any sinister inference from this.

9.81 The submissions also refer to PT/34(c), recorded at page 58 of Dr Hayes' notes as having been extracted from PI/221 (a fragment of the brown check Yorkie trousers), and described as a very small fragment of paper consisting of two sheets. The submissions point out that page 23 of Mr Feraday's handwritten notes (CP 1498) contains a description of PT/34(c) as being four fragments of paper, as opposed to the two fragments Dr Hayes described.

9.82 The Commission notes that the RARDE report (CP 181, section 6.2.2) also refers to PT/34(c) as four fragments of paper. A member of the Commission's enquiry team examined PT/34(c) during a visit to Dumfries Police Station and established that it comprises four individual fragments of paper and, indeed, that there

appears to be a minute fifth fragment. It is possible that, as with PK/689, PT/34(c) fragmented during the course of examination or handling, and that this might explain the difference between Dr Hayes' notes and those of Mr Feraday. In any event, given that the Commission is satisfied with the provenance of PK/689, and of PI/221 (as described in chapter 10) from which PT/34(c) was extracted, the Commission can see no significance in the differences between Dr Hayes' notes and those of Mr Feraday.

9.83 As regards PT/31(a), the submissions refer to page 84 of Dr Hayes' notes in which is recorded the extraction, *inter alia*, of three overlaid pieces of paper from PK/2209 (a fragment of the blue babygro, see chapter 11), and the submissions point out that at page 22 of Mr Feraday's notes reference is made to *ten* pieces of paper being extracted from PK/2209. It is suggested that this might be an example of page changing and insertion in which the scientists have been caught out.

9.84 The Commission observes that in Dr Hayes' notes he refers to the three fragments of paper as PT/31(a), but that he also refers to a quantity of paper adhering to the surface of a separate piece of debris, PT/31(b), also recovered from PK/2209. No further details are given by Dr Hayes about this other fragment of paper. In Mr Feraday's description of PT/31(b) he does not mention the paper adhering to it. Photograph 146 of the RARDE report is a collective shot of PT/31. It includes the three fragments described by Dr Hayes, and also the other quantity of paper. In the Commission's view, it is possible that this other quantity of paper might comprise a further seven small fragments of paper adhering together, which would explain Mr Feraday's note that there were ten fragments. If that is correct, the only confusion that arises is that Mr Feraday's note refers to all ten fragments as being PT/31(a), whereas in fact some of the fragments had first to be extracted from PT/31(b). In any event, given that the Commission is satisfied with the provenance of PK/689, and of PK/2209 (as described in chapter 11), the Commission can see no significance in the differences between Dr Hayes' notes and those of Mr Feraday. In particular, it is difficult to see how this could ever be used as evidence to support an allegation that the notes had been altered retrospectively, or how it could have furthered any conspiracy.

Defence forensic examination of manual fragments

9.85 The submissions suggest that the defence at trial failed to instruct a forensic examination of the alleged fragmentation of the Toshiba manual. Although MacKechnie and Associates had attempted to instruct such an examination, according to the submissions this was hampered by lack of access to the original productions.

9.86 The defence commissioned a forensic report from the Forensic Science Agency of Northern Ireland ("FSANI") (DP 21) prior to trial, but it contains no mention of the Toshiba manual. However, the Commission obtained from MacKechnie and Associates a number of papers concerning the defence enquiries in this area, included in which was an earlier draft of the FSANI report, dated 7 April 2000 (see appendix). Appended to this version of the report is a section headed "Further information" which includes the following passage: "Examination of the original photographs of the BomBeat SF16 manual indicate their explosives involvement due to blackened and shattered edges and a compressed, wrinkled surface." In light of this very clear conclusion, the defence could hardly be criticised for any decision not to conduct further enquiries in this area. In any event, given the results of the Commission's enquiries in respect of the manual, any such further enquiries were likely to be fruitless.

Comparisons between PK/689 and other fragments/control samples

9.87 It is observed in the submissions that no comparison was made between PK/689 and the other recovered fragments of manual (PT/2, PT/31, PT/34(c) and PT/40(c)); and that no comparison was made with the other types of Toshiba owner's manuals.

9.88 The Commission notes that it was reported in the appendix of further information attached to the draft FSANI report of 7 April 2000 mentioned above that it would be possible to make comparisons between the fragments of paper to test whether they came from different sources or could have come from the same source, although it was emphasised that it would never be possible conclusively to establish that the fragments all came from the same piece of paper. However, given that the

Commission has no reason to doubt the provenance of any of the paper fragments, or of the items from which they were extracted, such a forensic comparison was, in its view, unnecessary. For the same reasons, the Commission does not believe it to be necessary to compare the fragments with the other control sample manuals. In any event, it is clear from the photographs in the RARDE report (293, 296, 297, 299 and 302) that PK/689 does not match the front page of any of the other manuals. Even if the smaller fragments could be shown to match parts of any of the control samples, this would not detract from the conclusion that they also match the control sample RT-SF16 manual.

Commission's conclusions regarding ground 2

9.89 As indicated, by raising these disparate issues MacKechnie and Associates sought to provide support for the central assertion referred to in ground 1, namely that the Hortons found an intact Toshiba manual which was then fragmented by the police and/or forensic scientists in order to provide a link between PA103 and the Autumn Leaves cell. In the Commission's view, however, once that central assertion is rejected, these other allegations are at worst unfounded and at best amount simply to irregularities in record-keeping which in themselves do not support allegations of malfeasance on the part of the investigating authorities. Viewed separately or cumulatively, they do not persuade the Commission that the provenance of the manual fragments is in any doubt.

Overall conclusion

9.90 For the reasons given, even when all the matters raised are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 10
THE YORKIE TROUSERS

Introduction

10.1 On 29 July 2004 MacKechnie and Associates lodged with the Commission a substantial submission regarding fragments of clothing which the RARDE report (CP 181, section 5.1.2) concluded had formed part of a pair of brown "tartan" Yorkie brand trousers contained within the primary suitcase.

10.2 This garment was of significance for three reasons. First, as acknowledged by the trial court at paragraph 12 of its judgment, the marks of identification found on one of the fragments led the police to the Yorkie Clothing manufacturers in Malta on 1 September 1989, and from there to Mary's House and the witness Anthony Gauci. Secondly, the evidence of the order number on one of the fragments provided a direct connection between the clothing sold at Mary's House and the contents of the primary suitcase. Lastly, the order number also linked the garment to a specific delivery of trousers made to Mary's House on 18 November 1988. This assisted in narrowing the range of possible dates on which the purchase of clothing spoken to by Mr Gauci in evidence could have taken place.

10.3 The submissions raise a wide range of issues about the evidence surrounding the fragments of Yorkie trousers. In particular, doubts are raised about the suggestion that Mr Gauci was first identified as a witness from the enquiries conducted by the police at the Yorkie Clothing factory. The allegation underlying much of what is submitted is that the police in fact knew of Mr Gauci and his connection with PA103 before 1 September 1989, and that the alleged link to Mr Gauci through the Yorkie enquiries was "engineered" by the police.

10.4 The Commission has divided the submissions into the following three broad grounds:

(1) allegations by the Golfer of surveillance in Malta prior to 1 September 1989;

(2) alleged doubts about the sequence of events leading to the first visit by police to Mary's House; and

(3) various alleged irregularities regarding the identification marks said to have been found on two of the fragments of trousers.

10.5 The Commission's consideration of a fourth ground, which covers a number of diverse issues concerning the provenance of the fragments, is contained in the appendix.

Ground 1: alleged surveillance in Malta before 1 September 1989

10.6 The Golfer's allegations about surveillance in Malta, as contained in the submissions, are twofold. First, the submissions allege that the Golfer was informed by [redacted] that there had been a surveillance operation of a Palestinian terrorist cell in Malta before the bombing of PA103, and that an individual associated with that cell was seen making a purchase of clothing from Mr Gauci's shop. Secondly, the submissions claim the Golfer was informed that surveillance was conducted on the shop before the first visit there by the police and that this was done to ensure that it was not being used as a terrorist base, and was safe for officers to enter.

10.7 The submissions recognise that these allegations are "extraordinary", but suggest that there is evidence which raises doubts about the sequence of events which led the police from Yorkie Clothing to Mr Gauci's shop. The Commission has addressed that evidence in ground 2, below. At interview the Golfer raised doubts about the provenance of the order number on the fragment of Yorkie trousers, and these are addressed under ground 3 below (as well as in chapter 5), along with other matters relating to the identifying marks on the fragments.

Consideration of ground 1

Surveillance prior to the disaster

10.8 The Commission's conclusions in respect of the Golfer's credibility are outlined at chapter 5. In relation to alleged surveillance in Malta, although no reference is made to this in volume A, the Golfer is recorded in the defence memorandum of 23 February 2003 (see appendix to chapter 5) as referring to a "second witness" (i.e. apart from Anthony Gauci) to the sale of clothing at Mr Gauci's shop and to the fact that that witness saw two people involved in the purchase, one who bought the clothes and a second who drove the purchaser to the shop. The Golfer is recorded in the memorandum as suggesting that the witness to these events would be able to identify both men, as he had seen them coming and going from a nearby Libyan Consulate. According to the memorandum, the Golfer was adamant that there was a statement for this witness.

10.9 It is unclear whether the witness described by the Golfer in the memorandum was supposed to be Paul Gauci (which would be consistent with the Golfer's later claim that Paul Gauci was present in the shop when the purchase took place), or someone who had been carrying out surveillance. Either way, the allegation in the memorandum is clearly at odds both with the contents of the Yorkie trousers submissions and with the Golfer's statements to the Commission (as described below), particularly in the suggestion that the individuals observed were connected to the Libyan Consulate.

10.10 Summaries of the Golfer's three statements to the Commission are included in chapter 5, and the statements themselves are contained in the appendix of Commission interviews. As regards his allegation that surveillance was carried out on Palestinian terrorists in Malta prior to the bombing, there are a number of inconsistencies. In particular, in his first statement, the Golfer positively alleged that "certain suspects from Autumn Leaves were followed to Mr Gauci's shop at some juncture". However, at the third interview, the Golfer seemed to retract this allegation and, in particular, denied informing MacKechnie and Associates that he had been told a member of the Palestinian cell had been followed to Mr Gauci's shop and observed

purchasing clothing. Although he accepted that he had told MacKechnie and Associates about surveillance, the Golfer claimed that he had not specified Mr Gauci's shop, or that clothing was purchased. According to the Golfer, he did not know of Mr Gauci's shop at the time his discussions with [redacted]

10.11 Moreover, the sum of the allegation made by the Golfer is vague. It amounts to [redacted] having suggested that, at some time before the bombing of PA103, either before or after the arrest of the Autumn Leaves suspects in Germany, there was surveillance of some description, possibly by the German authorities, on one or more unnamed Palestinian terrorists in Malta. In terms of the allegation these individuals were apparently part of the Autumn Leaves gang. There was also some mention of a shop, which it seems the Golfer assumed was Mr Gauci's shop.

10.12 Given that the initial focus of the police enquiry was on the Autumn Leaves suspects, any surveillance of them in Malta in such obviously incriminating circumstances would doubtless have been the subject of much police attention. However, in response to a request by the Commission, D&G stated that there was no information in its records to suggest that any surveillance of Palestinians had been carried out in Malta between September 1988 and the date of the disaster. The Commission also had access to protectively marked materials held by D&G but found nothing in the materials examined by it that would support the allegation. Nor did it find any support for the allegations as a result of its other enquiries.

Surveillance prior to 1 September 1989

10.13 As regards the alleged surveillance of Mr Gauci's shop prior to the visit there by Mr Bell on 1 September 1989, the Golfer's accounts to the Commission were broadly consistent and reflected the terms of the submissions. His position at the second and third interviews was that [redacted] had informed him of this surveillance operation, although again the details the Golfer gave were vague. He did not know the nature of the surveillance, who had carried it out or how it had been done, although he doubted that it simply amounted to the interviewing officers watching the shop before they entered. In his third statement, the Golfer's position was that he did not think [redacted]

had mentioned Mr Gauci's shop by name, only that it had been on "a shop where the clothes were bought". The Golfer indicated that this conversation took place before 1 September 1989.

10.14 The Commission has found no evidence to support the Golfer's allegation in this regard. D&G confirmed to the Commission that it had no information relating to surveillance carried out on Mary's House at any time between the date of the disaster and 1 September 1989. The Commission also had access to protectively marked materials held by D&G but found nothing in the materials examined by it that would support the allegation. Nor did it find any support for the allegations as a result of its other enquiries. As stated in chapter 5, at interview Mr Bell recalled being informed by Mr Scicluna on 1 September 1989, en route to Mary's House, that it posed no risk to their safety.

10.15 The Golfer also suggested at interview that the police officers involved in the initial enquiries in Malta (in July 1989), when the suppliers of the babygro were identified, were instructed to curtail their investigations and return home, so that "preparatory work" could be done prior to the enquiries undertaken by Mr Bell. For the reasons stated in chapter 11 the Commission is satisfied that there is no substance in that suggestion.

Conclusions regarding ground 1

10.16 In light of the above, and bearing in mind its conclusions about the Golfer's credibility in chapter 5, the Commission is satisfied that there is no merit in the Golfer's allegations on the issue of surveillance.

10.17 Despite this finding, the Commission considered that the issues raised in the remainder of the submissions warranted further enquiries. This seemed particularly important given the suggestions of official malpractice (and even criminality) which underlie the submissions, as well as the overall significance of the evidence relating to the Yorkie trousers fragments.

Ground 2: Doubts about the sequence of events leading to the first visit by police to Mary's House

10.18 The submissions point to a number of matters which, it is suggested, cast doubt on the evidence that the police first became aware of Mr Gauci after conducting enquiries at Yorkie Clothing on 1 September 1989.

George Grech

10.19 The submissions refer to a precognition from George Grech, Deputy Police Commissioner in Malta at the time of the Lockerbie investigation, which was obtained by MacKechnie and Associates in May 2004. In the precognition Mr Grech is noted as saying that he was aware as early as the beginning of July 1989, that the Scottish police had traced a link between Mr Gauci's shop and two items of clothing, namely a babygro and a pair of Yorkie trousers. The submissions also refer to Mr Grech's pre-trial defence precognition, dated 11 October 1999, in which he indicated that the police had possession of a babygro and "something else" in July 1989, and that they managed to trace these to Mary's House at that time.

Alexander Calleja

10.20 Reference is also made in the submissions to a precognition from Alexander Calleja of Yorkie Clothing. According to the precognition, Mr Calleja was adamant that the first contact he had with police was at around 11.30am on Saturday, 2 September 1989, when he was about to finish work for the day. The precognition also records that when his original police statement was read to him, Mr Calleja refuted any part of it which suggested that he had first been visited by officers on 1 September 1989. Copies of the statement and the precognition are included in the appendix.

Dates of seizure of Yorkie Clothing productions

10.21 The submissions also refer to three productions obtained by the police from Mr Calleja, and seek to raise doubts about the dates on which these were recovered.

The productions in question consist of the delivery note (CP 424, police reference DC/55) which records the delivery of order 1705 to Mr Gauci, a certified copy of the control delivery book (CP 492, police reference DC/56) which shows a breakdown of Mr Gauci's order, and a certified copy of the cutting control book (CP 491, police reference DC/57) which interprets the colour codes mentioned in the delivery book as having been ordered by Mr Gauci. The submissions highlight inconsistencies in the accounts of when these items were seized by the police, and also point to evidence indicating that the date on the police label attached to the cutting control book has been altered. The submissions suggest that, given the seriousness of the crime, particular care should have been taken to record the dates on which productions were seized accurately, and allege that either this was not done here, or there was a degree of "reverse engineering" of the evidence.

Consideration of ground 2

George Grech

10.22 The suggestion in the submissions is that according to Mr Grech a link to Mary's House was established in July 1989 (and not on 1 September of that year as Mr Gauci's initial police statement indicates). According to the submissions, Mr Grech was "very vague" in his 2004 precognition about what he had been referring to in his pre-trial defence precognition when he had suggested that the police had a babygro and "something else" in July 1989, although he thought the other item was a pair of Yorkie-make trousers.

10.23 The Commission notes that, although Mr Grech is recorded in both precognitions as saying that the items in possession of the Scottish police could be traced to Mary's House, it is not expressly stated in either precognition that the link was actually made to Mary's House in July 1989. Even assuming that Mr Grech's memory was that the link was made in July 1989, the fact that he was "very vague" about one of the items instantly raises questions about his reliability. Having reviewed all his accounts, and having interviewed him, the Commission believes such doubts about his reliability to be justified. Copies of these accounts are included in the appendix.

10.24 Mr Grech's only HOLMES statement on the matter (S5571) refers to the initial visit by DI Brown and DC Graham on 5 July 1989, and generally to subsequent enquiries in Malta, but gives no details or dates, other than mentioning his attendance at the international case conference in Meckenheim on 14 September 1989. In his Crown precognition, taken on 26 July 1999, Mr Grech is noted as saying that his recollection of some details, and of the chronology of events, might not be accurate, although he could recollect some events clearly. He stated that his first recollection of a Maltese connection with the Lockerbie enquiry came as a result of a briefing by Paul Newell (then Deputy Chief Constable of D&G) some time in 1989, and that he attended the international conference at Meckenheim at about the same time. He made no reference to the enquiries by DI Brown in July 1989, or to those conducted by Mr Bell at the start of September of that year. It appears from records recovered by D&G that the briefing by DCC Newell took place in Malta some time shortly before 9 September 1989, although the Commission has not established its precise date.

10.25 In his pre-trial defence precognition of 11 October 1999 (which in fact takes the form of a file note of the interview), Mr Grech indicated that his involvement in the case started on 12 July 1989 when he received an Interpol request to assist the Scottish police who had discovered Maltese clothing and wanted to investigate this. It is here that Mr Grech is recorded as saying that the Scottish police had "a babygro and something else which they managed to trace to Mary's House". He then made reference to a request for assistance by DCC Newell, which presumably relates to the presentation mentioned in Mr Grech's Crown precognition, and to the international conference he attended in Germany which he thought probably took place in July 1989. Later in his precognition of 11 October 1999 he stated that at the time of the Meckenheim conference the police had just established that the bomb-damaged clothing had been purchased in Malta.

10.26 Given that it is known that the Meckenheim conference took place on 14 September 1989, over two months after the initial enquiries in Malta by Scottish police, the impression given by Mr Grech's precognition of 11 October 1999 is that he

recalled events in the early stages of the Maltese enquiries having been much closer together in time than in fact was the case.

10.27 Mr Grech made scant reference to the chronology of events in his evidence at the trial. He testified that, following a visit to Malta by DI Brown, DCC Newell came to Malta and gave a "demonstration" of events at Lockerbie, after which Mr Grech attended the Meckenheim conference (54/7369 et seq).

10.28 Mr Grech's post-trial defence precognition, obtained by MacKechnie and Associates, indicates that his first involvement in the enquiry was at the conference in Germany, and that shortly thereafter there was an "exhibition" by DCC Newell in Malta. Mr Grech also suggests in the precognition that it was after this presentation by DCC Newell that Mr Bell came to Malta. He is noted as stating:

> *"I agree that George Brown and one other officer came to Malta following an approach by Interpol but I cannot now remember the exact dates. I remember that when George Brown came to the Island they were in Possession of a Babygro and one other article of clothing which could be traced to Mr Gauci's shop. I think the other item of clothing was the Yorkie Trousers.*"

10.29 This precognition demonstrates Mr Grech's uncertainty as to the dates, and also his confusion as to the chronology of events, such as his belief that the German conference took place before the presentation by DCC Newell.

10.30 Members of the Commission's enquiry team interviewed Mr Grech and questioned him in some detail about the sequence of events (see appendix of Commission interviews). His account was somewhat confused which, given the passage of time, is not surprising. In brief, he recalled that DI Brown came to Malta without informing the Maltese police (which contradicts his own earlier accounts and the statements of other officers confirming that a formal request for assistance was made in advance of the visit through Interpol and that Mr Scicluna had in fact assisted DI Brown). When asked whether DI Brown brought items with him to Malta, Mr Grech replied:

"They must have brought with them I think labels [by which he meant labelled items or exhibits] or what have you. And there was a Yorkie and Mary's House… I think [Brown is] the name. Unless I'm mixing up. Some time has elapsed… I'm just talking from my memory now."

10.31 When asked about the outcome of DI Brown's investigations, Mr Grech said:

"As far as I recall is that they said that Mr Gauci from Mary's House remembered having sold a baby suit or whatever it was similar to, to an Arab speaking person."

10.32 However, he explained that he did not learn this from DI Brown and that he was only informed about the link to Mary's House later on, by DCC Newell and then by Mr Bell.

10.33 Mr Grech also recalled that Mr Bell only became involved in the enquiries in Malta after the German conference. On any view, this recollection is inaccurate. When asked if he disputed that it was Mr Bell and Mr Scicluna who visited Yorkie Clothing, Mr Grech said that he could not dispute anything as he had no access to any of the records. The statements given at the time, he said, should be preferred, as his memory was fresher then and the records would speak for themselves. Although Mr Grech thought Mr Bell was only involved in Malta after the Meckenheim conference, and appeared to conflate the babygro enquiries with those at Yorkie Clothing, his recollection seemed to be that the connection to Mary's House was made through enquiries at Yorkie Clothing.

10.34 It is clear from the above accounts that Mr Grech is not a reliable witness as to the sequence of events that led the police to Mary's House. In these circumstances, and given the vagueness of his descriptions of events, the Commission does not believe that the contents of his 1999 and 2004 precognitions are capable of supporting the allegation that the police identified Mary's House prior to 1 September 1989 and their enquiries at Yorkie Clothing.

Alexander Calleja

10.35 The submissions indicate that Mr Calleja was "passionate in the belief that Saturday 2nd September, 1989 was the first day that he was visited by the Police". This is reflected in the precognition obtained by MacKechnie and Associates, where in response to the question whether the police might have visited his premises on Friday 1 September Mr Calleja is noted as saying:

> *"Listen to me, this all happened a long time ago and some of what happened is a bit unclear, but I am absolutely positive that these officers came to my factory for the first time on the Saturday."*

10.36 Given that Mr Gauci's initial police statement is dated 1 September 1989, if Mr Calleja's memory was to prove accurate it would cast serious doubt on the sequence of events as recorded by the police in witness statements and as presented by the Crown at trial.

10.37 Mr Calleja only gave one police statement, which bears to have been taken by DS William Armstrong at 9.30am on 2 September 1989, and is signed. It records that on 1 September Mr Bell and DS Armstrong, along with Mr Scicluna, called at the Yorkie Clothing factory where they showed Mr Calleja a photograph of a piece of material with a Yorkie label attached. They also informed him that the garment had on it the number "1705" in ink. Mr Calleja was able to say that the item had been manufactured at his factory. The number, 1705, represented the order number. The statement goes on to record that Mr Calleja identified from his order book that the order in question was made by Mr Gauci in October 1988. He also explained to the officers the details of the garments ordered. In particular, according to the statement the trousers made of the brown check fabric shown to Mr Calleja by the police were made into five pairs, all of which were supplied to Mr Gauci. According to the statement, no other trousers of that material would have been made with the order number 1705. Mr Calleja also stated that according to his delivery book the order was delivered to Mary's House on 18 November 1988. The relevant page from the delivery book was provided to the police.

10.38 The statement goes on to record that on 2 September the same police officers returned to Mr Calleja's factory and showed him three pairs of trousers, each of which Mr Calleja confirmed had formed part of the order delivered to Mary's House. In terms of other statements, the police had obtained these pairs of trousers from Mr Gauci at Mary's House the previous day.

10.39 According to the precognition obtained by MacKechnie and Associates after the trial, Mr Calleja was shown a copy of the handwritten version of his police statement, which he confirmed had been signed by him on each sheet. Mr Calleja maintained, however, that, contrary to what was recorded in the statement, he had first been visited at 11.30am on Saturday 2 September. Mr Calleja explained that he must just have signed the statement where he was asked to, and that if he had known its contents he would have refused to do so. Copies of the statement and the post-trial defence precognition are contained in the appendix.

10.40 In order to assess Mr Calleja's reliability, the Commission sought to review all the other accounts he had given. It was found, however, that neither the Crown nor the defence had precognosced him prior to the trial. Although a file note in the electronic files obtained from McGrigors suggested that Mr MacKechnie himself had met Mr Calleja on 18 August 1999, there was no precognition contained within those files. In a letter to the Commission dated 28 April 2005, Mr MacKechnie indicated that although he recalled interviewing Mr Calleja and believed that a precognition had been taken, none could be found. Mr MacKechnie added in the letter that he had "no clear recollection of what [Mr Calleja] said at the time."

10.41 As regards the Crown, a print of Mr Calleja's HOLMES statement was relied upon in place of a precognition. However, added to this was the following note by one of the procurators fiscal involved in the case (see appendix):

> *"This witness was seen on several occasions in March/April 1999 with a view to precognition. At first he was openly hostile and said that he would not assist in any way. DCS Bell persuaded him to consider the matter further and the witness said he would take legal advice. As he became more amenable it became apparent that he had concerns for his business because of the volume of trade*

with Libya. He refused to make any direct comment on his potential evidence but, on having his statement read to him declined the opportunity to disagree with its contents. He appears to be genuinely concerned for his welfare but eventually said that he would honour his obligations if asked to come to court…"

10.42 It is clearly of some significance that when his police statement was read to him in 1999 Mr Calleja did not give any indication that he disagreed with its contents. He did not give evidence at the trial.

10.43 A member of the Commission's enquiry team interviewed Mr Calleja in Malta on 26 May 2005 (see appendix of Commission interviews). He had initially refused to co-operate with the Commission's investigations but was persuaded to do so after contact was made with his solicitor. At interview, Mr Calleja remained certain that the officers had come to see him for the first time on a Saturday. He referred to the fact that he normally worked between 7am and 12pm on Saturdays, and he recalled the police arriving at about 11.30am when he was planning to go home. His recollection was that there were only two officers, one of whom was Maltese (whose name, after prompting, he agreed was Scicluna) and the other "English" (whose name he recalled was "Harry" and whose surname he agreed, again after prompting, was Bell). Mr Calleja could not, offhand, remember the month in which the first visit had taken place. He recalled, though, that the officers had come back to the factory on the following Monday, at which time they had spoken to his father.

10.44 Mr Calleja was referred to the terms of his signed police statement of 2 September 1989. He did not recall signing the statement but confirmed that the signatures on each page were his own. Although he indicated that his ability to read English was better than his ability to read Maltese, he stated that he had probably just signed the statement without realising the significance of its contents. He remained firm that the first visit by the police had taken place on a Saturday.

10.45 While Mr Calleja's belief that the police first came to see him on a Saturday appears genuine, in the Commission's view his reasons for ruling out the possibility that the visit took place on a Friday (the day on which 1 September fell in 1989) are not particularly convincing. Mr Calleja explained that in 1989 his father had been in

overall charge of Yorkie Clothing and it followed, to his mind, that if the police had first visited his premises on a Friday they would have spoken to his father, not to him. In other words, the fact that the police had first spoken to him rather than to his father suggested that it was a Saturday, when his father would not have been at the factory. While at some points in the interview Mr Calleja stated that it was "impossible" that the police had visited him on the Friday, at other points he said only that he could not remember the police visiting him on that day. He stated that, because of the pattern of work on a Friday, if the police had come on that day it would have been in the morning. This would be consistent with Mr Gauci's first police statement, CP 452, S4677, which is noted as having been taken at 12.45pm on the Friday, after the visit to the factory. Mr Calleja also recalled being in the office on his own. He was asked whether it was possible that his father was out of the office on that particular Friday, and that the police might therefore have spoken to him instead. In response, Mr Calleja said that his father "goes in and out" but that he "can't really think to be honest with you". He suggested, however, that Friday was the day on which his father was least likely to have been absent from the office. He reiterated that he had a very clear recollection that the police came to see him on a Saturday. Ultimately, however, he suggested that there was a 10% chance that he was present at the factory when his father and elder brother were not there, and that he would have met the police in those circumstances.

10.46 Accordingly, even in terms of his recollection 16 years after the events themselves, Mr Calleja considers it possible that he first met with the police on Friday 1 September 1989. Regardless of his current memory of events, the fact remains that on 2 September 1989 he signed a statement indicating quite clearly that he was visited by the police the previous day. As indicated, this statement was read over to him during the Crown's preparations for trial, at which time he did not dispute its contents. Moreover, there is no dispute that the police came to see Mr Calleja on the Saturday morning; the only issue is whether that was the first occasion on which they came to see him.

10.47 It is worth noting that at interview Mr Calleja maintained a similar air of certainty in respect of other recollections which are at odds with the version of events detailed in his police statement, and in those of the police officers involved. For

example, he recalled that only two officers, Mr Scicluna and Mr Bell, came to his factory, and he refuted the suggestion that there had also been a third officer. However, there appears to be no doubt that DS Armstrong was also present; indeed, it is he who is recorded as having noted Mr Calleja's statement. Similarly, Mr Calleja was adamant that what he had been shown by police was actual blast-damaged fragments of clothing, as opposed to merely photographs of such items, when the statements of the officers involved and the movement records of the fragments in question clearly suggest otherwise. Despite this, Mr Calleja resisted the suggestion that his recollection might be confused and maintained that he would not have been able to identify the fragments from photographs.

10.48 In the Commission's view, even assuming that there was some conspiracy to conceal the true sequence of events, it is difficult to envisage why the police would wish to portray DS Armstrong as present at Yorkie Clothing when he was not; or why they would pretend to have shown only photographs to Mr Calleja when in fact they had shown him the original fragments. Perhaps more significantly, it is very hard to envisage a situation where the police would risk presenting Mr Calleja with a detailed handwritten statement which they knew to contain a number of falsehoods, when there was every chance that Mr Calleja would read the statement and query its contents.

10.49 More broadly, the sequence of events whereby enquiries at Yorkie Clothing led the police to Mary's House was clearly and consistently described in the statements and precognitions of officers Armstrong, Bell and Scicluna, was confirmed in evidence by DS Armstrong (14/2194) and Mr Bell (32/4840) and was reiterated by Mr Scicluna and Mr Bell at interview with members of the Commission's enquiry team (see appendix of Commission interviews). Even Mr Calleja confirmed at interview that it was the information he provided which led the officers to Mr Gauci.

10.50 It is also of note that, at interview with members of the Commission's enquiry team, Mr Bell recalled meeting both Mr Calleja and his father during the initial visit to the Yorkie factory. Indeed, Mr Bell specifically recalled asking Mr Calleja's father where the name "Yorkie" came from, and being told by Mr Calleja's father that he got the name from his army days. Given Mr Calleja's insistence that his

father would have dealt with the police if they had arrived on a Friday, Mr Bell's memory of having met Mr Calleja's father on the initial visit to the factory adds further weight to the view that Mr Calleja may simply have forgotten about the first visit of police on 1 September, and has confused aspects of this with their subsequent visit the following day.

10.51 In conclusion, although there is no reason to doubt Mr Calleja's credibility, standing the weight of evidence against his current recollections, the absence of evidence to support them, his own acceptance that his memory of events may be wrong, and the inherent improbability that the police would have sought to invent details of a visit to Yorkie Clothing on 1 September 1989, the Commission does not consider Mr Calleja's accounts to be of sufficient significance to cast doubt upon the version of events presented by the Crown at trial. Accordingly, in the Commission's view, there is nothing in his accounts to suggest that a miscarriage of justice may have occurred in this connection.

Dates of seizure of Yorkie Clothing productions

10.52 The submissions refer to Mr Calleja's handwritten police statement (which MacKechnie and Associates appear to have extracted from papers given to the defence by the Maltese police prior to the trial), to a copy of the equivalent HOLMES version of this statement (which has an added passage of text not reflected in the signed handwritten version) and to the accounts of officers Bell, Armstrong and Scicluna. Based on these sources the submissions point to a number of inconsistencies in the dates on which the three Yorkie productions (the delivery note, the control delivery book and the cutting control book) were obtained by the police.

10.53 In brief, Mr Calleja's handwritten police statement indicates that the delivery note was provided to the police on 1 September, but makes no mention of the control delivery book and the cutting control book. However, in the additional text contained in the HOLMES version of the statement it suggests that these two documents were seized on 4 September. On the other hand, the HOLMES statements of the three police officers suggest that all three documents were obtained from Mr Calleja on 1 September 1989, as does DS Armstrong's defence precognition. A further version of

events is given in a "summary of assistance" document attributed to Mr Scicluna, but apparently written by Mr Bell. It is suggested there that while the delivery note was obtained on 1 September, the control delivery book was not obtained until 2 September. No reference is made in the summary of assistance document to the cutting control book.

10.54 The submissions also highlight inconsistencies in the dates written on the productions themselves or on the police labels attached to them. In particular, reference is made to a photocopy of the cutting control book and its label (see appendix). This photocopy was found by MacKechnie and Associates in the BKA papers which had been obtained by the defence prior to trial. In the photocopy the police label is shown as signed only by Mr Bell, and the date on the label is "1st September 1989". However, in the label attached to the production as it appeared at trial there are a further five signatures on the label, including DS Armstrong's, and the date has been changed to "4th September 1989".

10.55 The submissions also point to the signatures on the production itself. Two entries in the document have been signed by Mr Bell and dated 2 September 1989, whereas the same two entries have been signed by DS Armstrong and dated 4 September 1989. The document has been signed again by Mr Bell at the margin, and this signature is dated 4 September 1989. It has also been signed by Mr Calleja, who certified it as a true copy of the original, and his signature is also dated 4 September 1989. The submissions suggest that those dates that read 4 September might have been altered and that they might originally have read 1 September.

10.56 The Commission notes that as the photocopy of the document from the BKA papers clearly depicts the date of Mr Bell's signature in the margin as 4 September (the other dates are less clear), any change to that date must have occurred before the photocopy was made. On the other hand, the change to the label must have occurred after the photocopy was made.

10.57 The Commission obtained from D&G copies of the original handwritten statements of the various individuals involved (see appendix). It is worth noting that the handwritten statement of Mr Calleja provided by D&G has two further pages

which are not included in the copy of that statement submitted by MacKechnie and Associates. These two extra pages are not signed by Mr Calleja, but reflect the additional text which appears in the HOLMES version of his statement. It appears that this text has been added to the statement after Mr Calleja signed the first six pages and after the Maltese police were given a copy of the statement.

10.58 In general, the Commission is satisfied that the inconsistencies highlighted in the submissions are reflected in the handwritten statements. The Commission also accepts that the date on the production label attached to the cutting control book label was changed from 1 to 4 September 1989.

10.59 At interview with members of the Commission's enquiry team Mr Bell explained that the handwriting in which the change to the label had been made was not his and that he thought it was DS Armstrong's. He accepted that production labels should not be amended in this manner, but believed that there must be an explanation for it. Although he himself was unable to provide any explanation, he was confident that if DS Armstrong was responsible for the change there was no sinister reason for it. He confirmed that he had visited Mary's House after the first visit to Yorkie Clothing on 1 September, and had returned to Yorkie Clothing the next day. When asked if he had returned to Yorkie Clothing again on 4 September (a visit which is recorded only in the additional text of Mr Calleja's statement and in the dates inserted on the productions), he recalled that Mr Calleja would not provide the original cutting book and that eventually he was given a photocopy of the relevant page from the book together with the original pieces of material that had been attached to the page. Mr Bell suggested that the amendment to the label might have had something to do with them "going backwards and forwards to try to obtain the original book, or as near to it as possible".

10.60 A similar account is given by Mr Bell in his defence precognition (see appendix), in which he describes returning to see Mr Calleja over the weekend and Mr Calleja being reluctant to provide the cutting control book. It is also consistent with Mr Calleja's own recollections when interviewed as part of the Commission's enquiries. He recalled the police returning to his factory on the Monday (i.e. 4 September), at which time he signed the papers. He suggested that his father would

have met the police during that meeting, as he would not have released the papers without his father's permission.

10.61 In evidence, DS Armstrong spoke to the visit to Yorkie Clothing and confirmed that he seized the delivery note on 2 September and that the label for the cutting control book was dated 4 September (14/2198).

10.62 The dates on the police labels for the delivery note and the control delivery book are 2 and 4 September respectively, consistent with the police having returned to Yorkie Clothing on those dates. There is no suggestion that those labels have been altered.

10.63 It is clear from the above that, despite the contents of their statements, the police officers concerned made subsequent visits to Yorkie Clothing on Saturday, 2 September and Monday, 4 September. The question to be addressed is whether the inconsistencies in the dates and the change to the label are evidence of a conspiracy to cover up the true sequence or nature of events, or whether they simply reflect a level of confusion over precisely when certain items were obtained.

10.64 In the Commission's view the second of these propositions is the only plausible one. Regardless of the dates, there is no dispute that the documents in question were obtained by the police from Mr Calleja. In these circumstances, the Commission does not believe that the evidential value of the productions themselves is diminished by the issues highlighted in the submissions. Moreover, it is difficult to envisage any suspicious reason for the change to the production label attached to the cutting control book, even if similar changes were also made to the dates on the document itself. It might have been different had the date been changed from 4 September to 1 September, as this might have supported the allegation that the police had not visited Yorkie Clothing on 1 September, but that is not the case.

10.65 It should be added that the Commission's conclusions in this respect are not to be taken as condoning the unacknowledged amendment of police labels or of dates or signatures inserted onto productions themselves. However, in the absence of evidence of a deliberate plot by police officers to obscure the true sequence of events

the Commission can see nothing in the various inconsistencies which gives rise to the possibility that a miscarriage of justice may have occurred. In so far as the submissions seek to argue that the irregularities themselves constitute evidence of such a conspiracy, for the reasons given in chapter 4 the Commission is unable to accept such a proposition.

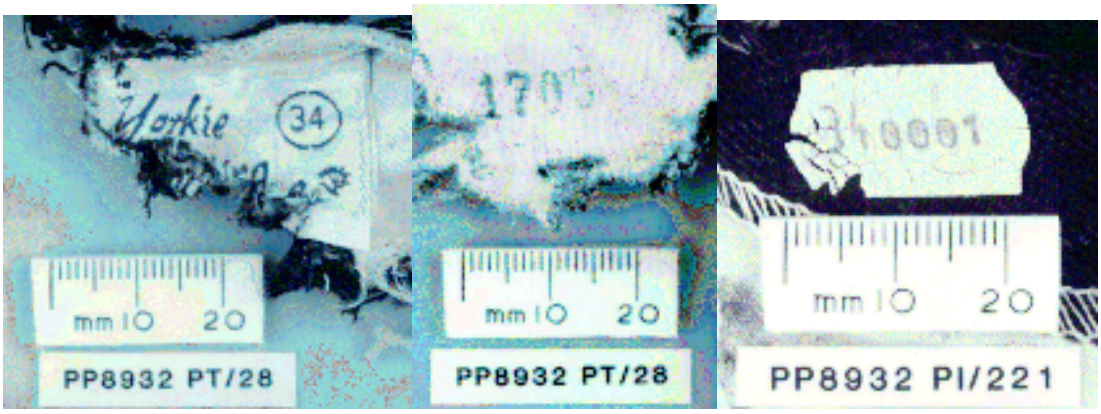
Conclusions regarding ground 2

10.66 For the reasons given the Commission does not believe that there is any reasonable basis for doubting the evidence relating to the police investigations at Yorkie Clothing, or that the enquiries there led the police to Mary's House on 1 September 1989.

Ground 3: doubts about the identifying marks on the fragments

10.67 The submissions seek to raise a number of doubts about the provenance of identifying marks said to have been found on two of the fragments of the brown check Yorkie trousers.

10.68 The evidence at trial was that one of the fragments, PT/28 (which had been given the "PT" number after it was extracted from a bag of items designated PK/323), had on it part of a Yorkie brand label showing the size of the garment as 34. Printed in black ink on the remains of a pocket on this fragment was the order number 1705. A second fragment, PI/221, had attached to it an adhesive label (called a "meta" label) on which the number 340001 was printed. These three identifying marks are pictured below. The other two fragments, PK/1504 and PK/1794, consisted partly of portions of brown tartan material that matched PT/28 and PI/221, but they did not have any specific identifying marks.



Close-ups from photographs 111, 110 and 108 of the RARDE report, respectively

10.69 As explained, the label on the left led police to the Yorkie Clothing factory, where the order number 1705 was identified as relating to an order for trousers delivered to Mary's House on 18 November 1988.

Submissions relating to order number 1705

10.70 The submissions refer to statements by Mr Bell and DS Armstrong in which it is recorded that, contrary to the position described above, the Yorkie label was on one fragment but the order number was located on the other fragment along with the meta label. The submissions argue that the concurrence of the two statements suggests that the description of the order number as being on the fragment with the meta label rather than on the fragment with the Yorkie label is not simply a typographical error. In support of this the submissions refer to DC John Crawford's defence precognition in which he quotes a report on the blast-damaged fragments. According to the precognition the report also suggests that the order number was located on the fragment with the meta label and that the Yorkie label was on the other fragment.

10.71 The submissions also point out that the photographs purportedly taken to Malta by Mr Bell (CP 435) on his first visit there do not include a photograph of the order number. The submissions reiterate the allegations addressed above, namely that the police had prior knowledge of Mr Gauci's shop, and suggest that the police might have visited Mr Gauci's shop *before* they visited Yorkie Clothing. According to the submissions, on realising the significance of the order number the police might have

begun the process of "reverse-engineering" evidence to convey the impression that they had reached Mary's House through enquiries at Yorkie Clothing. The submissions also make the point that, contrary to the way in which the evidence may have appeared at trial, trousers with the order number 1705 were not sold exclusively to Mary's House, and that in fact a number were sold by Yorkie Clothing to other parties.

10.72 Finally, the Golfer made certain allegations about the order number 1705 in his statements to the Commission.

Submissions relating to the Yorkie label

10.73 The submissions also refer to DC Calum Enwistle's defence precognition in which he is recorded as having viewed PT/28 and PI/221 at RARDE on 21 March 1989 in the presence of Dr Hayes. According to the precognition, while DC Entwistle observed the order number on PT/28 and the meta label on PI/221, "[t]here were no other apparent marks of identification visible on either piece at this time." It is also noted that DC Entwistle then obtained a sample of the brown check material (PT/70) and conducted enquiries into the origin of the garment, but without success. The submissions suggest that this indicates that there was no Yorkie label in existence on the fragments at that time.

Submissions relating to the meta label

10.74 The submissions also refer to certain issues raised by Mr Calleja in the precognition obtained from him by MacKechnie and Associates. Mr Calleja is noted as saying that, as meta labels were attached to garments in sequential order, he would have expected the number on the meta label of the fragment PI/221 to be close in sequence to the number of the meta label on the control sample brown check trousers, DC/44. According to the precognition this was because they were both from the same batch of five pairs of brown check trousers made under the order number 1705, which would have been cut one after the other. However, the number on the meta label attached to the control sample is 44, whereas the number on the label attached to

PI/221 is 1. Mr Calleja also doubted that the meta label would have survived the explosion.

10.75 The submissions seek to add to the alleged doubts regarding the meta label by referring to the "summary of assistance" document (see above), in which the number on the meta label is described in terms different from what is depicted in the RARDE report.

Consideration of ground 3

10.76 The submissions in relation to each of the identifying marks are addressed here in turn.

Submissions regarding order number 1705

10.77 In the version of Mr Bell's HOLMES statement, S2632C, included with the submissions to the Commission (see appendix), reference is made to two fragments of check trousers, one bearing the Yorkie label, the other bearing the order number 1705 and the meta label. The police reference numbers (PI/221 and PT/28) are not mentioned. The same description appears in the version of DS Armstrong's HOLMES statement (S2667H) that was provided with the submissions, and it is also repeated in his defence precognition (although, as the submissions acknowledge, this is likely to have resulted from DS Armstrong simply reading out his police statements at precognition). Clearly, this description is inconsistent with the evidence at trial, in which the Yorkie label and order number were said to have been attached to one fragment, PT/28, and the meta label to the other fragment, PI/221. The Commission obtained the original handwritten versions of these statements from D&G (see appendix) and they reflect the terms of the HOLMES statements.

10.78 The Commission also obtained from D&G a copy of the report quoted by DC Crawford in his defence precognition. In fact the report is contained in a police statement by DS Byrne (S312F) and is said to have been based on an examination of the fragments at RARDE by DC Crawford and DS Byrne on 10 and 11 August 1989.

As suggested in the submissions, the report indicates that the Yorkie label was attached to PT/28, whereas the order number and meta label were on PI/221.

10.79 The Commission also obtained a statement by DI George Brown (S4458G). Again, this indicates that the order number and meta label were on the same fragment, albeit in the statement it is suggested that this was PT/28 rather than PI/221.

10.80 The Commission is not persuaded that the inconsistency between the accounts of the various police officers and the contents of the RARDE report can be considered suspicious or in any way indicative of a conspiracy to manufacture evidence. The likely explanation is simply that there was a misunderstanding by the police about the precise positioning of the identifying marks. Contrary to what is suggested in the submissions the error could easily have been replicated across a number of statements if, for example, the statements were based on information contained in the report by DS Byrne and DC Crawford. This is perhaps all the more likely given that none of the other officers appear to have had access to the fragments themselves.

10.81 That the contents of the officers' statements are unreliable in this respect is confirmed by the results of the Commission's enquiries in this area. During a visit to the Forensic Explosives Laboratory ("FEL"), members of the enquiry team recovered a photograph of PI/221 and PT/28 (then still referred to as PK/323) bearing negative number FC3441, which the photographic records indicate was taken on or before 5 April 1989. This photograph is not included in the albums appended to the RARDE report. It clearly depicts the order number on PT/28, and the meta label on PI/221. A copy of the photograph is included in the appendix. Further, a statement by DC Entwistle (S450U) confirms that he visited RARDE on 21 March 1989 and saw the order number on PT/28. At interview with the Commission (see appendix of Commission interviews) DC Entwistle specifically remembered this incident, as he recalled that it was he who had suggested to Dr Hayes that the pocket material be peeled apart, as a result of which the order number was revealed. Assuming DC Entwistle's memory is accurate, his account provides further support for the conclusion that the passages in the statements by his fellow officers are wrong.

10.82 The photograph recovered by the Commission at FEL also serves to undermine any sinister inference sought to be drawn from the fact that Mr Bell did not take a photograph of the order number on PT28 with him on his initial visit to Malta. The submissions seek to link the absence of such a photograph to the suggestion that the police had prior knowledge of Mary's House. However, that suggestion has been rejected by the Commission see under ground 2 above.

10.83 With regard to the Golfer's allegations concerning the order number, it is perhaps surprising that no reference is made to these in the submissions. As described in chapter 5 at his first interview with the Commission the Golfer indicated that the order number had been an "addition" to the fragment. At his second interview, however, while the Golfer referred to the fact that the photographs taken to Malta by the police did not include a photograph of the order number, he refused to give any further information. At his third interview, the Golfer eventually revealed the source of his allegation to be DS Sandy Gay who, he said, had raised doubts about the order number and had pointed out, in particular, that it had only appeared on the fragment after the police enquiries in Malta.

10.84 The Commission's approach to the Golfer's accounts generally, and to his allegations about DS Gay, is explained in chapter 5. Beyond this, however, the photograph depicting the order number taken on or before 5 April 1989 provides a compelling rebuttal of the Golfer's claims. Moreover, there are various accounts, including the report by DS Byrne and DC Crawford, which pre-date Mr Bell's visit to Malta and which refer to the existence of the order number (albeit some refer to it on the wrong fragment). In short, not only are there serious doubts as to the Golfer's credibility, the available evidence positively refutes his allegation that the order number was somehow "added" to PT/28 following Mr Bell's initial enquiries in Malta.

10.85 Lastly, as regards the submission that not all the Yorkie trousers made with order number 1705 were sold to Mr Gauci, the most important fact, which is acknowledged in the submissions, is that all five pairs of the brown check trousers produced with that order number were delivered to Mary's House. It is therefore of no evidential significance that only 113 of the 136 other pairs of trousers made under

order 1705 were delivered to Mr Gauci, the remainder having been sold by Yorkie Clothing as surplus stock.

Submissions regarding the Yorkie label

10.86 The terms of DC Entwistle's defence precognition, in which he described seeing the order number on PT/28 and the meta label on PI/221 during his visit to RARDE on 21 March 1989, are reflected both in the HOLMES and the manuscript versions of his statement, S450U (see appendix). In particular, the statement confirms DC Entwistle's conclusion that "[t]here were no other apparent marks of identification visible on either piece at this time".

10.87 Given the evidence that the Yorkie label was also found on PT/28, the Commission considered the terms of DC Entwistle's statement surprising. They were all the more surprising when an examination of PT/28 by members of the Commission's enquiry team disclosed that the Yorkie label was in relatively close proximity to the order number. In the circumstances, it was considered that the matter warranted further investigation.

10.88 Chronologically, the first reference to the Yorkie label on PT/28 would appear to be at the foot of page 42 of Dr Hayes' notes (CP 1497), dated 14 March 1989: "N.B. (d) Fragment of damaged "Yorkie" brand label sewn into a seam, also the number "1705" printed in black ink on underside of hip pocket lining."

10.89 The date of Dr Hayes' note would suggest that the Yorkie label had been identified at RARDE prior to DC Entwistle's visit on 21 March, despite the latter's statement suggesting the contrary. However, as alleged in the submissions, the positioning and wording of the reference to the Yorkie label in Dr Hayes' notes indicates that it might have been added to page 42 at a date later than the other notes on that page. Page 43 of Dr Hayes' notes is also dated 14 March 1989. However, the page that follows page 42 is in fact page 42(a), dated 4 July 1989, which records an examination of PI/221, and which was presumably slotted in behind page 42 because PI/221 and PT/28 were of common origin.

10.90 The Commission instructed Mr McCrae, the forensic document examiner, to obtain ESDA traces of page 42(a). His report is in the appendix to chapter 6. In the event, Mr McCrae recovered an indented impression of the reference to the Yorkie label and order number on page 42(a). This suggests that the wording was written on page 42 after page 42(a) was inserted behind it. The inference is that the references to the Yorkie label and the order number were added to page 42 on or after 4 July 1989, when page 42(a) was written.

10.91 The next reference to PT/28 in Dr Hayes' notes is on page 57, dated 16 May 1989, when the item was still referred to as PK/323. However, the entry on that page, which has been scored through by a single line and has been cross-referred to page 42, bears no reference to the Yorkie label at all (although there is reference to the order number which, on the basis of Mr McCrae's conclusions about the ESDA traces, appears to have been written contemporaneously with the remainder of that page).

10.92 Assuming that the inferences drawn from the ESDA tracings are correct, the first reference to the Yorkie label in Dr Hayes' notes was in fact made on or after 4 July 1989. Such a conclusion is supported by other evidence suggesting that the Yorkie label on PT/28 was not identified before that date. In particular, there is no sign of the Yorkie label in the photograph of PT/28 recovered by the Commission from FEL which was produced on or before 5 April 1989. During their enquiries at FEL, members of the Commission's enquiry team also recovered a handwritten note by DCI Baird relating to a visit he made to RARDE on 26 and 27 April 1989 (see appendix). While the note makes reference to PT/28 and PI/221 and describes the order number and meta label, again there is no reference to the Yorkie label.

10.93 According to DC Entwistle's statement, on 30 March 1989 he and DI George Brown conducted enquiries to try to trace the source of PT/28 and PI/221. They visited several textile outlets, including the Scottish Textile and Technical Centre at Galashiels, but at that time they could not establish the identity of the garment from which the fragments originated. The fact that DC Entwistle and DI Brown's enquiries in this connection did not include any attempt to investigate the Yorkie label is further confirmation that the label was not identified until later. Had it been otherwise, it is inconceivable that the police would not have pursued that lead instead.

10.94 It should be noted that there are two statements by DI Brown regarding these enquiries. The first, S4458G (see appendix), refers only to PT/28 and suggests that the order number and meta label number were both found on that fragment. This statement refers to the unsuccessful attempts he and DC Entwistle made to identify the origin of the fragment. It also contains the following passage:

> *"It is significant to note at this stage that only part of the trouser seat and a small part of the pocket were recovered… The ongoing search at Lockerbie recovered production PI221 the seat of the trousers bearing [the Yorkie label]. I thereafter concentrated on tracing the brand name 'Yorkie' and established there was none in the USA."*

10.95 The statement goes on to describe that on 25 August 1989 DI Brown made contact with the US legal attaché in Italy, who had assisted him with the enquiries he had conducted regarding the babygro, to establish if Yorkie garments were manufactured in Malta. According to the statement, DI Brown received a reply the same day informing him of the address of Yorkie Clothing.

10.96 Clearly, there are inaccuracies in DI Brown's statement regarding the positioning of the identifying marks. The suggestion in the statement that PI/221 was examined after his enquiries with DC Entwistle is also inconsistent with the terms of DC Entwistle's statement. The second statement by DI Brown, S4458L (see appendix), is more in line with DC Entwistle's statement but states that, following "further information" from RARDE that PT/28 had a partially embroidered Yorkie label, he instigated enquiries in the USA and then with the legal attaché in Italy who advised him on 25 August 1989 of the Yorkie Clothing manufacturer in Malta. However, DI Brown's second statement was in fact written on his behalf by DC Entwistle in his role as a member of the "collation of reports team" (DC Entwistle confirmed this at interview with the Commission; he also confirmed that he wrote statements of behalf of Mr Bell and DS Armstrong, in which apparent errors in their earlier statements were corrected, but in the event those statements were not used in the police report). Although informative in describing the position as DC Entwistle

understood it to be in retrospect, in the circumstances DI Brown's second statement is of no evidential value.

10.97 As part of their enquiries members of the Commission's enquiry team interviewed DC Entwistle, DI Brown and Dr Hayes about the matters raised in the submissions (see appendix of Commission interviews).

10.98 DC Entwistle's initial position was that he was unable to explain the absence of any reference to the Yorkie label in his police statement or during the enquiries he and DI Brown conducted. When it was suggested to him that this might simply have resulted from the label having been missed during initial forensic examinations, at first DC Entwistle did not think that was possible and positively asserted that the label would have been seen. While he could understand the police officers at Lockerbie not noticing the label, he did not see how Dr Hayes could have missed it, because he knew how thorough Dr Hayes had been. DC Entwistle was sure, however, that there was nothing sinister in it.

10.99 Subsequently, DC Entwistle's position seemed to alter, and although he remained unable to explain the absence of any reference to the Yorkie label in his statement, his answers to questions acknowledged the possibility that the label might have been missed at first. He suggested that after he and Dr Hayes had examined the item, Dr Hayes might have continued the examination alone and discovered the Yorkie label at that stage. He specifically referred to the fragment having been folded up. The absence of any reference to the Yorkie label in his statement, he said, led him to believe that the label had not been discovered at the time of his examination of the item. When it was put to him that he had earlier doubted this possibility, he replied, "It's a terrible thing when you start to wonder." He repeated that he clearly remembered being present when Dr Hayes had found the order number. However, if the Yorkie label had been visible at the time, he could not believe that he would not have written it into his statement. According to DC Entwistle, this was information that he would immediately have sent back to Lockerbie.

10.100 At interview, DI Brown felt the obvious explanation as to why the Yorkie label was not spotted immediately was that it was on a separate fragment from the one

with the order number. He could not understand why, if the order number and the Yorkie label were on the same fragment, he had been told only about the order number when he had visited the textile outlets to try to source the fragments. He acknowledged that it was strange that the Yorkie label had not been found at the same time as the order number, but confirmed that, had it been found, he would have expected to be told about it as it was the most important and obvious clue. He reiterated several times that the only explanation he could think of was that they were on separate fragments. At another stage, however, he pointed out that the fragments were bomb-damaged and had been found in the snow and rain, and that he could understand even Dr Hayes missing part of the fragment.

10.101 DC Entwistle and DI Brown were also able to recall their subsequent investigations into the "Yorkie" label. DC Entwistle remembered that he had contacted the manufacturers of Yorkie chocolate bars. He also remembered the American legal attaché calling to confirm that there was indeed a Yorkie Clothing company in Malta, very close to where DI Brown had been when he went to see the manufacturers of the babygro. DI Brown, on the other hand, was unable to recall this telephone call, although he did recall making enquiries about "Yorkie".

10.102 Dr Hayes could not recall the Yorkie trouser fragments when shown a photograph of them, nor could he remember the order number. He was unable to explain why his notes suggested that he had examined PT/28 on 14 March 1989 and PI/221 on 16 May 1989, when DC Entwistle had apparently been present with him during an examination of both items on 21 March 1989. Prior to the results of the ESDA traces being brought to his attention, he accepted that the entry at the bottom of page 42 of his notes regarding the Yorkie label and the order number on PT/28 had been added to the page at a later stage. When he was referred to the statement by DC Entwistle, the report by DCI Baird, the photograph taken on or before 5 April 1989 and the subsequent photographs depicting the Yorkie label, he also accepted that it was possible that the Yorkie label had been attached to PT/28 and simply had not been apparent to him during his initial examinations of the item. When the results of the ESDA tracing were subsequently explained to him, Dr Hayes accepted that the reference to the Yorkie label on page 42 of his notes must have been inserted on or after 4 July 1989. He considered it to be a reasonable explanation that when he

revisited PI/221 on 4 July 1989, as described in page 42(a) of his notes, he might also have re-examined PT/28 and at that stage discovered the Yorkie label. Thereafter he might have added the reference on page 42.

10.103 Ultimately, there appear to be two competing explanations for the inconsistencies and apparent anomalies across the statements and other items:

(1) that the Yorkie label was not attached to PT/28 at the time of DC Entwistle's examination on 21 March, the implication being that it was deliberately sewn on to the fragment at some time thereafter, in an attempt to manipulate the evidence;

or

(2) that the label was simply missed by the police and Dr Hayes during their initial examinations and was discovered at some later time when PT/28 was revisited (presumably on or after 4 July 1989).

10.104 In the Commission's view the former explanation is inherently implausible whereas the latter stands up to scrutiny. Although the precise date on which the Yorkie label was discovered cannot be pinpointed from the available evidence, in the Commission's view there is no doubt that this had occurred by July or August 1989. Not only is that view consistent with the statements of DI George Brown, which refer to his enquiries with the US legal attaché on 25 August 1989, it is also consistent with the report by DC Crawford and DS Byrne which refers to an examination of PT/28 on 10 or 11 August 1989 and expressly mentions the Yorkie label.

10.105 Moreover, the photographic records indicate that a photograph of the Yorkie label contained in PT/18 (the booklet of photographs which correspond to the Polaroids taken by Mr Bell to Malta at the end of August 1989), bearing negative number FC3739, was taken on or before 23 August 1989, thereby refuting any suggestion that it somehow came into being only after Mr Bell's initial enquiries on the island. It is also consistent with the statements by Mr Bell, DS Armstrong and Mr Calleja, all of which describe Mr Calleja being shown the photograph of the Yorkie label on 1 September 1989.

10.106 With regard to what Dr Hayes, DI Brown and DC Entwistle said at interview, it is clear that the passage of time has affected their memories, perhaps more so in the case DI Brown and Dr Hayes. Nevertheless, in the Commission's view their accounts are at least consistent with, if not positively supportive of, the conclusion that the Yorkie label was simply missed during initial examinations. The fragment was clearly convoluted and had suffered heat damage. As DC Entwistle described at interview, the pocket on PT/28 had been stuck together by the heat to such an extent that it had to be pulled apart to reveal the order number. This might reflect the appearance of the fragment in the photograph that was taken on or before 5 April 1989, which does not depict the Yorkie label and which shows PT/28 in a much more crumpled, compressed state than the same fragment in photograph 107 of the RARDE report (in which the Yorkie label is visible).

10.107 In conclusion, the Commission is satisfied that the Yorkie label attached to PT/28 was simply missed during initial examinations, and that the inconsistencies in the various statements and other items are not evidence of some wider conspiracy by the police to fabricate evidence.

Submissions relating to the meta label

10.108 As explained, the submissions refer to the precognition obtained from Mr Calleja by MacKechnie and Associates, in which he suggests that the meta labels were attached sequentially to the trousers when they were cut, to ensure that the correct pieces were stitched together. As the five pairs of brown check trousers would have been cut one after the other, according to Mr Calleja's precognition the numbers on the meta labels attached to these pairs of trousers should have been consecutive. The meta label purportedly found on PI/221 was numbered 340001 (the 34 relating to the size of the trousers), and therefore Mr Calleja would have expected the meta labels attached to the other four pairs of brown check trousers that were made to have ended with numbers 2 to 5. However, the meta label attached to the control sample pair of trousers, DC/44, obtained by the police from Mary's House was numbered 360044.

10.109 In the Commission's view, nothing sinister can be read into this apparent anomaly. Various pieces of evidence vouch for the provenance of the meta label on PI/221. Most significantly, it is clearly depicted in the photograph referred to above, which was taken at RARDE on or before 5 April 1989. The report by DCI Baird of his visit to RARDE on 26 and 27 April 1989 also mentions the meta label number (although it erroneously describes it as 840001). Likewise the number is referred to in Dr Hayes' examination notes, and in the report by DC Crawford and DS Byrne.

10.110 Moreover, at interview with the Commission Mr Calleja did not seem concerned by the apparent anomaly between the meta labels on PI/221 and DC/44. He was more concerned about the fact that the documentation indicated that only 24 pairs of check patterned trousers were made, which he expected would mean that the meta label numbering went from 1 to 24. He was therefore surprised that DC/44's meta label ended in the number 44. However, he was able to envisage a possible explanation for this, and he also acknowledged that one simply could not tell what had happened seventeen years previously.

10.111 Lastly, the meta labels adhering to another control sample pair of Yorkie trousers (DC/42, a pair of size 36 herringbone trousers bought by the police from Mary's House) demonstrate that the numbering of the meta labels was not rigorous. According to the RARDE report, DC/42 had four meta labels attached to it, all of which one would expect to be printed with the same number. However, while two are numbered 360014, one is numbered 3620014 (pictured in photograph 128 of the RARDE report) and the last is numbered 360015 (pictured in photograph 127 of the RARDE report). It would be difficult to read anything sinister into anomalies in a system that is demonstrably imprecise.

10.112 In the Commission's view the above factors amply dispel any doubts about the provenance of the meta label on PI/221. The fact that Mr Calleja expressed surprise that the meta label survived the explosion is of no moment; nor, in the Commission's opinion, are the various inconsistencies in police officers' accounts of the meta label numbering.

Overall conclusions regarding the Yorkie trousers submissions

10.113 As stated above, a fourth ground, which addresses a number of disparate further issues raised in the submissions, is included in the appendix.

10.114 In conclusion, the Commission has considered in detail the various allegations raised in respect of the fragments of Yorkie trousers and does not believe that, even when these matters are considered cumulatively, a miscarriage of justice may have occurred under this ground of review. Over and above its concerns as to the Golfer's credibility, the Commission has found no evidence to support his allegations as to surveillance in Malta either before or after the bombing. In the Commission's view, Mr Grech's memory of the sequence of events is unreliable. With regard to Mr Calleja, standing the evidence which contradicts or undermines his account, as well as his concession that his memory of events may not be reliable, the Commission does not consider what he had to say as significant. Likewise, the Commission does not consider the various irregularities in the police records regarding the documents obtained from Yorkie Clothing to be evidence of a deliberate attempt by the police to conceal the "true" sequence of events in Malta. As regards the apparent anomalies in the identifying marks on the fragments, the Commission does not believe that these support the submission that efforts were made by the police or forensic scientists to alter the physical evidence in the case. On the contrary, the Commission is satisfied that evidence such as the FEL photographic records is significant in supporting the provenance of the fragments of Yorkie trousers.

CHAPTER 11
THE BABYGRO

Introduction

11.1 On 22 November 2004, MacKechnie and Associates lodged submissions with the Commission regarding the provenance of fragments of clothing which the trial court accepted were parts of a blue babygro (see appendix of submissions). The court found that this item had been within the primary suitcase, and was among those sold by Anthony Gauci.

11.2 It is argued in the submissions that the authenticity of the fragments of babygro is open to doubt because of allegations made by the Golfer. Central to these is the claim that the fragments were recovered, not from the crash scene, but rather as a result of the test explosions involving police and forensic scientists which took place in the US in 1989. According to the submissions, the fragments were then taken back to Scotland and passed off as having been recovered from the crash scene. The Commission has addressed these allegations under ground 1 below.

11.3 The submissions acknowledge that there is no positive proof that this occurred. However, it is claimed that certain circumstances relating to the conduct of the police and forensic scientists provide support for the Golfer's assertions and raise doubts about the provenance of the babygro fragments. These issues are addressed in ground 2 below.

Ground 1: The Golfer

11.4 The submissions make the following allegations in relation to the Golfer:

> *"From the beginning 'the Golfer' has stressed to us the importance of closely examining the background to the alleged recovery of the various fragments of the babygro as it was known to him that an* ***intact*** *babygro had been recovered and not fragmented items as claimed in evidence.*

Golfer has maintained that the reason for using a child's sleep suit was that it was an evocative item and was intended to shock and pull at the heart strings of a jury (as was anticipated at that time).

Golfer claims that he knows that an intact sleep suit was taken to America where it was fragmented and then introduced into the chain of evidence as having been found at the crash scene. He recollects that following the Test Explosions various fragments of bomb damaged property were taken back to Lockerbie and he remembers being shown some of these items as an indication of what they should be searching for…"

11.5 According to the submissions, the Golfer's position was that the "engineered" babygro evidence was initially to be used against one of the incriminees, Abo Talb ("Talb"), and that a similar garment had been purchased by Talb or his associates while they were under surveillance. However, the Golfer was said to have no evidence to support this allegation.

Consideration of ground 1

11.6 The Commission's views as to the Golfer's credibility and reliability are set out in chapter 5 above. Reference is made in that chapter to certain inconsistencies in the Golfer's three statements to the Commission so far as these relate to the babygro, and it is unnecessary to revisit these in detail here.

11.7 At interview the three passages from the submissions which are quoted above were read out to the Golfer (see the appendix of Commission interviews). During the second interview the Golfer's position was that the first passage, concerning his alleged knowledge that an intact babygro had been recovered, was true. Conversely, at his third interview, while the Golfer claimed to know that a babygro had been recovered, he did not know whether it was intact. During both his second and third interviews the Golfer denied informing MacKechnie and Associates that the reason for using a child's sleep suit was that it was an evocative item which was intended to shock and "pull at the heartstrings" of a jury. More importantly, he also denied telling

MacKechnie and Associates that an intact sleep suit was taken to America where it was fragmented and then introduced into the chain of evidence as having been found at the crash scene. The Golfer did, however, make the following allegations about the police enquiries into the babygro in Malta.

Cessation of babygro enquiries in Malta in July 1989

11.8 The Golfer alleged that Scottish police officers involved in enquiries in Malta to establish the source of the babygro were instructed to curtail their investigations, and he suggested that this must have been for sinister reasons. He connected the alleged withdrawal of officers from Malta to his allegation that there was surveillance conducted on Anthony Gauci's shop, Mary's House, prior to the first visit there by police (a matter which is addressed in chapter 10). The Golfer confirmed that the source of this allegation, and of many of the suspicions he raised about the babygro, was the police officer, Alexander Gay. The dubious nature of the Golfer's allegations regarding Mr Gay is discussed in chapter 5, above. However, as part of its enquiries into the babygro submissions, the Commission considered the circumstances surrounding the investigations by the Scottish police officers in Malta in July 1989, and the reasons for their apparent failure at that stage to identify Mary's House as a possible retailer of the babygro.

11.9 According to their HOLMES statements, two Scottish police officers, DI George Brown (S4458B; see appendix) and DC George Graham (S3145G; see appendix), visited Malta in July 1989 to pursue investigations into the babygro. The basis for these enquiries was the discovery of a manufacturer's label on one of the fragments of babygro, PK/669, which indicated that the item was made in Malta. Specifically, the officers had obtained information that a company based in Malta, PVC Plastics Ltd, had manufactured it. According to the officers' HOLMES statements, enquiries at PVC Ltd revealed that 125 blue babygros were sold on to another Maltese company, Big Ben Clothing Wholesale. Further, on 7 July 1989, Paul and Lino Gauci of Big Ben Clothing provided the police officers with a control sample of the babygro. However, they informed the officers that they had no records as to whom they had sold the babygros. According to the officers' statements it was for this reason that their enquiries in Malta came to an end at that stage.

11.10 However, after further enquiries had led the police to Mary's House on 1 September 1989 (see chapter 10), Paul Gauci of Mary's House (see his statement S4680 in the appendix) produced an invoice on 2 September 1989 for the babygros Mary's House had bought from Big Ben Clothing (CP 418). On 14 September 1989 Paul Gauci of Big Ben Clothing (see his statement S4692A in the appendix) informed DS Armstrong that, having checked his records, he saw that they had supplied twelve of the babygros to Mary's House on 22 September 1988. On 19 September 1989, the same Paul Gauci handed over to DS Armstrong a photocopy of the relevant invoice which corresponded to that obtained from Mary's House. D&G confirmed to the Commission that Lino Gauci of Big Ben Clothing provided the original invoice (CP 488) to the police on 23 April 1999.

11.11 As part of the Commission's enquiries, George Brown was interviewed on 26 September 2005 by two members of the enquiry team (see appendix of Commission interviews). He was asked, in particular, why he had been unable to recover from Big Ben Clothing in July 1989 the invoice confirming that babygros were supplied to Mary's House. Mr Brown's position was that Big Ben had no records. Indeed, Mr Brown said that he had only become aware of the production by Big Ben Clothing of photocopy invoices in September 1989 when members of the Commission's enquiry team told him about it during the interview. He had no explanation for it. He indicated that after he returned from Malta he was assigned to work on other areas of the case.

11.12 Although it may seem surprising that in September 1989 Paul Gauci of Big Ben Clothing was able to produce an invoice for the sale of the babygros to Mary's House, when in July of that year he apparently told police that Big Ben had no records showing to whom the garments had been sold, in the Commission's view this does not support the Golfer's suggestion that the officers concerned had been instructed to curtail their enquiries in Malta. There is also no reason to doubt that the invoice and its copies are genuine. For the reasons given in chapter 10, the Commission also has no basis for doubting that Mary's House was identified by police through enquiries at Yorkie Clothing on 1 September 1989. This is consistent with Mr Brown's account at interview, namely that after his return from Malta in July 1989 enquiries in relation to

the babygro were put in abeyance while all the other clothing was examined, and that the attention of police officers was led back to Malta by the evidence relating to the Yorkie trousers.

11.13 In light of the above, and in view of its doubts as to the Golfer's credibility, the Commission can see no basis for the allegation that police officers were instructed to curtail their enquiries in Malta in July 1989 for any reason other than that given in the officers' HOLMES statements, above.

Link between babygro and Talb

11.14 As regards the allegation that the babygro evidence was "engineered" to incriminate Talb, and that Talb or his associates had purchased a babygro while under surveillance, the submissions seek to support this by reference to the clothing seized from Talb's home in Sweden on 27 November 1989. DC Callum Entwistle took this clothing to Malta and showed it to various witnesses. Crown production number 1302 is the list, in Swedish, of the items seized from Talb's home, while Crown production number 1303 is an English translation of this. One of the items listed in production 1302 is described as "SB184 Sparkbyxa, blå, strl 60, A&A", the English translation of which is given in production 1303 as "Kick trousers, blue, size 60, A&A." However, a list of the clothing compiled by DC Entwistle (DC/318), which was not a production at the trial, is included within the submissions. There, the item is described as a "Blue overall style babygrow, two penguins on front, no label."

11.15 The suggestion by MacKechnie and Associates that Talb or other Palestinian terrorists were observed purchasing clothing while under surveillance has been rejected by the Commission in chapter 10 above. However, it is worth repeating here that at his third interview the Golfer distanced himself from the allegation that clothing had been purchased by individuals while they were under surveillance. Despite this, given the apparent coincidence that a blue babygro was found in Talb's possession, the Commission considered it appropriate to make further enquiries into item SB184.

11.16 The Commission instructed a linguist based at Glasgow University to translate the phrase "Sparkbyxa, blå, strl 60, A&A". According to the linguist, the Swedish term "Sparkbyxa" is "what the Americans would call a romper suit: a footed one-piece of clothing for babies", and the term "blå" simply means blue. The Commission also obtained from D&G various photographs of the clothing seized from Talb (CP 1245; police references DC/317 and DC/490). A photograph of SB184 within DC/490, which was not a production at trial, and a photograph of the control sample babygro, are reproduced below. The differences between the garments are clear. Needless to say, as SB184 was found intact in Talb's home it could not have been on board PA103.

Photo of SB184

Photo 139 from the RARDE report

11.17 Two members of the Commission's enquiry team interviewed Mr Entwistle on 24 June 2005 (see appendix of Commission's interviews). Mr Entwistle confirmed that he had travelled to Sweden in December 1989 to collect clothing seized from Talb. There were five cartons of clothing in all and Mr Entwistle arranged for these to be transported to Malta. The items were shown to various individuals linked to the clothing industry in Malta, including Frank Aquilina, Alexander Calleja of Yorkie Clothing and Paul Gauci of Big Ben Clothing, in an attempt to trace the manufacturers. According to Mr Entwistle SB184 was one of the items shown to the witnesses in Malta, but nobody expressed any interest in it. Mr Entwistle agreed that Anthony Gauci was not shown any of the items in his presence, and added that Paul Gauci of Mary's House had not been helpful with this enquiry.

11.18 In seeking to connect the items found in Talb's possession with the contents of the primary suitcase the submissions also refer to a "dispatch sheet" (CP 506) obtained from PVC Ltd, the company which manufactured the babygro established to have been within the primary suitcase. In particular, the submissions refer to an entry in the sheet, "Penguin Dungarees", and suggest that PVC Ltd may have manufactured item SB184. According to the submissions, if that is correct it is either a remarkable coincidence, or evidence that a possible link between Talb and the babygro fragments was engineered by the police.

11.19 As part of its enquiries in this area a member of the Commission's enquiry team interviewed Miriam Cianter, an employee of PVC Ltd at the relevant time (see appendix of Commission's interviews). Ms Cianter was shown photographs of the clothing seized from Talb, including one of SB184, and confirmed that PVC Ltd did not manufacture any of the items pictured. When asked about the "Penguin Dungarees" referred to in the dispatch sheet, Ms Cianter was able to describe this item. On being shown the photograph of SB184 again, she was certain that this was not the item produced by PVC Ltd.

11.20 Furthermore, at interview with members of the enquiry team (see appendix of Commission interviews) Paul Gauci of Mary's House was shown photographs of the clothing recovered from Talb but did not recognise item SB184. Although Paul Gauci believed that Mary's House stocked items similar to SB85 (a ladies' sweater recovered from Talb's home: see photograph number 1 in CP 1245), without seeing the manufacturer's label he was not able to confirm that they had stocked this particular item. In any event, according to Paul Gauci similar items were stocked by other shops and by the local market.

11.21 In the Commission's view, standing the results of the above enquiries, there is no evidence of a link between item SB184 and the babygro established to have been within the primary suitcase. Indeed, the Commission is satisfied that there is no evidence of a link between any of the clothing recovered from Talb, including the Mickey Mouse T-shirt and Melka trousers which are referred to in the submissions, and those items found to have been within the primary suitcase.

Conclusions in respect of ground 1

11.22 As indicated, the Golfer did not speak at interview to the central allegation made in the submissions, namely that fragments of a babygro obtained from the test explosions in the US were subsequently inserted into the chain of evidence as having been found at the crash scene. The Commission has addressed the other allegations attributed to him in the submissions, none of which cause it to doubt the provenance of the babygro fragments found to have been within the primary suitcase.

Ground 2: issues regarding the police and forensic investigation of the babygro fragments, including the US test explosions

11.23 It is also argued in the submissions that alleged irregularities in the police and forensic investigation of the babygro, including the test explosions carried out in the US, lend support to the Golfer's allegations. Given that at interview the Golfer did not support the central allegation made in the submissions, on one view most, if not all, of the additional issues raised under this ground can safely be rejected. However, given the seriousness of the central allegation, and the possibility that the Golfer might for some reason have been reluctant to speak to it at interview, the Commission considered it appropriate to address some of the points directly.

The test explosions in the US

11.24 The submissions refer to two reports by Henry Bell regarding test explosions carried out in the US (see appendix). According to these reports, five test explosions were held at the US Naval Explosive Ordnance Technology Centre, Indian Head, Maryland ("Indian Head") during the week beginning 17 April 1989. The purpose of those tests was to estimate the amount and location of the explosives used on PA103 by comparing the damage caused to luggage containers with that caused to AVE 4041, the container found to have contained the primary suitcase.

11.25 According to Mr Bell's reports four further tests were carried out at the Federal Aviation Administration headquarters ("FAA"), Atlantic City, New Jersey and again at Indian Head between 17 and 27 July 1989.

11.26 According to the reports, tests numbered in the reports as 6 and 7 were carried out at the FAA headquarters and used "lost baggage" supplied by the FAA. These tests were designed, among other things, to establish the extent of damage to the improvised explosive device ("IED"), the adjacent suitcases and their contents; and to ascertain what parts of the IED and its contents it was possible to recover and identify. The materials recovered following the explosions were to be used to allow the forensic scientists to make comparisons between them and items recovered following the bombing of PA103. In each test, a "capri blue child's walk suit," (i.e. a garment similar to the babygro) bearing both "PRIMARK" and "JELLY BEAN" labels, with a blue coloured plastic hanger and "Kimbo" tag, was placed on top of the IED which was housed in a radio cassette recorder (there is no indication that this garment was used in the April 1989 tests). The purpose of this was to evaluate the damage caused to the garment.

11.27 Tests numbered in the reports as 8 and 9 were carried out at the centre at Indian Head. The object of these tests was to facilitate a full recovery of all fragments of the IED suitcase, the radio and the suitcase contents, post explosion. This was in order to permit an assessment of the recovered debris and to establish what parts of the IED suitcase and its contents it was possible to recover and identify. The recoveries were also to be used to enable the forensic scientists to make comparisons between these and items recovered after the bombing of PA103. As in the earlier tests, the suitcase was packed with clothing and the "capri blue child's walk suit" was placed on top of the IED to allow an assessment of the damage to the garment.

11.28 According to the submissions the first of Mr Bell's reports, dated 21 April 1989, was obtained from the BKA files held by MacKechnie and Associates. The second report, dated July 1989, was said to have been found in MacKechnie and Associates' archives. The submissions point out that neither report was lodged as a production at trial. However, since MacKechnie and Associates provided both reports to the Commission, it is clear that the defence was in possession of them, and

accordingly there is no significance in the fact that the reports were not productions. Moreover, as the test explosions were expressly referred to in the trial court's judgment, in the RARDE report (CP 181), and in the evidence of Allen Feraday (21/3303 et seq), it is clear that there was no attempt to conceal the fact they had occurred.

11.29 The submissions suggest that the photographs of the babygro fragments recovered from the July 1989 test explosions resemble very closely the fragments of the babygro recovered from the crash scene. However, in the Commission's view, any similarities between the fragments recovered from the test explosion and those recovered from the crash site can be explained by the fact that the object of the July tests was to ascertain the damage caused to a babygro subjected to an explosion similar to that which occurred on board PA103.

11.30 Over and above the fact that the police were already investigating the fragments of babygro prior to the July test explosions, in the Commission's view the results of three enquiries, individually and cumulatively, demonstrate the provenance of a key fragment of the babygro, PK/669, prior to these tests being carried out. As indicated, PK/669 was of particular importance because it bore the manufacturer's label, including the words, "Made in Malta".

11.31 First, the Commission recovered a photograph of PK/669 which, according to the HOLMES statement of Strathclyde police scenes of crime officer, James Ryder, (S1234C, see appendix) he photographed on 10 January 1989, some 6 months prior to the July test explosions. Although the manufacturer's label is not itself visible in the photographs, the overall shape, size and appearance of this fragment is consistent with PK/669 as it appears in subsequent RARDE photographs. The date of 10 January 1989 is depicted in the photograph itself. A copy of the photograph is contained in the appendix.

11.32 Secondly, the Commission obtained from D&G photocopies of the front and back of PK/669 itself (see appendix). It appears that these photocopies were shown to witnesses by the police in an attempt to confirm the source of the label. They are referred to in the HOLMES statements of three civilian witness, namely Pamela

Coxell (S4685), Laura Cronshaw (S4686) and Philip Merry (S4687) and copies of these statements are contained in the appendix. The photocopies have been signed and dated 27-30 June 1989 and therefore pre-date the July test explosions.

11.33 Thirdly, the photographic records at the Forensic Explosive Laboratory ("FEL") assist in proving the provenance of the babygro fragments. According to this source, photograph 145 of the RARDE report (reproduced below) pre-dates the July test explosions. Specifically, the negative number on the reverse of photograph 145 is FC3594, which is recorded as having been returned from the developing laboratory on 29 June 1989 (see appendix to chapter 6). Thus, according to the records the photograph must have been taken on or before that date.

Photo 145 from RARDE report

11.34 During their second visit to FEL in March 2006, members of the Commission's enquiry team also examined the negative corresponding to FC3594, and found that it corresponded in appearance to photograph 145. The sheath containing the negative was date stamped "29 June 1989", consistent with the contents of the photographic log book.

11.35 The Commission also recovered from FEL a composite photograph of the babygro fragments PK/669, PK/2209, PK/202, PK/1505, PI/1391 and PI/1421 (see appendix), on the reverse of which appears the negative number FC3630. According to the photographic records, this was taken on or before 13 July 1989, again pre-dating the July test explosions.

11.36 In light of these enquiries, the Commission is satisfied that PK/669 was in existence well before the July 1989 test explosions.

11.37 Reference is also made in the submissions to the fact that photographs show that two labels (Primark and Jelly Bean) were attached to the fragments of babygro used in the July test explosions. As Mr Bell makes express reference to this in his report of the July tests, it is difficult to draw any sinister inference from it. Similarly, at interview with members of the Commission's enquiry team, George Brown made no attempt to hide the fact that an additional label was sewn onto the babygros used in the test explosions (see appendix of Commission interviews). Indeed, according to Mr Brown, it was he who had obtained the labels in question.

FBI and police enquiries in Malta

11.38 It is alleged in the submissions that FBI agents and police officers attended the factory premises of PVC Ltd in Malta earlier than the official position would suggest. The submissions refer to a number of statements and precognitions of various witnesses obtained by MacKechnie and Associates in support of this contention.

11.39 The sequence of events according to the relevant HOLMES statements is that George Brown was provided with information on two of the fragments of babygro, namely PK/669 and PK/2209, on 2 June 1989 (see his statement S4458B in the appendix). After receiving this information he was tasked with establishing the origin of the garment. As the label forming part of PK/669 stated that it was "Made in Malta", Mr Brown arranged for "tentative enquiries" to be carried out there to establish the main exporters of children's wear. Mr Brown was informed that PVC Ltd fitted this criterion and that they had a sister factory, Hellane, located in Ashby-de-la-Zouch in England.

11.40 The individual who carried out these enquiries on Mr Brown's behalf is not named in the relevant police statements. However, in his statement concerning the Yorkie trousers (S4458L, see appendix to chapter 10) Mr Brown said that he had previously carried out enquiries in Malta regarding the babygro, and therefore made

contact again with the American legal attaché who had assisted him on that occasion. The legal attaché in question, although not named in Mr Brown's statement, appears to have been James Frier. Mr Frier's defence precognition (see appendix) indicates that in 1988 he was the FBI legal attaché in Rome, from where he conducted investigations in countries in the Mediterranean and North Africa. He refers in his precognition to being sent photographs of labels from clothes by the Lockerbie task force, and being asked to travel to Malta to make enquiries in relation to these. He visited a number of factories and established that the clothing was made in Malta. He located the factory where the clothes had been manufactured and discovered that this type of clothing had not been exported. According to the precognition he could not recall the name of the factory. Shortly after Mr Frier had sent a report to the Lockerbie task force, Scottish officers and FBI agents were dispatched to Malta where they spent some considerable time conducting enquiries. Copy correspondence from Interpol identifies Mr Frier as having conducted his initial enquiries in Malta in relation to this matter on 7 June 1989 (see appendix).

11.41 The Commission has examined all the statements and precognitions which are referred to in the submissions in support of the contention that FBI agents and police officers were conducting enquiries in Malta prior to the time which has been officially acknowledged. In fact, the precognition of only one witness, Jeff Grewcock, which was obtained by MacKechnie and Associates after the appeal, contains timings which are inconsistent with the official chronology (see appendix). The terms of Mr Grewcock's precognition are described below. Although there is a suggestion in Dennis Satariano's precognition, which was also obtained after the appeal, that the FBI were in Malta in about May 1989 (see appendix), given that this is only an approximate timescale, it is not necessarily inconsistent with the official timings.

11.42 Mr Grewcock was a production manager at PVC Ltd. He refers in his precognition to his passport which confirmed that he travelled to Malta on 19 June 1989 to visit the PVC factory there and returned to England on 24 June 1989. He recalls in his precognition that on a previous visit to Malta he had been present when police officers had attended the factory. As his passport indicated that his previous visits to Malta were in April and May 1989, this suggests that the police visited the

PVC factory at a time prior to that suggested by the official chronology. However, Mr Grewcock was unable to recall in his precognition obtaining a control sample babygro on 23 June 1989 and delivering it to the factory in England, which his HOLMES statement (S4684, see appendix) confirms that he did. In these circumstances, and standing the evidence in support of the official chronology, the Commission does not consider Mr Grewcock's current recollection about the timing of the officers' visit to the PVC Ltd factory to be reliable.

11.43 Reference is also made in the submissions to the following passage within "On the Trail of Terror", a book about the case written by David Leppard, a journalist with *The Sunday Times*. It is said that the passage supports the allegation that police officers were in Malta at a time prior to that suggested in the HOLMES statements. The passage is as follows:

> *"It was not the first time that John Orr's men had been in Malta. In March, Detective Sergeant William Armstrong, Bell's right-hand man on the Co-ordination team, had travelled there to make enquiries about the origins of the blue romper suit"* (at p158).

11.44 The Commission notes that none of DS Armstrong's HOLMES statements refers to such a visit, nor is there any mention of this in his defence precognitions. Furthermore, D&G confirmed to the Commission by letter dated 14 April 2005 that, having researched the matter, they could find no confirmation of any visit prior to June 1989. Indeed, as far as could be established by D&G, the first visit was made by George Brown and George Graham in July 1989. According to D&G, there is no documentation to support the claim in Mr Leppard's book. D&G also advised that George Graham (now Deputy Chief Constable) had been asked about the matter and had confirmed that his was the first visit to Malta by Scottish police officers. According to D&G Mr Graham indicated that the visit in July was a preliminary visit to assess what "might be available to evidence manufacture and distribution of particular items of clothing."

11.45 Lastly, the submissions point out that, in terms of the trial court's judgment and the evidence at the trial, the police investigation in Malta regarding the babygro

began in August 1989, rather than in July of that year. It is suggested that the trial court was misled into concluding that the initial investigations into the babygro took place in August 1989 with "no other agency involvement".

11.46 In the Commission's view, while the trial court may well have wrongly believed that these initial enquiries took place August 1989, there can be no question of any deliberate attempt to mislead the court. As the submissions acknowledge, Mr Bell made specific reference in his evidence to police enquiries into the babygro taking place in July 1989 (53/7144). The defence was also aware of these enquiries from various other sources including the precognition obtained from George Brown. Nor can it be said that the absence of any reference at trial to the FBI investigations in June 1989 prejudiced the defence in any way, given that this too was known to the defence through James Frier's precognition and accompanying documentation. Although there is a suggestion in the submissions that the defence should have raised this issue at trial, the Commission does not consider this as significant.

The control sample

11.47 Doubts are expressed in the submissions about the authenticity of the control sample babygro obtained by the police from Paul and Lino Gauci of Big Ben Clothing in Malta on 7 July 1989. The control sample was given the police reference DC/34, and featured in photographs 139 and 140 of the RARDE report. The submissions refer to various precognitions taken by MacKechnie and Associates in support of its claim that the origin of the control sample is doubtful.

11.48 The Commission is not persuaded that any of the matters raised give rise to doubt as to the provenance of the control sample. In particular, the Commission notes that one purported criticism about the control sample's authenticity in fact provides support for its provenance. This criticism relates to the presence of particular cards attached by tags to the control sample. In his HOLMES statement (S4689, see appendix) Dennis Satariano explained that when a finished garment left the PVC factory it did not have paper or cardboard cards (which he describes as "Kimballs") attached to the labels. These cards were attached by PVC Ltd's sister company, Hellane, by means of a small plastic tag. However, when garments were returned by

Hellane to PVC Ltd the cards were left attached. According to Mr Satariano, when PVC Ltd sold the batch of walk-in sleepers to Big Ben Clothing these tags were still attached to the garments.

11.49 During a visit to Dumfries police station on 3 March 2005, two members of the Commission's enquiry team examined all three control sample babygros, including DC/34, and were present when a scenes of crime officer photographed them. DC/34 still had the same cards attached to it, consistent with the account given by Mr Satariano.

11.50 In any event, the Commission notes that at trial Anthony Gauci, Paul Gauci of Big Ben Clothing and Mr Satariano, confirmed that the control samples shown to them in court, DC/34 (Crown label 439) and DC/97 (Crown label 451), were the same as those manufactured or sold by them.

11.51 It is also argued in the submissions that the recovery of a pink control sample babygro (DC/97; label 451) by police from Paul Gauci of Mary's House was suspicious, as his initial position was that there were no other babygros of the kind sold by Mary's House in stock. For what it is worth, the Commission notes that Mr Bell in an entry in his diary, dated 2 October 1989 (see appendix), confirms that it was in fact Mr Gauci's sister who found the pink babygro. Even without this, however, there is clearly no substance to this point.

11.52 For the foregoing reasons, the Commission is satisfied that there is no reason to doubt the authenticity of the control sample.

Criticisms of Dr Hayes' examination notes

11.53 The submissions contain various criticisms of the examination notes of the forensic scientist, Dr Thomas Hayes, in which he records his examination of some of the babygro fragments (CP 1497). A number of these criticisms are addressed in the following paragraphs.

(i) Preliminary examination of PK/669

11.54 Reference is made in the submissions to the preliminary pages of Dr Hayes' examination notes, in which large numbers of items are listed, and marked either with an "R" (signifying that the item is of "possible significance") or a "G" (signifying that it is of "no significance"). The submissions point out that on the page dated 25 January 1989 PK/669 is marked "G", suggesting that at that stage Dr Hayes considered it to be of no significance. The Commission notes that this is confirmed by the police report, which indicates that PK/669 was sent to RARDE on 16 January 1989 but was returned as "showing no particular explosive significance." The submissions question how an item subsequently said to be of such significance could have been considered at one time to be of no significance.

11.55 In fact, the situation highlighted in the submissions is by no means unique to PK/669, as other fragments initially regarded as of no significance were subsequently considered to display explosion damage (see e.g. PI/236, PK/1504, PK/1978). Clearly PK/669 was identified by the police as being of possible significance fairly soon after the initial assessment at RARDE, as it was resubmitted to RARDE on 9 March 1989 (see LPS form 351, CP 288). According to page 75 of Dr Hayes' notes, he examined PK/669 in detail on 22 May 1989 and concluded that it was severely damaged and was blackened and scorched around its periphery. No IED or other significant fragments were recovered from it. It appears that it would only have been once it was associated with the other fragments of babygro, particularly PK/2209 (which Dr Hayes' notes, at pages 84-86, indicate he examined on 1 June 1989), from which fragments of the Toshiba manual were recovered, that it could be concluded that PK/669 was of particular significance. Dr Hayes confirmed this when he was interviewed by members of the Commission's enquiry team on 8 March 2006 (see appendix of Commission's interviews).

(ii) Reference to "rompersuit"

11.56 The submissions also refer to page 75 of Dr Hayes' examination note and point out that Dr Hayes describes PK/669 as a "rompersuit". The submissions

question how Dr Hayes would have known at that point that PK/669 came from a romper suit.

11.57 The submissions appear to ignore the actual wording of Dr Hayes' examination note: *"Possibly originating from a sock? rompersuit? NB 86cm?"* It is clear from the insertion of the question mark and the other stated possibility that Dr Hayes was not certain that the fragment had originated from a rompersuit. In any event, given the information on the label – the age of 12-18 months and the height measurement of 86cm – it seems a reasonable deduction that the item might in fact have originated from a rompersuit.

(iii) Cross-reference to page 142

11.58 The submissions point out that in the same examination note Dr Hayes wrote, just below the entry for PK/669, the words "NB see pg 142 (cf DC/34)". Page 142 of Dr Hayes' examination notes is dated 16 November 1989 and records a comparison between the control sample babygro (DC/34) and the babygro fragments. The submissions suggest that the cross-reference to page 142 on page 75 may have been inserted at the same time as the other writing on page 75, which would indicate that the notes on page 75 could not have been written on 22 May 1989.

11.59 As noted in chapter 6, a recurring theme in the submissions regarding the provenance of items of debris is whether Dr Hayes' examination notes are contemporaneous. As part of its enquiries in this area, the Commission arranged for the forensic document examiner, John McCrae, to examine pages 75 and 142 of Dr Hayes' notes. In his report dated 26 April 2005 (see appendix to chapter 6), Mr McCrae had the following to say in relation to page 75:

> *"'NB See pg 142 (cf DC/34)' is same ink as on page 142, same as on page 75 with similar indented pressure. Could have been written with remainder page 75 and is contemporaneous with preceding lines."*

11.60 In a supplementary report dated 15 December 2005 (see appendix to chapter 7), Mr McCrae stated:

"*I refer to my report date 26th April 2005 and wish to clarify my findings on Page 2 re 'Page 75'…*

…Impressions of page 75 were found by ESDA on page 76. The entry 'NB See pg142 (cf DC/34)' and above, were found to be consistent with page 75 being in alignment with page 76.

These entries were in the same ink, with similar pressure, - a feature indicating writing possibly made at the one time. It is not necessary that this is the case, and it is very possible that the entry 'NB See pg 142 (cf DC/34)' was written some time later.

When the ESDA sheet from page 76 is overlaid on page 75, the writing from 'NB See pg 142 (cf DC/34)' and above are in the same position, not usual when a writing is later added."

11.61 In the Commission's view, the terms of Mr McCrae's reports on this issue are neutral. On the one hand, Mr McCrae points to features within the notes which suggest that the cross reference on page 142 of the notes was written contemporaneously with the other entries on page 75. On the other hand, Mr McCrae considers it "very possible" that the cross-reference was written some time later.

11.62 In the Commission's view, the important question is whether one can be satisfied as to the provenance of PK/669. For the reasons given (in particular, those concerning the police photograph of PK/669 taken in January 1989, the RARDE photographs and the photocopies of PK/669 signed by witnesses in June 1989) the Commission can see no basis for doubting the provenance of this item.

(iv) <u>Absence of reference to second label on PK/669</u>

11.63 According to the submissions it is suspicious that on page 75 of Dr Hayes' notes there is no sketch or entry regarding the finding of the small label which was recovered along with the larger Primark label on PK/669. In the Commission's view,

this is a minute criticism which, when considered along with the Commission's conclusions as to the provenance of PK/669, is of no significance. For what it is worth, the smaller label features in the composite RARDE photograph of the babygro fragments taken on or before 13 July 1989 (see appendix). Mr Satariano also provides an explanation for the presence of such labels in his HOLMES statement (S4689, see appendix).

(v) Sketch of plastic tie on PK/669 label

11.64 Lastly in relation to Dr Hayes' notes, the submissions refer to the sketch of PK/669 on page 75. According to the submissions the sketch shows the plastic tie penetrating the label on PK/669. The submissions question whether this sketch was made at the time the note was written and, if so, why there is no mention of the plastic tie in the main text of Hayes' notes. The submissions also query how Dr Hayes would have known that the plastic tie came from a label.

11.65 Again, viewed in the context of the Commission's other findings, this point is of no significance. It is perhaps worth highlighting that photograph 145 in the RARDE report, referred to above, clearly depicts the plastic tie.

Other alleged irregularities

11.66 The submissions point to various other alleged irregularities concerning the babygro fragments. In the Commission's view, none of these matters raises any doubt about the provenance of the fragments. However, the Commission has addressed two of them in the following paragraphs.

(i) Finding of an intact babygro

11.67 Precognitions obtained post-trial by MacKechnie and Associates were provided to the Commission in support of the suggestion that an intact babygro was found after the explosion. For example, according to the precognition of Robert Mole (see appendix), a former police sergeant, he recalled seeing an intact babygro which may have been pink. David Thomson, who assisted with the searches and found

PK/669, recalled in his post-trial precognition (see appendix) that possibly a few days before the end of 1988 one of his team, David Clark, became upset when he found a "blue baby romper type suit." Mr Thomson could not recall any details of labels or markings on the item, but he remembered that it was intact and that it showed no sign of damage. He was shown a photograph of the control sample babygro from the RARDE report (photograph 139 – see above) by MacKechnie and Associates, and although he said it looked very similar, he could not say with any certainty that it was the same. David Clark in his precognition (see appendix) recalled finding a baby's nappy and an intact blue babygro. He too was shown a photograph of the control sample babygro by MacKechnie and Associates. He said that it was identical, apart from the fact that he could not remember the type of motif there had been on the item he had found.

11.68 The Commission notes that in David Clark's HOLMES statement (S2619, see appendix), he refers to finding, on 29 December 1988, a pink coloured child's "Rompersuit" marked from 0-6 months. According to the statement, there was also a baby's disposable nappy found approximately 70 metres from this item While David Thompson's (not Thomson as per the MacKechnie and Associates precognition) HOLMES statement (S758D, see appendix) refers to David Clark finding on 29 December a T-shirt which had a "Forearm and Fist" motif with the word "Hezbollah", it contains no reference to the finding of a pink romper suit. David Clark's HOLMES statement also refers to the finding of this T-shirt, although, according to the statement, he was unable to read it as the logo was in Arabic. In their respective precognitions obtained by MacKechnie and Associates, both witnesses refer to the T-shirt being found at the same time as the babygro. (The Commission notes that at a meeting between a representative of MacKechnie and Associates and the former CIA officer, Robert Baer, on 9 February 2002 Mr Baer apparently said that he had given a "Hezbollah" T-shirt to one of the passengers on board PA103, Charles McKee, see appendix to chapter 15).

11.69 Accordingly, there are indications that the item found by these witnesses was not a blue babygro, but a pink one. In any event it is a completely separate item from the babygro fragments established to have been within the primary suitcase. It is not surprising that baby clothing was found at the crash site, given that two babies, a boy

and a girl, each aged two months, were on the flight. There were also a number of other children on the plane aged 1 and under.

11.70 The submissions also refer to a memorandum dated 21 June 1989 from DI Watson McAteer to the BKA which contains the following passage (see appendix):

> "*During a recent search an article described as possibly being a Childs Romper suit (one piece overall) was found. Tom Hayes at RARDE examined this item and has concluded verbally, that it had been contained within the suitcase that had held the Toshiba radio cassette device. The Romper suit is blue in colour, and sized to fit a child aged between 12 and 18 months. There is a 'Made in Malta' label attached. The article is being subjected to further examination and a full report will be provided when at hand…"*

11.71 The submissions suggest, first, that this passage indicates the babygro was intact and, secondly, that its description – "one piece overall" – would be more consistent with the babygro found in the possession of Talb. In the Commission's view, neither of these propositions is of any merit. The first requires too much to be read into the wording of the memorandum, which might just as easily describe the fragments of babygro eventually linked to the primary suitcase. The second point is entirely speculative. The Commission is satisfied that the origin of the babygro fragments has been established, and the contents of DI McAteer's memorandum do not alter that conclusion. The same applies to submissions made regarding John Crawford's defence precognition in which he refers to an intact babygro, and to a further memorandum dated 15 June 1989 from the US Department of Justice, both of which were provided to the Commission by MacKechnie and Associates.

(ii) Witness expenses

11.72 It is alleged in the submissions that after a meeting with representatives of MacKechnie and Associates on 7 October 2004, Paul Gauci of Big Ben Clothing informed a Maltese lawyer, Dr Emmanuel Mallia, who had sat in on the meeting, that he had received an unusually high award of expenses in connection with his involvement as a witness at trial. According to the submissions the sum paid to Mr

Gauci was 4000LM (said to equate to around £7000) plus hotel and travel expenses. It was submitted in volume A that this witness was in fact a Charles Gauci but MacKechnie and Associates later informed the Commission that this was an error. According to the submissions, the payment was made to Paul Gauci of Big Ben after he had decided not to attend the trial due to what he considered to be the "paltry" level of expenses on offer.

11.73 The Commission has verified the position with Crown Office and is satisfied that the sum paid to Paul Gauci of Big Ben was calculated in a manner consistent with expense payments made to all other witnesses in the case. It is sufficient to say that the amount paid is substantially less than that alleged in the submissions. Even if the allegation were true, however, it is difficult to see how it would ever be capable of undermining the applicant's conviction.

Overall conclusion

11.74 In the Commission's view nothing in the submissions made by MacKechnie and Associates succeeds in casting doubt upon the provenance of the babygro fragments. As explained, the Golfer denied at interview the central allegation that this evidence had been fabricated. The Commission also found nothing to support such an allegation in any of the issues raised by MacKechnie and Associates dealt with under ground 2 above. Indeed, the results of the Commission's enquiries in this area serve to confirm the authenticity of the fragments.

11.75 It is worth adding that even if the Golfer had spoken to the allegation at interview, given the lack of support for this, the inconsistencies in his statements regarding the babygro and the doubts as to his credibility, the Commission would have had little hesitation in rejecting it. Even when the matters raised are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred under this ground of review.

CHAPTER 12
ABUSE OF PROCESS

Introduction

12.1 It is alleged on behalf of the applicant (see chapter 14 of volume A) that certain activities on the part of those investigating and prosecuting the case indicate that there was a misuse of state power sufficient to amount to an abuse of the court's process. Before considering these allegations it is important to set out the legal and factual submissions on which they are based.

The legal submissions

12.2 According to the submissions while the term "abuse of process" is well established in England it was recognised only recently in Scotland in *Brown v HMA* 2002 SCCR 684. Reference is also made in the submissions to the decision of the House of Lords in the English case of *R v Loosely* [2001] 1 WLR 206 where it was held that the court has an inherent power to prevent an abuse of its process so as to ensure that state agents do not misuse the coercive law enforcement functions of the courts to oppress citizens.

12.3 The submissions argue that a plea of abuse of process is similar to one of oppression under Scots law, but that the former is concerned with questions of whether the exercise of executive power is an affront to ordinary notions of fairness or to the public conscience. The issue, according to the submissions, is not whether the accused was given a fair trial but whether the abuse in question should be countenanced.

12.4 In terms of the submissions an abuse of process might amount to oppression, in which case the prosecution must fail or be dismissed. It might also, it is submitted, breach the principles of the European Convention on Human Rights and, by virtue of section 57(2) of the Scotland Act 1998, render the prosecution *ultra vires*.

The factual submissions

12.5 Although it is alleged in the submissions that certain features of the case point to, and may amount to, an abuse of the process, it is acknowledged that such a plea cannot be established without further evidence. Various "causes for concern" are thereafter listed. As many of these concerns (eg regarding the provenance of items PI/995 and PT/35(b), the Golfer, Mr Gauci's treatment by the Scottish police and the disclosure of the CIA cables) are addressed by the Commission elsewhere, they are not examined in detail here. It is sufficient to say that in light of its conclusions in respect of those allegations the Commission does not consider any of them to be capable of amounting to an abuse of process.

12.6 The following are the remaining issues which it is said may amount to an abuse of process.

(1) Interference with the crash site

12.7 According to the submissions there are a number of "reported suggestions" of items being "spirited away" from the crash site and of unofficial CIA involvement in the recovery and examination of these. Reference is made in this connection to a defence precognition obtained from a former police constable, Mary Boylan, who reported finding a CIA "badge" which according to the submissions the police were "instructed not to report". Reference is also made to evidence that productions were "interfered with" and, in particular, that a suitcase (PD/889; label production number 96) had been cut open and its contents disturbed.

(2) Concerns over the "control" of witnesses

12.8 A further matter raised concerns the control said to have been exercised by both the UK and US authorities over crucial witnesses. According to the submissions the Crown witnesses, Abdul Majid Giaka ("Majid") and Edwin Bollier, were "handled" by US agencies in that they were interviewed countless times and spent periods staying in government quarters there. Majid, for example, was a paid informer who it is alleged had been rewarded by the US Government and whose

evidence was heavily influenced by the CIA. It is alleged that US officials had interviewed him extensively since 1991 and that he was prompted in respect of the content of his evidence.

(3) The role of the US authorities

12.9 More generally the submissions express concern over the role of the US authorities in the investigation and prosecution of the case. The picture presented by the case, it is submitted, is that the US authorities were not only behind the scenes but often in control. According to the submissions this was demonstrated in a variety of ways: their presence from the outset at the locus, their role in the shifting of focus in the investigation from the PFLP-GC to Libya, their control over and concealment of information before and during the trial and their presence at the prosecution table throughout the proceedings.

The Commission's response

12.10 As noted above the relevant Scottish authority in this area is *Brown v HMA* where, in considering the appellants' allegations of entrapment by police officers, the High Court adopted the approach taken to this issue by the House of Lords in *R v Loosely.* In doing so, the judges appeared to endorse the wider concept of abuse of process, a principle already firmly established under English law. In particular, Lords Philip and Clarke in *Brown* quoted with approval the following passage from Lord Nicholls' speech in *R v Loosely*:

> *"[E]very court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state."*

12.11 Lord Philip went on to observe that in entrapment cases, "the abuse of state power is so fundamentally unacceptable that it is not necessary to investigate whether the accused has been prejudiced or has been the victim of any form of unfairness" (at p 694).

12.12 Lord Clarke adopted the following passage from Lord Steyn's speech in *R v Latif* [1996] 1 WLR 104 at p 112:

> *"Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed… The speeches in* R v Horseferry Road, ex parte Bennett *[1994] 1 AC 42, conclusively establish that proceedings may be stayed…not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place… [The] judge must weigh in the balance the public interest in ensuring that persons charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means"* (at 2002 SCCR p 695).

12.13 Based on that passage and other English authorities Lord Clarke reached the following conclusion:

> *"I consider, therefore, that it is more appropriate to recognise that in such cases the proper function of the court is to mark the unacceptability of certain practices being adopted by the police and prosecution authorities, which the law will not tolerate and that the principle involved is that the court is refusing to allow an abuse of process. To put the matter another way, I would refer to what Lord Hoffmann said in* Loosely *at para 71, that is, the question is:*
>
> > *'Whether the involvement of the court in the conviction of the defendant who had been subjected to such behaviour would compromise the integrity of the judicial system'"* (at p 695E-F).

12.14 Lord Marnoch observed that the onus would be on the defence to establish any abuse of process (at p 690).

12.15 In terms of those principles the Commission would require to be satisfied of the following in order to base a reference on an alleged abuse of process:

- that there is evidence, capable of being considered credible and reliable by a reasonably jury (or court), which might establish that the police and/or prosecuting authorities have acted in such a way as to cause affront to the public conscience or to compromise the integrity of the judicial system; and

- that viewed alongside all other relevant aspects of the case the evidence suggests that a miscarriage of justice may have occurred.

12.16 It is with these principles in mind that the Commission has considered each of the applicant's concerns.

(1) Interference with the crash site

(a) Mary Boylan's allegations

12.17 The first allegation under this heading is that a CIA "badge" was recovered from the search area after the explosion and that instructions were issued not to report the find. The allegation is made in a precognition of a former police officer with Lothian and Borders police, Mary Boylan, which was obtained by the defence after the trial but before the appeal. Ms Boylan makes no reference to finding such an item in her pre-trial defence precognition, her Crown precognition, or in either of her statements contained on the HOLMES database. Copies of all these accounts are contained in the appendix.

12.18 According to her post-trial precognition Ms Boylan had been sent to the Lockerbie area following the crash. On 28 December 1988, while searching fields in the area, she is said to have found a CIA badge, following which she immediately summoned Constable Derek Forrest in order to corroborate the find. According to the precognition Mr Forrest informed her that at an earlier briefing "he had been instructed that in the event of such a find, nothing was to be recorded and that they

were to be handed over to a Senior Officer". Ms Boylan thereafter approached an inspector who confirmed this instruction and took the badge from her. As far as Ms Boylan could say, the inspector did not record it in any way. She had no idea who the inspector was.

12.19 Ms Boylan retired from the police in 1993 but according to the precognition she was contacted again in 1999 and asked to go to Dumfries to give a statement to a procurator fiscal depute. She was asked by the fiscal depute to describe from memory some of the items she had recovered and was then shown a suitcase rim and handle which she recognised as having found with Mr Forrest. She asked the fiscal depute about the significance of this item and according to the precognition was told that she would be "hearing a lot more" about the owner of the suitcase, a Joseph Patrick Curry, during the trial.

12.20 Ms Boylan describes in the precognition how after her interview with the fiscal depute she went to the garden of remembrance for those who died in the Lockerbie disaster. While she was there she saw on a plaque the inscription "Joseph Patrick Curry, Captain US Army Special Services, killed in the line of duty". Later that evening she remembered finding the CIA badge and the following day she contacted the fiscal depute to tell him about this. According to the precognition the fiscal depute told her not to worry and said that all of the CIA badges had been returned to the US Government.

12.21 Ms Boylan is said in the precognition to have always been troubled by this area of the case as she believed that the treatment of the CIA badge was contrary to normal police procedures in the gathering of evidence. The reason she had not mentioned the CIA badge when precognosced by the defence prior to the trial was that the person noting the statement was an ex-police colleague who she knew was in contact with serving officers and who she did not trust to keep the information confidential.

12.22 By letter dated 14 December 2005 the Commission asked D&G to provide all the information in its possession regarding this matter. In the event a response was not received until 29 November 2006. In the intervening period members of the

Commission's enquiry team examined various protectively marked materials produced during the police investigation by the D&G Joint Intelligence Group ("JIG"). One of the JIG files, which was marked "X", was considered to be of possible relevance to Ms Boylan's allegations. D&G was advised of this by letter dated 15 September 2006 in order that the contents of the file could be taken into account by them in their response to the Commission's initial request.

12.23 D&G's replied by letter dated 29 November 2006. According to this D&G holds no information on HOLMES concerning either the allegation that CIA badges were removed from the search area after the explosion, or instructions that such items should not be recorded. Despite the Commission's letter of 15 September 2006 D&G's letter of 29 November made no reference to JIG file X. The Commission therefore requested D&G to examine the contents of that file and provide details of any information relating to Ms Boylan's claims.

12.24 In its reply dated 4 December 2006 D&G confirmed that a reference to a US Special Forces Group badge in the name of "J P Curry" had been found in JIG file X and that two photographs of this item were present in the file and formed part of a document dated 27 January 1989. According to the letter "[t]here is no clear indication on HOLMES as to when or where this item was recovered". However, the letter states that records held on HOLMES showed that an item, PF/554 (described in the Dexstar log as a "Wallet containing papers of Joseph P Curry Special Forces Group (Airborne) + Keys + Medal" (see appendix)) was found in sector F on 27 December 1988. According to the letter the records on HOLMES indicated that a "medal" was found in the wallet. D&G advised that it was possible that the badge belonging to Mr Curry referred to in JIG file X may in fact have been the "medal" linked to PF/554. Support for this view was said to be provided by an entry in the Dexstar log for item PF/1381 (see appendix) which refers to two "code cards" also found within PF/554. D&G explained that these cards appear in the photographs of the badge referred to in JIG file X. It appears to the Commission from this information that the Special Forces Group badge belonging to Mr Curry was found in item PF/554.

12.25 D&G also suggested in its letter that the senior investigating officer at the time would have been involved in any direction to staff that certain finds should not be recorded.

12.26 In light of the information provided by D&G the Commission considered it necessary to interview Ms Boylan and to carry out further enquiries in connection with her claims. Copies of all statements obtained in this connection are contained in the appendix of Commission interviews.

- Mary Boylan

12.27 At interview Ms Boylan maintained that during searches conducted by her on 28 December 1988 she had found a CIA badge and that she had been advised by both Mr Forrest and a police inspector not to record its discovery. She did not know the identity of the inspector.

12.28 According to Ms Boylan after being precognosced by the Crown in Dumfries (on 2 March 1999) she was being driven home by a friend when she remembered finding the CIA badge. She had said to her friend "My God, I found a CIA badge and I didn't put it through my notebook." She later telephoned the fiscal depute who had precognosced her (who she recalled was Mr Logue) to inform him of this. According to Ms Boylan, Mr Logue said not to worry about this and told her that all the CIA badges had been returned to the US Government.

12.29 Ms Boylan informed the members of the enquiry team that the reason she had not mentioned the matter when precognosced by the defence prior to the trial was because the precognoscer was "too friendly" with police officers she knew and that she did not trust him with the information. She did not want the police to know that she had mentioned the CIA badge in her defence precognition and thought that her discovery of the badge was "hush-hush". She had held back the information because she "hoped to get in touch directly with the defence lawyers". She accepted, however, that she did not in fact do so until after the trial.

12.30 Ms Boylan described the badge she had found, saying "I think it was in a leather folder, that it was black leather with a badge on the front and I just flicked it over and saw 'CIA'. I do not remember any person's name." She was also asked to sketch the badge (see appendix).

12.31 During the interview Ms Boylan was shown the photographs of the US Special Forces badge or medal which according to D&G belonged to Mr Curry. However, Ms Boylan did not recognise this as the item she had found.

12.32 Ms Boylan was also shown an image of a CIA badge obtained by the Commission from an internet website (see appendix). Ms Boylan said that seeing this image had caused an "emotional reaction" in her and she appeared shocked and tearful. The badge in the image bore the words "Central Intelligence Agency" and a symbol which Ms Boylan described as having "spikes protruding from it". According to Ms Boylan it was similar to the item she had sketched earlier in the interview and matched the item she remembered finding.

- Crown Office

12.33 Following Ms Boylan's interview the Commission wrote to the Crown Agent seeking any information the Crown might have in relation to Ms Boylan's claims. By letter dated 14 February 2007 the Crown Agent confirmed that Ms Boylan had been precognosced by John Logue on 2 March 1999. According to the letter:

> "*She impressed* [Mr Logue] *with her detailed recollection of the piece of debris which was the subject of the precognition, part of Joseph Curry's baggage, and a book which she was able to describe in some detail before discovering a record which supported her recollection. As part of the effort to assist the defence in preparing for trial, her precognition was shared with the defence and her evidence was the subject of agreement as was the evidence of Derek Forrest who was precognosced by John Logue on 4 June 1999.*"

12.34 The letter added that Mr Logue had no recollection of Ms Boylan telephoning him about the finding of a CIA badge and that if she had done so then Mr Logue would have recorded this in her precognition.

- Derek Forrest

12.35 Mr Forrest was interviewed by the Commission. He said he knew Ms Boylan quite well in December 1988 and said that during searches on 28 December 1988 they were to corroborate one another's finds. Asked whether he remembered Ms Boylan finding a CIA badge on that day, Mr Forrest replied that he had no recollection of this. Mr Forrest said that his recollection of Ms Boylan's other find that day (a piece of suitcase rim) was "quite vivid" and so he thought that a CIA badge would "definitely have stuck" in his mind.

12.36 According to Mr Forrest no instructions were issued to hand over particular kinds of items to a senior officer, as is alleged by Ms Boylan. He did not recall advising Ms Boylan not to record any finding of a CIA badge and said that although he might be mistaken he was "99.9 per cent sure" that the incident described by her did not happen. Mr Forrest was also "99.9 per cent sure" that no instructions were issued "to treat particular finds in a special way". Mr Forrest thought Ms Boylan was "completely wrong" about finding a CIA badge and was "adamant" that it did not happen.

- Sir John Orr

12.37 Ms Boylan's allegations were also put to the former senior investigating officer in the Lockerbie enquiry, Det Chief Supt (now Sir John) Orr.

12.38 Sir John said that an instruction not to record items found during the searches would have been "contrary to the procedures of evidential procurement" and would border on "a possible attempt to pervert the course of justice". He considered Ms Boylan's allegations to be "centred in the realm of fantasy" and claimed they were "absolute nonsense". He denied that any such instruction had come from him and he

doubted whether one would have been issued without his knowledge. According to Sir John, anything of possible significance that was found during the searches had to go through proper channels and recording procedures. He said that he would expect to have been told about such a find if it had occurred, but he was not. He had never heard of a CIA badge being found and said that he did not give or condone any instruction to keep such a find quiet.

- Consideration

12.39 In the Commission's view there is little support for Ms Boylan's allegations and a good deal of evidence to undermine them. Her corroborating officer on the day in question, Mr Forrest, has no recollection of her finding a CIA badge and believes that he would have remembered if she had. In addition Mr Forrest was almost certain that no instruction had been given to the effect that such finds should not be recorded, and was supported in this by Sir John Orr. Furthermore, Mr Logue has no recollection of Ms Boylan telephoning to inform him of having found the badge and claims that if she had done he would have been recorded this in her precognition.

12.40 For these reasons the Commission does not consider that Ms Boylan's allegations are capable of being considered reliable by a reasonable jury or court.

(b) Alleged interference with a suitcase

12.41 The second issue under this heading concerns the alleged interference with a suitcase (recorded in the Dexstar log as PD/889) belonging to one of the passengers on PA103. Although the submissions make no reference to the identity of the passenger concerned, it is clear from the evidence at trial that this was a Charles McKee. According to section 34 of the police report Mr McKee was a Major in the "US Army Intelligence Section" and was attached to the US Embassy in Beirut, Lebanon. PD/889 was one of two suitcases belonging to Mr McKee that were recovered from the crash site, the other having been recorded in the Dexstar log as PD/120.

12.42 At trial it was agreed by joint minute number 1 that Mr McKee's suitcase, PD/889, was recovered near a farm on 30 December 1988 (7/1014). In evidence the forensic scientist, Dr Thomas Hayes, confirmed that he had examined the item on 20 January 1989 and was referred to the relevant page in his notes in which he had written the words "Labels, name tag, brand name apparently removed" (16/2636 et seq; CP 1497, p 22). Dr Hayes' notes also contained a sketch of the item on which he had written the words "Hole cut" near to his depiction of the handle of the case. Dr Hayes agreed with the suggestion put to him in cross examination that a hole had been cut in the vicinity of the locking mechanism of the case and that this had clearly not been caused by blast or impact damage. He also agreed that an inference could be drawn that someone had interfered with the case following the disaster but before it was made available for forensic examination. Dr Hayes' notes also contained reference to a plastic bag which had accompanied the suitcase and which bore a label marked "Contents of grey suitcase belonging to Charles McKee". In his notes Dr Hayes had said of this item "Contents: Assorted clothing which unlike the suitcase from which it was supposedly taken showed little evidence of explosives involvement". He agreed in cross examination that one interpretation of his use of the word "supposedly" was that the items did not on the face of them represent the contents of the suitcase (16/2640).

12.43 The presence of the hole in PD/889 was also referred to in the RARDE report itself (CP 181, section 4.2.12) which contained a photograph of the suitcase (CP 181, photograph 74).

12.44 Although the trial court was aware of the alleged interference with Mr McKee's suitcase there was no explanation given for this in evidence nor is there any such explanation in the relevant HOLMES statements or in the police report. The Commission therefore wrote to D&G on 14 December 2005 requesting all information in its possession as to who might have been responsible for the alleged interference. The Commission also enquired as to whether any items were removed from the suitcase (either permanently or temporarily) and whether records of such items existed. A response to these enquiries was not received from D&G until 29 November 2006. In the intervening period members of the Commission's enquiry team noted that there was reference to Mr McKee in JIG file X. D&G was informed

of this in order that they could take account of the contents of that file in preparing their response.

12.45 In its letter of 29 November 2006 D&G confirmed that there is no information held on HOLMES which would explain the hole that was allegedly cut in Mr McKee's suitcase and that no other records of any relevance had been found. As the letter made no reference to the contents of JIG file X, the Commission asked that this be examined to establish whether it contained any information relevant to Mr McKee's suitcase. In a further letter dated 4 December 2006 D&G confirmed that JIG file X contained several references to Mr McKee's property, as well as photocopies of various photographs and personal papers. The file was said also to contain an inventory of Mr McKee's effects which D&G assumed related to a separate entry in the Dexstar log, PD/1324 (described in the log as "Miscellaneous Leaflets/Papers, Charles McKee" found in PD/889). According to the letter, which was written by DCI Dalgleish, now senior investigating officer in the case:

> *"the presence of Mr McKee on PA103, along with certain others, appears to have been the focus of high level discussions between Senior Police, Security Service and American officials. It is clear that the American authorities were keen to recover any items that may have belonged to McKee in particular, which could be linked to their duties. It may well have been the case that certain items were not recorded in the normal manner to protect American interests but this is purely speculation on my part. Again it is my opinion that the Senior Investigating Officer would be aware if such a decision had been taken.*"

12.46 The Commission also enquired with D&G as to whether generally there was known to have been any deliberate or unintentional failures to record items found at the crash scene. In response DCI Dalgleish said that he was not aware of any such examples. Indeed, some years ago DCI Dalgleish had been part of an audit of all baggage and wreckage material held at Loreburn Street police station in Dumfries which, according to DCI Dalgleish, had established that "everything was recorded and numbered".

12.47 Given that D&G's responses did not provide any explanation for the presence of the rectangular hole which Dr Hayes said had been cut into Mr McKee's suitcase, the Commission considered it appropriate to carry out further enquiries in this connection. In the first instance the Commission enquired with the Crown Agent as to whether Crown Office had any information that might explain the presence of the hole. By letter dated 14 February 2007 the Crown Agent replied that Crown Office "does not possess any further information on this issue other than the evidence which was before the court…"

12.48 The Commission also requested D&G to arrange for photographs to be taken of both of the suitcases belonging to Mr McKee which had been recovered (ie PD/889 and PD/120). The photographs are reproduced below (with close ups of the rectangular hole in PD/889 and the combination lock of PD/120), along with Dr Hayes' sketch of PD/889.

12.49 The Commission also interviewed a number of witnesses whose accounts are summarised below (copies of their statements are contained in the appendix of Commission interviews).

- Kenneth Marshall

12.50 Mr Marshall (a retired police constable) confirmed that he and his colleague PC John Ritchie had found PD/889 in search sector D on 30 December 1988. He said

that the above photograph of PD/889 showed the condition of the suitcase at the time of its discovery. He recalled that it was "burst open" at the time and that there was a "big hole" in one corner of it. Mr Marshall could not remember whether the suitcase was open or shut when he found it but he recalled seeing an envelope addressed to Mr McKee which he believed was in the hole in the corner of the case. Mr Marshall's account of having found this envelope is consistent with what he said in his police statement (S646A, see appendix; CP 130).

12.51 When asked about the rectangular hole just above the handle on PD/889 Mr Marshall could not recall whether this had been present at the time he found the case. He was referred to the photograph of PD/120 above and agreed that the combination lock of that item was in the same position as the rectangular hole in PD/889. He accepted that it would be reasonable to infer that the hole had been caused by the absence of the combination lock. However, he had no recollection of removing a combination lock from PD/889 and believed that this was something he would have remembered.

- Stephen Comerford

12.52 Mr Comerford (a retired detective constable) said that for the first month after the explosion he was responsible for recording items found in search sector D and transporting these to the Dexstar property store. He explained that a member of the recovery team had found PD/889 and had handed it in to the collection point for that sector. Along with DC Ian McLure, Mr Comerford had logged the item in the production book and on 4 January 1989 transported it to the Dexstar store. Mr Comerford recalled that at that time the suitcase was bashed and partly open. Furthermore, the seals in the middle of the case had come away and the lock was open. He assumed at the time that the case might have been opened by the officers who had found it. He recalled seeing the rectangular hole in the case and the missing lock. He remembered thinking at the time that it was a "neat hole". It looked to him as if the locking mechanism had come out in one piece but he did not know what had caused this. After being referred to the photograph of the suitcase PD/120, Mr Comerford said that he suspected what was missing from PD/889 was its combination lock.

12.53 Mr Comerford explained that during the searches on 24 or 26 December 1988 he was accompanied by a man named Ralph Fadner. Mr Comerford was advised at the time that Mr Fadner was a Pan Am engineer but had suspected him to be an intelligence officer. (It is worth noting that Mr Fadner is described as a Pan Am engineer in a number of statements held on the HOLMES database as well as in a number of defence precognitions).

- William Williamson

12.54 Mr Williamson (a retired Chief Inspector) said that on 11 January 1989 he and DCI John (Jack) Baird were given an instruction by the senior investigating officer at the time, Det Chief Supt Orr, to examine baggage identified as belonging to Mr McKee at the Dexstar property store. According to Mr Williamson they were instructed by Det Chief Supt Orr to return to him with any items considered to be of "potential relevance to intelligence matters". Mr Williamson recalled that he and DCI Baird found a number of documents in PD/889 and PD/120 which indicated that they belonged to Mr McKee. He also recalled finding a series of photographs in one of the cases. He and DCI Baird removed these items and later the same day took them to Det Chief Supt Orr. Mr Williamson explained that no index was prepared of the items removed and said that it was only he and DCI Baird who had examined the cases that day. According to Mr Williamson there was absolutely no link in his view between the documents recovered from Mr McKee's suitcases and the PA103 bombing. He did not recall any difficulty opening PD/889.

12.55 Mr Williamson did not recall whether at that time there was a rectangular hole above the handle in PD/889. However, he confirmed that he and DCI Baird had not cut any holes in the case or removed anything like a combination lock. He agreed that the rectangular hole in PD/889 was in the same position as the combination lock in PD/120 and that it was reasonable to infer that the missing lock could explain the presence of the hole.

12.56 It is perhaps worth noting in this connection the following passage in DCI Baird's Crown precognition (see appendix) in which he refers to the items that were removed from Mr McKee's suitcases:

> "*I should also say that we were aware of the significance of McKee and his background and in fact there were within the case photographs which were passed on to Special Branch. We formed the view at the time that they were photographs of a Middle Eastern Building*."

- Sir John Orr

12.57 Sir John Orr was interviewed on two occasions in relation to this matter. At the first interview he said that he had no knowledge of any interference with Mr McKee's suitcase and had no explanation for the existence of the rectangular hole. However, this interview took place before the photographs of PD/889 and PD/120 were obtained by the Commission and before Mr Williamson had been interviewed in this connection. It was therefore considered appropriate to re-interview Sir John in light of that information.

12.58 At his second interview Sir John was shown the photographs of PD/889 and PD/120. He reiterated that he could not explain the presence of the rectangular hole in PD/889, although he agreed that the combination lock on PD/120 was in about the same position. Sir John could not recall instructing Mr Williamson and DCI Baird to examine the contents of Mr McKee's suitcase for intelligence-related items but he did rule out that this had happened. Sir John added that the events had taken place twenty years ago and that it was important to bear in mind that "this was a massive investigation and Charles McKee was not the focus of our enquiries".

- Consideration

12.59 The Commission has found no evidence to suggest that anyone other than Scottish police officers came into contact with Mr McKee's suitcase, PD/889, at the crash scene. Indeed, the fact that what were considered to be intelligence-related

items remained in Mr McKee's suitcases until removed by Scottish officers on 11 January 1989, after the hole in PD/889 had first been noticed by the police, tends to undermine any suggestion that that the suitcase might have been interfered with by intelligence agents in order to "spirit away" items contained within it.

12.60 The Commission has also found no evidence, beyond what was stated at trial, to support the allegation that the rectangular hole in that suitcase was cut after the disaster in order to gain access to its contents. At interview Mr Marshall (who found the suitcase) and Mr Comerford (who came into contact with it shortly after) variously described PD/889 as "burst open", "partly open" and as having a "big hole" in one of its corners. Indeed, it appears from both his original police statement and his account to the Commission that on 30 December 1988 Mr Marshall was able to extract from the case an envelope addressed to Mr McKee. Given the condition of the case at the time of its discovery it is difficult to understand why anyone would require to have cut a hole in the case or remove the locking mechanism in order to gain access to the contents. Indeed, in view of the location of that hole it is possible that this occurred as a result of the locking mechanism having been dislodged by the blast or by the fall or at the point of impact with the ground. In other words the hole in PD/889 might well have been made at the time of manufacture in order to accommodate the locking mechanism.

12.61 The question that requires to be considered by the Commission is whether the actions of the police in removing intelligence-related items from Mr McKee's suitcases are capable of amounting to an affront to the public conscience or of compromising the integrity of the justice system. In the Commission's view the facts as established fall well short of satisfying this test. As DCI Dalgleish states in his letter of 4 December 2006 it is clear that the US authorities were keen to retrieve items belonging to Mr McKee that could be linked with his official duties. This might explain the instructions which Mr Williamson claims he and DCI Baird were given to examine the contents of Mr McKee's suitcases. Had the items retrieved by them been material to the bombing then it is conceivable that their exclusion from the chain of evidence might amount to an abuse of process (although it would more likely form an appeal based on fresh evidence). However, the Commission has examined the relevant contents of JIG file X and is satisfied that the items referred to there bear no

relevance to the destruction of PA103. In other words it seems that the actions of the police were designed not to conceal material evidence but to assist in the recovery of intelligence-related items unconnected with the bombing. In these circumstances it does not appear to the Commission that the actions of the police amount to an abuse of process.

(2) Concerns over the control of witnesses

12.62 Various allegations are made in the submissions regarding the treatment of Majid and Mr Bollier by the US authorities. The credibility and reliability of both witnesses were major issues at trial and the court was prepared to accept only limited parts of their evidence.

12.63 The status of Majid as a paid informer of the CIA was referred to expressly in the trial evidence, as were his many meetings with the CIA. Indeed, the trial court commented at paragraph 42 of its judgment that Majid's "continued association with the American authorities was largely motivated by financial considerations" and that "[i]nformation provided by a paid informer is always open to the criticism that it may be invented in order to justify payment, and in our view this is a case where such criticism is more than usually justified." The court went on to say in paragraph 43 that it was "unable to accept [Majid] as a credible and reliable witness on any matter except his description of the organisation of the JSO and the personnel involved there".

12.64 In the Commission's view Majid's status as a paid informer of the CIA is not in itself something that would cause an affront to the public conscience or which compromises the integrity of the judicial system. The situation would have been different if there was evidence that the police or prosecution had colluded in inventing aspects of his account but the Commission has come across no such evidence. Accordingly, the Commission does not consider that an abuse of process has been established in this connection. The Commission has reached the same conclusion in respect of the allegations concerning Mr Bollier. Again the Commission knows of no evidence to suggest that the police or the Crown acted in any way inappropriately towards this witness.

(3) The role of the US authorities

12.65 The submissions also express concerns over the role of the US authorities in the investigation and prosecution of the case. However, the Commission has come across nothing to suggest that their involvement amounted to an affront to the public conscience or compromised the integrity of the judicial system. The investigation into the bombing of PA103 involved police forces and intelligence services from a number of different countries. The participation of US agencies is understandable given the number of passengers on the plane who were American citizens and the perception that the bombing was effectively an attack upon that country. Contrary to the suggestion in the submissions, the Commission sees no basis for concluding that the shift of focus in the investigation from the PFLP-GC to Libya resulted from anything other than natural developments in the police investigation (see chapters 7 and 8). Moreover leaving aside the issue of the CIA cables relating to Majid (see chapter 14 below) the Commission is not aware of any instances in which it could be said that the US authorities withheld material evidence from the police or the Crown.

12.66 Nor does the Commission consider that a sinister inference should be drawn from the presence of US officials in the well of the court. At interview with the enquiry team the applicant's trial solicitor Mr Duff was dismissive of any suggestion that the presence of those officials prejudiced the defence or the trial. In his view the officials concerned simply sat and watched the proceedings and were able to give advice about technical issues. According to Mr Duff this seemed perfectly understandable.

Conclusion

12.67 The Commission does not consider that any of the matters raised in the submissions can be said to amount to an abuse of the court's process in terms of the principles approved in *Brown v HMA*. In these circumstances the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 13
KHALED JAAFAR

Introduction

13.1 Since the time of the bombing a substantial number of allegations have been made as to the possible involvement of Khaled Jaafar, a passenger on PA103 who boarded PA103A at Frankfurt. In volume A of the application (chapters 12 and 16.8) some of those allegations are repeated and a number of questions are raised as to Mr Jaafar's reasons for being on the flight and as to possible links between his recovered belongings and the explosive device. Although further reference is made to Mr Jaafar in the section of chapter 14 which relates to the "Goben memorandum", it is appropriate to deal separately with the submissions that concern him directly.

The applicant's submissions

13.2 It is submitted that within days of the crash there was speculation in the media about Mr Jaafar's role in the explosion. It was reported in the media that he was a drugs courier acting on behalf of the US Drug Enforcement Agency ("DEA") and that he might have been duped into carrying the bomb on board PA103. According to the Golfer (see chapter 5 above), Mr Jaafar was initially one of the prime suspects in the case and the Golfer had produced a profile of him which it is said would have been recorded on the HOLMES system. The submissions also refer to Juval Aviv, a former Mossad agent who was commissioned by Pan Am to investigate the cause of the crash, and whose report (the "Interfor" report) repeated the allegations that had been made about Mr Jaafar in the media. Similar allegations were also made in a book "Trail of the Octopus" written by a former DEA agent, Lester Coleman.

13.3 It is also suggested in the submissions that a former CIA agent, Robert Baer, (see chapter 15) could confirm that Mr Jaafar was a member of the Popular Front for the Liberation of Palestine – General Command ("PFLP-GC"), and that the El Salheli

brothers, with whom Mr Jaafar associated in Dortmund before he boarded the flight at Frankfurt on 21 December 1988, were also members of that organisation.

13.4 According to the submissions the Crown's position was that only one passport belonging to Mr Jaafar was recovered from the crash site, although it was accepted that he held two, namely a US one and a Lebanese one. A witness, Yasmin Siddique, testified to having seen Mr Jaafar with a US passport when he checked in at Frankfurt, but it was his Lebanese passport that was produced at trial.

13.5 The submissions suggest that prior to the trial the defence investigated the situation concerning the passports in order to establish Mr Jaafar's movements in the period leading up to the bombing. Reference is made to the entry in the Dexstar log (CP 114) for item PH/504, the recovered passport, which indicates that it was found on 3 January 1989 by DC John Crawford and another officer (identified from other records as David Freeburn). The nationality of the passport is not specified in the entry. The "disposal of property" column within the log indicates that this passport was returned to its owner's representative on 28 April 1992. Despite this, a Lebanese passport in Mr Jaafar's name was lodged as Crown production number 1307 (under the police production reference DC/1730). According to the submissions it is not known how Crown production number 1307 came into the possession of the police and the Crown. The submissions refer to a statement given by FBI Special Agent David Edward in which he said that the FBI had this passport in connection with ongoing investigations which were being made in the US concerning the allegations by Juval Aviv and Lester Coleman.

13.6 It is suggested in the submissions that the passport which was recorded in the Dexstar log as PH/504 was actually Mr Jaafar's US passport rather than the Lebanese passport produced at trial. It is asserted that David Freeburn, one of the finders of the passport, provides some support for this contention. In early 2003 he was interviewed on behalf of MacKechnie and Associates and according to the submissions his opening words were "Have you come about that passport?" Thereafter Mr Freeburn was shown a copy of Mr Jaafar's Lebanese passport (CP 1307) and a copy of his application for a US passport (CP 1308). Both contained photographs of Mr Jaafar.

Mr Freeburn was uncertain which of the passports he had found, but said the photograph in the US passport application looked familiar to him.

13.7 According to the submissions the Golfer could confirm that during the police investigation he had possession of Mr Jaafar's US passport, which he had arranged to be photographed at Strathclyde Police headquarters. It is alleged that thereafter it was taken for fingerprinting to a Metropolitan Police laboratory in London, where it was handed over to John Creer (in fact it was Kenneth Creer, see below) and John Irving.

13.8 A further matter raised in the submissions is that in his defence precognition DC John Crawford stated (at p 111) that during an examination of immigration cards received from the Maltese police he found a card with the name "Jaffer Khaled" which indicated that this individual had left Malta on 20 June 1988. According to the submissions the defence made no attempt to investigate this embarkation card prior to the trial.

13.9 The submissions also refer to the Crown's position that Mr Jaafar checked in only two items of luggage (productions PD/403 and PD/825) and that neither showed any sign of scorching or blast damage. It is pointed out that neither of these items had attached to it a Pan Am label which, according to the submissions, one would expect to have found had they been checked in to the hold. In addition, PD/825 was said to contain travel documents, which indicated that it might be hand luggage. The submissions refer to the passenger manifest for PA103A (CP 199) which showed that Mr Jaafar checked in only two bags. According to the submissions the joint minute agreeing this evidence (joint minute number 13) was signed by the defence despite the possibility that an additional bag, which was not recovered or identified, might have been checked in by Mr Jaafar.

13.10 It is submitted that support for this proposition is contained in the Dexstar log in which it is recorded that on 20 February 1989 an item with the reference PH/695 was found. According to the submissions this item was described in the log as "a piece of brown material, (possibly suitcase lining)" and was identified as belonging to Khaled Jaafar. The entries for items PH/696 to PH/705 all relate to PH/695 and indicate that they were found "within suitcase lining". It is submitted that the police

officers who originally dealt with PH/695 were in no doubt that it was a piece of suitcase lining. The application refers to the evidence of a police officer, William Williamson, in which he referred to PH/695 (65/7982-7994). According to the submissions, Mr Williamson's testimony demonstrates that the applicant's defence team at trial was aware of the existence of PH/695 and the items linking it to Mr Jaafar. The submissions state that although the allegation might have been made that the defence should have carried out tests on PH/695 to ascertain its origins, it is clear from the Dexstar log that this item and the items connected with it were returned to their owner's representative on 28 April 1992. The submissions allege, however, that the presence of PH/695 and its contents should have alerted the applicant's defence team to the danger of signing a joint minute which, according to the submissions, accepted that Mr Jaafar was in possession of only two bags.

13.11 Reference is also made in the submissions to the fact that multiple copies of pages from the Koran were included in Mr Jaafar's personal property recovered from the crash site. According to the submissions informal opinions obtained by MacKechnie and Associates from various "Muslim contacts" indicate that the contents of these pages deal with an individual's fear for his own safety.

Consideration

13.12 As the trial court recognised (paragraph 75 of its judgment), there was evidence that before travelling to Frankfurt airport Mr Jaafar had two holdalls in his possession. The passenger manifest for flight PA103A (CP 199) indicates that he checked in two items of luggage, both of which the trial court accepted had been found close by one another at the crash scene. Neither had suffered any explosion damage.

DEA operation

13.13 The submissions refer to the claims made by Lester Coleman, Juval Aviv and various media reports to the effect that Mr Jaafar was a DEA mule tricked into carrying the bomb onto PA103. In the Commission's view there is no evidence capable of being considered credible and reliable by a reasonable court to support

these claims, which in any event were well known to the defence prior to trial. Furthermore, Mr Coleman pled guilty to a charge of perjury in respect of allegations he had made about Mr Jaafar in a sworn statement, further details of which are given below.

Robert Baer

13.14 The submissions refer to comments attributed to Robert Baer suggesting that Mr Jaafar and the El Salheli brothers were members of the PFLP-GC. It appears from a file note provided with the application that Mr Baer made these comments at a meeting which took place with a journalist, John Ashton, on 9 February 2002. However, according to a another file note provided with the application, dated 10 February 2002, Mr Baer confirmed to Mr Ashton that he could find no information to back up these claims and that he might be mistaken about what he had said. Copies of those file notes are contained in the appendix to chapter 15. Accordingly there is nothing in the submissions which causes the Commission to doubt the evidence given at trial by Hassan El Salheli to the effect that Mr Jaafar arrived in Dortmund on 8 November 1988 with the same two holdalls as he had in his possession when he left to travel to Frankfurt on 21 December, and that to Mr El Salheli's knowledge these contained only clothing.

Passport PH/504

13.15 As indicated, it is suggested in the submissions that the passport recovered from the crash scene and given the reference PH/504 was Mr Jaafar's US passport and not his Lebanese one as maintained by the Crown at trial. In support of that suggestion reference is made to Yasmin Siddique's evidence at trial; to an allegation by the Golfer that he had possession of the US passport and had it photographed prior to it being sent for fingerprinting; and to a precognition of David Freeburn (see appendix), one of the finders of PH/504, in which he said that although he could not recall which passport he had found, the photograph on Mr Jaafar's US passport application looked familiar.

13.16 Reference was made in the evidence at trial to the two passports belonging to Mr Jaafar. The Lebanese passport (CP 1307) was spoken to by Ian Howatson (65/7954 et seq) and Mr Jaafar's use of his US passport at passport control in Frankfurt airport was spoken to by Ms Siddique (67/8193).

13.17 The HOLMES statement of Mr Freeburn (S1823: see appendix) and the Dexstar log entry for PH/504 (see appendix) indicate that he found Mr Jaafar's passport on 3 January 1989 in H sector, but neither source contains details as to the nationality of the passport. As the submissions point out, the Dexstar log indicates that PH/504 was returned to its owner's representative on 28 April 1992. The submissions suggest that, assuming PH/504 is indeed Mr Jaafar's Lebanese passport, it is not known how this came to be in the possession of the Crown at trial.

13.18 By letter dated 13 June 2005, D&G advised the Commission that on 8 May 1992 DS Thomas Gordon (S2481F: see appendix) in the presence of DC Derek Henderson (S452CC: see appendix) handed over Mr Jaafar's Lebanese passport to the US Consul's Office. According to various HOLMES statements referred to in the letter the purpose of this was "for return to the families of American victims".

13.19 However, in terms of a letter dated 28 December 1993 (see appendix), a copy of which was provided to the Commission by D&G, confirmation was given by the US Department of Justice to Crown Office that Mr Jaafar's Lebanese passport was being held by the FBI for use in the trial of Lester Coleman in the US. The letter also refers to the passport as bearing the reference PH/504. According to the defence precognition of FBI Special Agent David Edward (see appendix) the charge against Mr Coleman was one of perjury relating to an affidavit sworn by him in which he made various allegations against Mr Jaafar. The precognition also refers to Mr Coleman's plea of guilty to this charge and to his "plea allocution" (ie the formal statement which Mr Coleman made to the court in connection with his plea of guilty). According to the plea allocution (a copy of which was passed to the Commission by D&G: see appendix) Mr Coleman accepted that he had no basis for alleging that Mr Jaafar was ever involved in drug smuggling, or had anything to do with terrorists, or played any role, witting or unwitting, in placing the bomb on board PA103. Mr

Coleman also apologised to the parents of Mr Jaafar for making these allegations. According to Mr Edward's precognition Mr Jaafar's US passport was never found.

13.20 According to Mr Edward's HOLMES statement (S5847: see appendix), he recovered Mr Jaafar's Lebanese passport at the request of Mr Brisbane of Crown Office and handed it to DC Richard Brown on 5 November 1999. In the statement the passport is given the reference DC/1730. At the same time he handed over the certified copy of Mr Jaafar's US passport application to DC Brown (DC/1731).

13.21 As regards the Golfer, in his second interview with the Commission he confirmed that during his involvement in the police enquiry he produced a profile on Mr Jaafar which included details as to his movements (p 20 et seq of 14 December 2005 statement, see appendix of Commission's interviews). The Golfer's position was that he could not be absolutely certain but that he was "sure" two passports belonging to Mr Jaafar had been recovered. He stated that he arranged for these to be photographed and took them to London for fingerprinting. He said he could remember one of them being a US passport. He was asked if he recognised the photograph on Mr Jaafar's application for a US passport (p 25 of 14 December 2005 statement, although the statement wrongly refers to this as a visa application) and he confirmed that he did. He thought it had been attached to documentation, either a passport or a visa application, which had come from Mr Jaafar's personal effects.

13.22 The Commission's conclusions in respect of the Golfer's accounts are set out in chapter 5. As indicated, the Commission does not consider him to be a credible witness. In relation to his claims about Mr Jaafar, the Commission has found no records to suggest that two passports were recovered. In any event it is notable that the Golfer did not claim the US passport contained evidence of any sinister movements by Mr Jaafar, which calls into question why there would be any need to conceal its recovery.

13.23 Various documents identified as relating to Mr Jaafar were taken to the Metropolitan Police laboratory for fingerprinting and were dealt with there by witnesses named John Irving and Kenneth Creer. In his signed statement of 5 July 1989 (S4587: see appendix to chapter 9) Mr Irving, who was a senior identification

officer at the laboratory, states that on 8 April 1989 he received a number of items including Mr Jaafar's passport PH/504 which he processed for finger and palm marks. The items from which marks were recovered were then handed to Mr Creer to be photographed (S4585: see appendix).

13.24 The Commission obtained the photographs referred to in these statements (see appendix). Two of them bear the reference PH/504 and show the page of a passport containing Mr Jaafar's photograph. These photographs are entirely consistent with the relevant page of Mr Jaafar's Lebanese passport (CP 1307) and are wholly inconsistent with the photograph in his US passport application (CP 1308). In the Commission's view the photographs provide convincing evidence that PH/504 was the Lebanese passport belonging to Mr Jaafar. This reflects D&G's position, as confirmed in its letter to the Commission of 13 June 2005. According to the letter PH/504 is Mr Jaafar's Lebanese passport and is exactly the same item as formed Crown production number 1307 and police production DC/1730. D&G also provided to the Commission a copy of Mr Jaafar's passport held on HOLMES and a separate colour copy of the passport which was held elsewhere in their records. Both are identical to the Lebanese passport (CP 1307). In a letter dated 23 June 2005 D&G confirmed that Mr Jaafar's US passport was never recovered.

13.25 As a result of these enquiries the Commission is entirely satisfied that it was Mr Jaafar's Lebanese passport that was recovered after the explosion of PA103 and that his US passport was not found.

PH/695

13.26 The submissions suggest that the item PH/695, which was described in the Dexstar log as possibly being suitcase lining, might have established that Mr Jaafar had an additional piece of luggage in his possession on the flight (see appendix for the relevant extract from the log). The submissions suggest that despite its "blatant" relevance to the defence this evidence was returned to its owner's representatives in 1992. It is also submitted that the mere existence of PH/695 should have been enough to alert the defence to the dangers of signing a joint minute agreeing that Mr Jaafar was in possession of only two bags.

13.27 As regards that latter assertion, the application proceeds on a misunderstanding of the position at trial. The joint minute in question (number 13) confirmed only that Mr Jaafar checked in two bags and that two bags identified to him were recovered from the crash site. It did not contain any agreement that Mr Jaafar was in possession of only two bags.

13.28 According to the HOLMES statement of DC Denis Feeney (S35H: see appendix) he was a member of the team of officers searching H sector at CAD Longtown on 20 February 1989 when he recovered PH/695. In his statement DC Feeney describes the item as a piece of "pocket lining containing documentation identifying it to Khaled Jaafar." This account is supported by the HOLMES statement of DC Graham Clark (S1977L: see appendix).

13.29 The submissions point out that there is no record in the Dexstar log of PH/695 being transported to RARDE, but that a laboratory request form dated 21 February 1989 records the transfer of the item to William Williamson for transmission to RARDE (CP 288, image 329). A note attached to that form indicates that PH/695 was flown to RARDE that day but was not logged there and was returned to the productions office the same day. The notes of the forensic scientists (CPs 1497 and 1498) do not contain any reference to an examination of the item that day. There is, however, a forensic examination note dated 29 March 1990 recording Mr Feraday's examination of PH/695 (CP 1498-E019). That note indicates that that PH/695 was "NPES", the abbreviation for "no particular explosive sign", suggesting that the fragment was not associated with the primary suitcase. Mr Feraday's examination was conducted at Lockerbie in the presence of DC McManus (as noted in CP 1498-E006). The next record of the item is in the HOLMES statements of DS Gordon (S2481F) and DC Henderson (S452CC) which indicate that on 28 April 1992 it was passed to a US Government representative to be returned to Mr Jaafar's family. As indicated, this is reflected in the relevant entry in the Dexstar log.

13.30 William Williamson was the only witness who gave evidence about PH/695 at trial (65/7982-7994), but owing to a successful defence objection he was not asked the result of the forensic examination of the item in February 1989. Mr Williamson

was asked about the item at interview with the Commission's enquiry team on 5 January 2006 (see appendix of Commission interviews). His recollection was that on 20 February 1989 his team was searching a particular sector at CAD Longtown. Two police officers, namely Dennis Feeney and Graham Clark, were side by side examining the debris when one of them found PH/695 which was a piece of brown material with other bits of material attached to it. Some of the items within PH/695 bore Mr Jaafar's name. Mr Williamson did not witness officers Feeney and Clark finding PH/695 but they had shown him the item.

13.31 Mr Williamson said that at the time this find generated a lot of excitement amongst the officers because PH/695 appeared identical to what the officers remembered the lining of the fragments of primary suitcase to be like. The officers had been shown fragments of the primary suitcase earlier that month. Mr Williamson said that he and officers Feeney and Clark were so sure that they had found something of real significance that they all went to Lockerbie to tell the then senior investigating officer John Orr about it. However, they did not at the time have a piece of the primary suitcase with which to compare the fragment. Mr Orr thereafter called a meeting of senior officers and a decision was reached that Mr Williamson should go to RARDE the next day so that PH/695 could be compared to the suitcase lining.

13.32 Mr Williamson said that on 21 February 1989 he took PH/695 to RARDE. His recollection was that another officer, Gordon Ferrie, accompanied him on that visit. When they arrived at RARDE, one of the forensic scientists examined PH/695 although Mr Williamson could not recall for certain whether this was Mr Feraday or Dr Hayes or whether they were both present. Mr Williamson recalled that upon examination it was immediately clear that PH/695 was not part of the lining of the primary suitcase. Moreover, the scientists could see at that point that PH/695 showed no sign of explosive damage. The Commission's enquiry team also asked Mr Feraday and Dr Hayes about the examination of PH/695 but neither had any recollection of this.

13.33 Mr Williamson was asked at interview why there was no police statement from him or anyone else regarding the outcome of this examination at RARDE. He replied that if PH/695 had been found to be of significance then a statement would

have been noted. However, as the item was found to be of no significance it was no more important than hundreds of other items. Mr Williamson said that he understood that PH/695 turned out to be a piece of pocket from an item of Mr Jaafar's clothing. He thought that it might have come from a piece of the brown leather jacket worn by Mr Jaafar.

13.34 The Commission also requested information from D&G regarding PH/695. In a letter dated 13 June 2005, D&G advised that a number of other items had been linked to PH/695. As well as the various items found within it, reference was made in the letter to PH/887 which is described in the Dexstar log as a piece of brown material possibly connected with PH/695 (see appendix). According to D&G's letter PH/887 was described on 22 January 1991 as being part of a brown leather jacket although no further information is given about this. The letter states that the outcome of enquiries appeared to suggest that PH/695 was from a jacket as opposed to a suitcase and reference is made to the HOLMES statements of officers Clark and Feeney (above) in which they described PH/695 as pocket lining. D&G's letter also confirms that no photographic record of PH/695 could be found and that apart from the laboratory request form (CP 288, LPS 329 referred to above) no other documentation could be found regarding the forensic examination of the item. The letter makes no reference to Mr Feraday's examination of PH/695 on 29 March 1990.

13.35 In the Commission's view the enquiries narrated above, in particular Mr Williamson's recollections about the result of the forensic examination of PH/695 on 21 February 1989 and the examination note by Mr Feraday on 29 March 1990, leave no basis for suggesting that PH/695 was connected to the primary suitcase.

Embarkation card in the name "Jaffer Khaled"

13.36 The submissions refer to a passage in the defence precognition of DC John Crawford in which he refers to an embarkation card in the name of "Jaffer Khaled." This card was not referred to in the evidence at trial. According to the precognition DC Crawford seized a number of Maltese embarkation cards in January 1991 which included one in the name of "Jaffer Khaled", which indicated that the person in question left Malta on 20 June 1988. The Commission notes that a defence

precognition of DI Peter Avent also refers to this embarkation card, as do the HOLMES statements of both officers (S609AX and S5388C respectively, see appendix), although there the name of the individual is given as "Khaled S Jaafer".

13.37 The submissions criticise the defence at trial for not investigating whether the card was of significance. However, the Crown and defence profiles of Mr Jaafar both suggest that he was in the US on 20 June 1988. There is also no indication in his Lebanese passport that he travelled either to or from Malta in 1988 and his US passport was not issued to him until 24 June 1988, four days after "Khaled S. Jaafer" left Malta. Moreover, the initial in that name is inconsistent with the individual being Mr Jaafar whose middle name, as recorded on his Lebanese passport, is Nazir. In these circumstances, it is doubtful that the embarkation card in the name "Khaled S Jaafer" (or "Jaffer Khaled") relates to the Khaled Jaafar who was killed on PA103. In any event, it is difficult to see how the latter's presence in Malta in June 1988 could itself be significant given that there is nothing to link Mr Jaafar's recovered belongings to the explosive device.

The pages from the Koran

13.38 Reference is made in the submissions to multiple pages of the same verse of the Koran which were found in Mr Jaafar's luggage (see CP 197, image 1; see also the evidence of Ian Howatson: 65/7963-4).

13.39 The Commission instructed the Language Centre at the University of Glasgow to translate the pages in question along with two other documents found within Mr Jaafar's luggage. This confirmed that the pages were indeed multiple copies of a particular verse of the Koran (see appendix). A further report was thereafter obtained from the Centre for the Study of Islam at the university as to the meaning of the verse (see appendix). In terms of the report the verse is a popular one which is often recited by Muslims before they go to sleep and may also be read to the sick by family members. The report explains that one does not have to be ill or in danger to recite the verse.

Conclusion

13.40 In the Commission's view the results of its enquiries provide no support for the allegation that Mr Jaafar was involved, unwittingly or otherwise, in the bombing of PA103. Accordingly, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 14
ALLEGED NON-DISCLOSURE BY THE CROWN

Introduction

14.1 In the application to the Commission a number of submissions were made alleging failures by the Crown to disclose material to the defence. In this chapter four specific areas are addressed, namely (1) the Bundeskriminalamt ("BKA") papers, (2) the CIA cables, (3) the Goben memorandum and (4) information in relation to the incriminees. Further issues in relation to disclosure are addressed in chapters 22-25.

(1) The BKA papers

Introduction

14.2 The BKA is the national criminal police force of the reunified Germany and, at the time of the bombing, was the national force for the former West Germany. It was responsible for the "Autumn Leaves" operation on 26 October 1988 which resulted in the arrest of various PFLP-GC members, and was also involved in investigations into the destruction of PA103. As such, the BKA had in its possession a substantial number of files relating to both incidents most, if not all, of which were in German.

The applicant's submissions

14.3 It is alleged on behalf of the applicant that the Crown refused to provide the defence with copies of translated versions of the BKA files which it had obtained prior to the trial. A similar allegation was made by Mr MacKechnie of MacKechnie and Associates at a meeting with members of the enquiry team, when he asserted that the defence had attempted to carry out its own translation of the files but required to abandon this process, incomplete.

Consideration

14.4 Prior to the trial, the defence obtained copies of various untranslated BKA files from the German authorities and sought copies of the English translations of these from Crown Office. Specifically, by letter dated 2 August 1999, the applicant's representatives requested the English translations of the files relating to the Autumn Leaves operation. In its response dated 17 August 1999 Crown Office said that steps had already been taken to clear the release of the English translations of these files with the German authorities. On 5 September 1999 Crown Office advised that before the translated files could be disclosed the Crown was obliged to request the German authorities formally to release the files to them, and that it would thereafter require to cross-refer these to the untranslated files which had been released.

14.5 Subsequently, however, in a letter dated 8 October 1999, Crown Office informed the defence that it would only be with the permission of the German authorities that it could disclose either the German text of any of these files, or the English translations. According to the letter, before the German authorities would authorise this they required Crown Office to satisfy them that the translated material did not include any material which was not in the "official" files i.e. those lodged with the German court. However, without a German/English speaker to check this, there was no way in which Crown Office could satisfy the German authorities on this point. Crown Office suggested in the letter that a translator could carry out this task, and confirmed that the Lord Advocate would be prepared to issue a letter of request to Germany requesting that the defence be given access to the files.

14.6 Thereafter, on 1 November 1999, the applicant's representatives wrote to Crown Office saying that their understanding from the German authorities was that the defence had been given copies of everything and therefore that they had the same untranslated materials as the Crown itself had.

14.7 On 5 November 1999, identical devolution minutes were lodged on behalf of both accused, in which access was sought to the translated versions of the BKA's Autumn Leaves files as well as to those relating to the PA103 investigation. According to the minutes, Crown Office had obtained the Autumn Leaves files from

the Federal Prosecutor in Germany in response to a letter of request in 1989 and had then had these translated. Although the German Federal Prosecutor had granted the defence access to parts of the Autumn Leaves files in their original form, according to the minutes the time it would take the defence to translate these would be likely to necessitate an application for postponement of the trial.

14.8 The devolution minutes also made reference to the BKA's investigations into the bombing of PA103. According to the minutes the resulting 170 files, amounting to approximately 40,000 pages, had been forwarded to the Crown by the German authorities and had been translated. Although the German authorities had given the defence access to these files in their original form, again it was averred that the time it would take to translate these would be likely to necessitate an application for postponement of the trial.

14.9 Shortly before the preliminary hearing on the minutes which took place on 22 November 1999 Crown Office provided the defence with six floppy disks containing translations of the BKA's Autumn Leaves files. Five further disks were disclosed to the defence on 26 November 1999 containing what Crown Office described as a substantial part of the material from the BKA's "investigative" files, i.e. those relating to its investigation into the bombing of PA103. On 3 December 1999, following further court procedure, Crown Office provided the defence with what were said to be the outstanding translations. In its letter of that date, however, Crown Office explained that a small amount of documentation relating to communications between prosecutors and police in Germany and the UK had not been disclosed. According to the letter there was nothing in the nature of evidence in this material, nor did it contain the type of information ordinarily amenable to recovery through the courts.

14.10 According to the minutes of a further hearing which took place on 8 December 1999 counsel for the applicant and the co-accused accepted that the matters raised in the respective devolution minutes had been satisfactorily resolved. The court thereafter allowed the devolution minutes to be withdrawn.

14.11 This version of events was broadly reflected in what Mr Beckett told members of the Commission's enquiry team at interview. According to Mr Beckett the Crown said that it had applied the *McLeod* test (which the Commission has set out below in relation to the CIA cables issue) and gave an assurance that all materials had been disclosed except for a small amount that was subject to public interest immunity which the Crown said did not contain anything exculpatory. Although it was a concern to the defence that the Crown had exercised its judgment about the undisclosed materials, in Mr Beckett's view it was not possible for the defence to do any better given that the principles of *McLeod* had been met.

14.12 Mr Beckett was also asked about Mr MacKechnie's allegation that the defence had required to translate the BKA materials throughout the trial, but in the event were forced to abandon this process when it was still incomplete. Mr Beckett could not remember this having occurred but said that this did not mean that it did not happen. He added, however, that the defence knew what was in the BKA materials. There was a file on Autumn Leaves, as well as a batch of general BKA files. According to Mr Beckett, defence solicitors went through these files and counsel were given synopses of them. Much of the material was lodged as productions, and some was led in evidence and brought out at cross examination. As the defence knew what was in the materials, Mr Beckett presumed there must have been English copies. Mr Beckett did not think that the defence had been hampered by anything concerning the disclosure of the BKA papers.

14.13 The Commission sought access to those sections of the BKA materials that were withheld from the defence. However, by letter dated 26 May 2006, Crown Office advised that having reviewed their files they had not been able to find any copies of this material or any information in relation to their consideration of it (see chapter 4).

Conclusion

14.14 The Commission is satisfied in light of the above that the Crown eventually disclosed the translations of the BKA files to the defence, and therefore that the allegation made on behalf of the applicant is without merit. While the defence might

very well have carried out its own translation of this material, there is nothing to suggest that it was prejudiced by any inability to complete such an exercise.

14.15 As far as the undisclosed material is concerned, the Commission was unable to assess the significance of this for itself, but it has no reason to doubt the Crown's assurances as to its content. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred in this connection.

(2) The CIA cables

Introduction

14.16 It is alleged on behalf of the applicant (see chapter 12 of volume A) that the Crown's approach to the disclosure of CIA cables concerning the Crown witness Abdul Majid Giaka ("Majid") amounted to a breach of the Crown's duty of disclosure as set out in *McLeod v HMA* 1998 SCCR 77. It is also alleged that the applicant's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention") was violated.

14.17 The Commission has set out below a summary of the submissions on which these allegations are based.

The applicant's submissions

14.18 It is alleged in the submissions that important information in the CIA cables concerning Majid's credibility and reliability was deliberately hidden from the defence, and that details which would have strengthened the incrimination defence were left "out of reach". According to the submissions, the events at trial surrounding the disclosure of the cables exemplify the amount of material kept hidden from the defence, and demonstrate that the disclosure of information was controlled by a third party, namely the US authorities.

14.19 According to the submissions the Crown included in its list of productions on 5 November 1999 25 heavily redacted CIA cables (CPs 804-828) consisting of reports

of meetings between Majid and his CIA handlers in Malta. The redactions were made by the CIA and the US Department of Justice. On 16 December 1999 the co-accused's representatives requested disclosure of all such material and suggested that the Crown obtain a letter of request for this purpose. In response the Crown said that it had not seen the unedited versions of the cables. CIA personnel precognosced by the defence suggested that all cables relating to Majid had been produced. Subsequently, annotations to the redacted passages in the cables were disclosed.

14.20 According to the submissions on 21 August 2000 the advocate depute Alastair Campbell QC informed defence counsel, apparently informally, that the Crown had seen the unedited cables. On the following day the defence asked the court to invite the Crown to provide complete versions of the cables. The Lord Advocate opposed this motion, arguing that the redacted sections had "no bearing upon the cables themselves." In particular, the advocate depute who saw the cables, Alan Turnbull QC, had concluded that they contained "nothing…that bore upon the defence case." The Lord Advocate added that in any event he did not have control over the documents, which lay with the US authorities. He repeated to the court that there was "nothing in these documents which related to Lockerbie or the bombing of PA103, or which could in any way impinge upon the credibility of Mr Majid in these matters."

14.21 In the event, the court invited the Lord Advocate to use his "best endeavours" to bring about the disclosure of all material in the cables, adding that some passages might require to be deleted if they concerned matters which could put lives at risk, would be prejudicial to national security or, in the opinion of the Lord Advocate, could have no relevance to any of the issues at trial. Accordingly, it is submitted that the Lord Advocate was given a discretion to withhold material on grounds of national security (ie in terms of public interest immunity).

14.22 Fresh copies of the 25 cables, along with one new cable, were provided to the defence on 25 August 2000. The Lord Advocate explained to the court that the cables "have now been produced in their entirety, except for those areas which relate to the safety of individuals, to the national security of the United States and to relevance." He added that a broad view had been taken of the latter issue. Although there were a

good deal fewer redactions, according to the submissions the defence was disturbed to see that certain of the new passages were highly relevant, eg comments by Majid's handlers that they considered him to be motivated by monetary reward. In light of this, counsel for the co-accused submitted that it was "inconceivable" that the Crown could have considered this material as anything other than relevant to the defence. The submissions point out that the less redacted versions of the cables suggested the existence of other cables.

14.23 On 28 August 2000, the Lord Advocate explained that the Crown's access to the unedited cables had taken place in restricted conditions. No notes were permitted to be taken and both Mr Turnbull and Norman McFadyen (the then Regional Procurator Fiscal, who also viewed the cables) were required to sign an undertaking as to the purpose of the exercise. According to the submissions the precise nature of this undertaking was not known to the defence despite enquiries they had made (it is not clear whether these were undertaken by the applicant's trial solicitor, or more recently by MacKechnie and Associates). In particular it was not known whether its terms might have breached the Crown's duty of disclosure. According to the submissions the picture presented is one in which the US authorities, rather than the Crown, were in control of information.

14.24 Following disclosure of the less redacted versions, the defence sought letters of request directing the US to disclose the complete cables. The Lord Advocate opposed that motion on the basis that it would cause considerable delay, and also that there was "no way" the US would release the unredacted versions. The court refused the defence motion, partly on the basis of delay, and asked the Lord Advocate simply to use his best endeavours to obtain any other cables.

14.25 The Lord Advocate advised the court on 21 September 2000 that he had disclosed a further 36 cables to the defence. According to the submissions it was clear to the defence from these cables that a substantial amount of information should have been disclosed previously. For example, the new cables indicated that the co-accused was not a member of Libyan intelligence, that the supposed "dummy run" by Nassr Ashur, referred to in charge 2(a) of the indictment, actually arose from a re-routing of the flight to Frankfurt due to bad weather and that Majid had previously

told his handlers that he had no information about PA103. According to the submissions the terms of these new cables suggested yet again that others had not been disclosed.

14.26 In terms of the submissions, the defence thereafter "asked the court to request the Lord Advocate to call upon the CIA to produce all information in its possession relating to the alleged involvement of Talb and the PFLP-GC." The court refused. The court also refused a further defence motion in which letters of request were sought directing the US to disclose the information referred to in the earlier motion.

14.27 In conclusion, the submissions allege that the defence was given only that information which was deemed appropriate by the Lord Advocate who, in turn, was given only that deemed appropriate by the US authorities. There was no effective review by the court of the material in question and no judicial protection of the rights of the applicant. According to the submissions it is surprising that the court dealt with the disclosure issues in ignorance of the Convention and by means of the traditional reliance upon the Lord Advocate's views. Such an approach is said to be made all the more unattractive by the fact that the Lord Advocate misled the court on the matter. By relying upon the Lord Advocate to determine what information should be released, the trial court is alleged to have violated article 6 of the Convention. In terms of that provision it is the *procedure* for disclosure (or lack thereof) which constitutes the breach. In other words, what matters is not the difference which disclosure would have made but the method of disclosure and the decision making processes involved.

14.28 According to the submissions, while the court rejected most of Majid's account, it still relied upon him for "one crucial piece of evidence", namely the applicant's membership of the JSO. In these circumstances, it is submitted that the cables and the disclosure of their contents remain a material issue. It could not be said, for example, that the failures in respect of disclosure no longer mattered because the evidence of the witness had been entirely rejected. Moreover, the unredacted cables contained more that just information about Majid. Their limited disclosure also led to the deletion from the indictment of the allegation concerning the dummy run. According to the submissions, such an allegation was not libelled in the US

indictment presumably because the authorities there knew that it had no substance whatever.

The events at trial

14.29 Before considering these allegations, it is important to set out in more detail the events at trial relating to the cables. Although, in doing this, certain aspects of the submissions are inevitably repeated, in the Commission's view a fuller account allows one to see clearly the difficulties which emerged at trial and the reasons why particular measures were adopted in order to address them.

22 August 2000 (day 41)

14.30 According to Mr Taylor's submissions the first edition of the cables, large sections of which were redacted, was disclosed to the defence as productions on 5 November 1999 (CPs 804-828). On 16 December 1999 the defence wrote to the Crown seeking clarification as to who had redacted the cables and why, and requesting assistance in recovering the unedited versions. On 2 January 2000 the Crown confirmed that the CIA had redacted the cables in conjunction with the US Department of Justice in order to remove material considered irrelevant or potentially damaging to US national security. The Crown also indicated that it had not examined the unedited cables. On 16 February 2000 the defence requested annotated versions of the cables and these were disclosed on 29 February 2000 (the "second edition" of the cables). While the defence had accepted the Crown's assurance that it had not examined the unredacted cables, according to Mr Taylor the position was radically altered by Mr Campbell's revelation the previous day that Mr Turnbull had in fact done so.

14.31 The Lord Advocate confirmed to the court that on 1 June 2000 Mr Turnbull and Mr McFadyen were given access to largely unredacted versions of the 25 cables. The purpose of this, the Lord Advocate explained, was to consider whether any of the information behind the redactions undermined the Crown case in any way, for example by reflecting on Majid's credibility or the incrimination defence. According to the Lord Advocate Mr Turnbull had concluded that nothing in the cables bore upon

those matters. The cables were in the hands of the US authorities and the Crown did not have copies of them. On 5 June 2000 two cables (CPs 817 and 819) with fuller annotations were disclosed to the defence.

14.32 In Mr Taylor's submission the playing field had ceased to be level on 1 June 2000. Moreover, the Crown had not informed the defence of its examination of the cables on that date until 21 August 2000. Mr Taylor said that witnesses relevant to the cables had been precognosced by the defence and had refused to answer questions about the redacted sections. However, as a result of this process Mr Taylor knew of material behind the redactions (although not its precise content) which would be of use in cross-examining Majid. As a first step, Mr Taylor proposed that the Crown use its best endeavours to secure disclosure of the unredacted cables. Mr Keen adopted these submissions, pointing out that as a result of the precognition process it appeared that some of the redacted sections related to offers and counter-offers of payments to Majid.

14.33 The Lord Advocate replied that the Crown had disclosed details of all payments made to Majid in a separate production (see CP 863, which provides a break-down of annual payments made to Majid by the US authorities between 1989 and 1992). While there were references to payments of "compensation" within the redacted sections of the cables, the Lord Advocate pointed out that the amounts already disclosed to the defence were in excess of these. In the circumstances, the Lord Advocate considered that the Crown had complied with its duty of disclosure.

14.34 In the event, the court considered that there might be information in the redacted sections of the cables to indicate that Majid was actively seeking a reward, and that such information would be material to the defence. In the court's view it was significant that on precognition of one or other of the CIA agents it became apparent that some of the redacted passages related to offers and counter-offers of payments to Majid. In addition, the Lord Advocate himself had accepted that some of the redacted passages contained references to such matters. In these circumstances, the court invited the Lord Advocate to use his best endeavours to ensure that all information contained in the cables be disclosed, apart from that which could put lives at risk,

which was prejudicial to the national security of the US or which, in the opinion of the Lord Advocate, could have no relevance to any issue in the trial.

25 August 2000 (day 44)

14.35 The Lord Advocate informed the court that fresh versions of the 25 cables (the "third edition") had been disclosed to the defence that afternoon. There were, the Lord Advocate explained, still a number of redactions, the basis for which he proposed to address the court on later.

28 August 2000 (day 45)

14.36 The Lord Advocate informed the court that he had consulted with CIA officials about the redaction exercise which had been re-done in accordance with the principles laid down by the court. As part of the exercise he had been shown "virtually complete" cables, although a number of words were still redacted. However, from what he had been told, and from the context in which these redactions had been made, they appeared to be single words or cryptonyms for names or places. Where redactions were still necessary, annotations had been made to assist the defence. The CIA had been concerned to ensure that the names of its officers were protected, along with those of other individuals whose lives or safety might be at risk if their identities were revealed. The CIA had also sought to protect "sources or methods of operation", as well as "internal operational and administrative detail", which might be useful to enemies of the US. The CIA considered that the release of such detail would prejudice the security of the US.

14.37 In respect of the original examination of the cables carried out by Mr Turnbull and Mr McFadyen on 1 June 2000 the Lord Advocate explained that this had occurred because the CIA had responded to the suggestion that the Crown be allowed sight of the largely unredacted versions of the cables. The examination had taken place in restricted circumstances at the US Embassy in The Hague. No opportunity was given to copy the cables or to make notes of them, and Mr Turnbull and Mr McFadyen were required to sign an undertaking as to the circumstances in which the examination took place, and its purpose. In terms of the undertaking, the purpose of

the examination was "not to make available information for the Crown's use at trial but was restricted to an assessment as to whether there existed information which would undermine the Crown case or supported any of the incrimination." During this exercise, both Mr Turnbull and Mr McFadyen "examined portions of the cables which still had certain redacted portions", and were given an explanation of what lay behind these by CIA officials. They were not in a position to demand access to the information, nor to disclose it, but were to ask the CIA whether there was any method by which they could bring to the attention of the defence any matters which might need to be disclosed. Essentially, Mr Turnbull and Mr McFadyen were looking for material which contradicted the Crown's assertion that the two accused were responsible for the offence or which supported the special defence. In the event, Mr Turnbull was satisfied that there was nothing in this connection. In the Lord Advocate's submission, Mr Turnbull was correct in his assessment.

14.38 According to the Lord Advocate, Mr Turnbull and Mr McFadyen had also attempted to ascertain whether information provided by Majid within the body of the cables was obviously false. Had they found such material they would have required to give consideration to the question of how to deal with it. While there were references in the cables to Majid's desire to undergo sham surgery and a request for payment on one occasion, according to the Lord Advocate this information had already been revealed to the defence.

14.39 The Lord Advocate confirmed that the Crown had disclosed another cable, dated 19 April 1989 (the "fourth edition"), containing information which Majid was said to have given to the CIA about the Crown witness, Vincent Vassallo. According to the Lord Advocate this was the only other cable concerning statements from Majid which the Crown were shown during the precognition stage.

14.40 In the Lord Advocate's submission the Crown had acted entirely properly in relation to its interaction with the cables. These had now been produced in their entirety, except for those areas relating to the safety of individuals, the national security of the US and relevance. The defence, he said, had seen all the cables which the Crown had seen and, in particular, had seen all the information with the exception of information in the three areas outlined above. The Lord Advocate was satisfied

that the CIA had now disclosed "everything which they feel proper [sic] should be revealed."

14.41 Following an adjournment, Mr Taylor confirmed that the defence had received three editions of the cables. The first of these, he said, contained large blanks; the second contained the same blanks but with annotations purporting to describe the information hidden in the redacted sections; and the third in which parts hitherto obscured were now revealed, but to which new annotations had been made which were sometimes at variance with the previous annotations.

29 August 2000 (day 46)

14.42 Mr Taylor began by referring the court to various matters of significance which had not been revealed in the earlier versions of the cables. Thereafter he submitted that despite assurances given at precognition by various CIA handlers, there were in fact more cables in existence than those lodged by the Crown. In support of this Mr Taylor referred to the further cable disclosed by the Lord Advocate the previous day, which was not a production. In addition, the disclosed cables were littered with phrases such as "as reported upon separately" or "as confirmed earlier." In Mr Taylor's submission, it was plain that the full complement of cables had not been disclosed.

14.43 Mr Taylor went on to make five applications to the court (four of which are relevant for present purposes): first, to invite the Lord Advocate to use his best endeavours to ensure that the further cables were disclosed; secondly, to instruct the Crown to disclose details of the dates, times and duration of all meetings between Majid and his CIA handlers between August 1988 and August 1989; thirdly, that the defence be allowed to see the still redacted sections of the cables which had been disclosed; and fourthly, that the court issue letters of request to obtain certain documents, the details of which would be the subject of submissions by Mr Keen.

14.44 Mr Keen moved the court to grant letters of request to the US authorities seeking in unredacted form all cables relating to Majid held by the CIA from August 1988 to July 1991 and in particular those relating to: (a) the activities of the Libyan

intelligence services or members thereof in Malta from August 1988 to July 1991; (b) the activities of both accused; and (c) the activities in Malta of persons suspected of involvement in the bombing of PA103, namely Abu Nada, Talb, the PFLP-GC and the PPSF.

14.45 The Lord Advocate first addressed Mr Taylor's various applications. In respect of the first and second of these, the Lord Advocate was prepared to give some thought as to whether they could be achieved. In the Lord Advocate's submission there was now a level playing field between the Crown and defence, with the exception of the still redacted material. Although the Lord Advocate was not able to say that every cable which might have reported some observation by Majid had been shown to the Crown, he was prepared to consider a similar exercise to that conducted by him the previous week in order to enable him to give such an assurance.

14.46 As to the third of Mr Taylor's applications (that the defence be allowed to see the redacted sections of the cables already disclosed), the Lord Advocate said that he had done everything he could on this matter and that the court could not accede to this request. According to the Lord Advocate, there was "no way" that the cables would be released in their full form, and this was for "good reasons associated with the security of the United States." The Lord Advocate traditionally exercised a role in relation to any claims of public interest immunity. Although he had considered inviting the court to review this process in the present case, he had decided against this for two reasons. The first was that it would not be in accordance with Scots law, and the second was that it would involve the court, as the fact finder, overseeing cables which might not then be led in evidence.

14.47 With regard to Mr Keen's motion for letters of request, the Lord Advocate highlighted various practical obstacles. The Lord Advocate submitted that as well as the likely delays involved in such a process, "great deference" would be paid in practice to the views of the Director of Central Intelligence as to whether confidential material should be released. Classified material held by the CIA would not ordinarily be made public, nor would it ordinarily be handed over through a process of discovery. In the Lord Advocate's submission, it was essentially the CIA's views on the question of national security that would prevail in considering such a request.

Because of this, the Lord Advocate did not consider that the letter of request procedure provided an effective way of dealing with the information sought by the defence. On the other hand, if he were to undertake the exercise suggested by Mr Taylor this would be done a lot more quickly. According to the Lord Advocate, the choice was between, on the one hand, simply relying upon the views of the CIA as to what material should be made available and, on the other, having his own involvement in reviewing this.

14.48 Mr Keen submitted in reply that under US law the final say as to how such a request would be dealt with did not lie with the CIA, although he accepted that the views of that organisation would be considered material in the circumstances. As to delay, Mr Keen had no doubt that the US authorities would do everything in their power to expedite any request made by the court.

14.49 In the event, the court was not inclined to grant authority for the letters of request sought by the defence. This was partly because of the possible delays involved and also because, if at all possible, any alternative route would be preferable. Instead, the court considered that the Lord Advocate should use his best endeavours to obtain such other cables as might have a bearing on what Majid told his handlers in Malta. In the event that the Lord Advocate felt unable to assist, or was unable to obtain the cooperation of the CIA, the court might require to reconsider the matter.

14.50 In respect of Mr Taylor's motion that the defence be allowed to see behind the redactions, the court said that no further request should be made of the Lord Advocate in respect of the existing cables. This was on the basis that the Lord Advocate had made it clear that there was nothing further he could do in this connection. Having regard to his personal involvement in the production of the latest versions of the cables, and his assurances in relation to the still redacted sections, the court was prepared to accept this view.

<u>30 August 2000 (day 47)</u>

14.51 The Lord Advocate informed the court that the Crown could undertake the exercise to which he had referred the previous day. This would entail a search for

excerpts of all CIA cables etc from August 1988 to July 1991 relating to Majid which reported what he had said to his handlers about the activities of both accused and of Abu Nada, Talb, the PFLP-GC and the PPSF. The exercise would also involve a search for cables in the same period relating to negotiations for payments, advantages, benefits or rewards to be made available to Majid. As to Mr Taylor's request for details of the dates, times and duration of meetings between Majid and his handlers, the Lord Advocate was not in a position to give an assurance on this matter. He would, however, use his best endeavours to provide such information as was available in this connection.

14.52 According to the Lord Advocate CIA officials would carry out the exercise, but he would review their work and consider "what should properly be made available and what requires to be made available."

14.53 Neither Mr Taylor nor Mr Keen took any exception to these proposals.

21 September 2000 (day 49)

14.54 The Lord Advocate confirmed that he had reviewed a number of cables which had been shown to him by the CIA. As a result of this exercise 35 additional cables were disclosed to the defence on 18 September 2000 (the "fifth edition" of the cables). A further cable (the "sixth edition") was disclosed to the defence on the morning of 21 September.

14.55 According to the Lord Advocate the approach taken was that if the cable could fall within one of the categories specified to the court on day 47 it should be disclosed. For example, even passing reference to the accused would merit disclosure. Where a cable was deemed to fall within one of the categories, the view taken was that as much as possible of it should be revealed. The Lord Advocate had been shown "lightly redacted" cables, by which he meant that what he understood to be CIA names and cryptonyms had been obscured. The further redactions had been made on the same basis (ie where information could put lives at risk, was prejudicial to the national security of the US or was, in the opinion of the Lord Advocate, of no relevance to any issue in the trial). Nine of the cables disclosed as a result of this

exercise did not fall within any of the specific categories, and the decision to disclose these was made, in some instances, on the basis that they were referred to in other cables.

14.56 The Lord Advocate added that on each occasion that the court had, through him, requested information from the CIA, this had been supplied. On the basis of what had been shown to him by the CIA the Lord Advocate considered that he had carried out the task described by him on 30 August 2000.

14.57 Mr Taylor informed the court that the cable passed to the defence that morning related to an allegation set out in paragraph (a) of the first alternative charge on the indictment (charge 2 - murder). It was alleged in that paragraph that the applicant and the co-accused caused Nassr Ashur to travel from Tripoli to Luqa airport on 10 November 1988 and from there to Frankfurt on 11 November 1988 using a passport in the false name of Nassr Ahmed Salem. Mr Taylor explained that at a preliminary hearing in the case the Lord Advocate had argued that these events constituted a dummy run for the progress of a bag from Malta to Frankfurt for onward transmission. However, the contents of the cable disclosed to the defence that morning indicated that Nassr Ashur had in fact transited Frankfurt airport on this occasion because of poor weather conditions. In Mr Taylor's submission, the cable, which was dated 12 December 1988, was therefore of the utmost materiality.

14.58 Mr Keen submitted, in the first instance, that the existence of the additional cables called into question assurances which had been given to the defence by two members of the CIA at precognition to the effect that the cables initially lodged by the Crown constituted all those available, and not just a selection.

14.59 Secondly, it was clear from the 35 additional cables that there were more cables, including ones involving negotiations for increases in salary payments. Thirdly, in Mr Keen's submission there existed a very substantial body of evidence which had not been disclosed by the CIA to the Crown, and consequently to the defence. In particular, it was noted in some of the cables that the co-accused was not a JSO staff officer, even though the indictment had proceeded upon that basis. Another cable, dated 1 September 1989, incorporated a series of requests from one

CIA station to another concerning the movements of "Abu Talb" from Sweden in Malta. A further cable, dated 6 September 1989, which in part responded to certain questions, observed: "Station shall query [redaction] re Abu Talb or Tulba and his travels to Malta at next meeting scheduled for 13th September." According to Mr Keen, however, the defence had no cable relating to any meeting on that date.

14.60 Mr Keen also made reference to the following passage in a cable dated 20 September 1989:

> *"[A]t 19th September meeting, Majid could not identify individual who purchased clothing found in suspect's suitcase aboard PanAm 103 from either blank sketch or from blank computer image."*

14.61 Mr Keen reminded the court that on 13 September 1989 Mr Gauci had assisted in the preparation of an artist's impression and computer image of the purchaser, who, the Crown maintained, was the applicant. Majid, Mr Keen pointed out, was well known to the applicant, yet the information contained in the cable was considered by the CIA to be of no relevance to the defence.

14.62 In Mr Keen's submission, it was clear from the last two cables that Majid was in fear that the CIA might abandon him as being of no further use, and that he might be turned over to Libya for cash. According to the cables, Majid understood that a meeting with US personnel was not a guarantee of future assistance or support, and that he might be returned to Malta without compensation. In Mr Keen's submission this had to be considered against the background of earlier information given by Majid that he knew nothing about a suitcase bomb at Luqa airport.

14.63 Mr Keen said it was clear that the CIA had evidence relating to certain of the incriminees which could be material to the Crown case or to any undermining of it. He referred in particular to the reference to Talb in the cables, as well as to the PFLP-GC and the cell based in Frankfurt led by Dalkamoni. According to Mr Keen, while the Crown was bound to meet its obligations under *McLeod*, the CIA was not, and the Crown could disclose only what the CIA disclosed to them.

14.64 Mr Keen moved the court to invite the Lord Advocate to call upon the CIA to produce to the Crown all information in its hands relating to the alleged involvement of Talb and the PFLP-GC in the destruction of PA103. In the event that the Crown was not prepared to comply with this request, Mr Keen said that he would present a letter of request to this effect.

14.65 Mr Taylor submitted that the Lord Advocate was "not the master in his own house". It was obvious that the Lord Advocate could only disclose to the defence material of which he was in possession. It was equally plain, in Mr Taylor's submission, that those who had been determining relevancy outside the law of Scotland had made fatal errors of judgment in important areas of direct relevance to the trial and to its fairness. In these circumstances, Mr Taylor moved that the court invite the Lord Advocate to request from the CIA all information in its possession which touched upon the enquiry into the bombing of PA103. In Mr Taylor's submission, the information which had come to light was exculpatory of the applicant and there were good grounds for believing that further material of this kind existed.

14.66 In reply the Lord Advocate said that while what had been addressed earlier were cables relating to Majid, the defence now sought evidence in the hands of the CIA relating to the alleged involvement of Talb and the PFLP-GC in the bombing of PA103. Evidence had been given by one of the police witnesses that the early suspects in the case were the PFLP-GC and, in the Lord Advocate's submission, what the defence now sought was the disclosure of investigative files. However, the defence had no right to demand all of the fruits of the investigation. Merely serving notice that they intended to lead evidence which might tend to incriminate a third party did not entitle the defence to conduct a fishing exercise through the investigative files of a police force or other agency. According to the Lord Advocate what Mr Keen was seeking was not evidence which pointed to Talb or the PFLP-GC, but all reports, from whatever source, whether found to be reliable or unreliable, which detailed nothing more than suspicions or rumours. The CIA, he added, like all such agencies, dealt with matters of intelligence, not evidence.

14.67 In reply, Mr Taylor said that the CIA had been "caught out" because until that morning it had "sat on" exculpatory evidence dated December 1988, on the basis

of which the indictment would not have been drafted in its current form. Mr Taylor made it clear that his submission was not that the CIA should hand over to the defence all their files, but that these should be given to the Crown. According to Mr Taylor, it was for the Crown to decide what required to be divulged to the defence.

14.68 Mr Keen replied that, contrary to the Lord Advocate's submission, it was apparent that the CIA was possessed not of rumour or suggestion, but of real evidence going to the case against both accused. Lord Sutherland queried with Mr Keen what real evidence he was saying the CIA possessed in relation to Talb and the PFLP-GC. Mr Keen replied that the cable dated 6 September 1989 referred to Talb's activities in Malta. In reply, the Lord Advocate explained that this particular cable contained the description of a man quite different to the Talb mentioned in the notice of incrimination. According to the Lord Advocate, the reference to "Tulba" in that cable was to the man described there. Mr Keen said in response that one paragraph in the cable related to Talb and the other to Tulba. In the event, it was agreed that the two cables relating to this matter would be passed to the court.

14.69 The court then considered the motions made by Mr Taylor (ie that the court should invite the Lord Advocate to ask the CIA to disclose all information in its possession which touched upon the bombing of PA103) and Mr Keen (ie that the court should invite the Lord Advocate to ask the CIA to disclose evidence of the alleged involvement of Talb and the PFLP-GC in the bombing).

14.70 The court noted that two of the 36 additional cables produced related, possibly, to Talb's activities in Malta. The first was a request from the CIA to its Malta station in the following terms:

> *"Would appreciate station querying Majid about following. What has Majid learned from Libyan intelligence circles regarding Pan Am 103? What are Libyan officials saying about the incident? Is Majid aware of the use of Malta as a staging area for radical Palestinians? Does Majid know an Abu Taleb from Sweden? Is Majid aware of any radical Palestinian activity in Denmark or Sweden? Finally, is Majid aware of any Libyan involvement with the activities of the PFLP-GC cell led by Dalkamoni in Frankfurt?"*

14.71 The second cable consisted of the response from the Malta station:

> *"Re individual Mohamed (Abu Taleb), Majid could recall only one Palestinian with similar name, Mohamed (Tulba). Majid met Tulba at Luqa International Airport when latter requested assistance with some individuals he was escorting to/from Libya and Egypt. Tulba eventually revealed to Majid that he was a 'security officer.'"*

14.72 According to the court there followed a description of Tulba and then the passage: "Majid could not recall any other Palestinians who received assistance or support while travelling through Malta." The cable then said:

> *"Station will query* [blanked-out name, which appears to be a source other than Majid] *re Abu Talb (or Tulba) and his travels to Malta at next meeting, scheduled for 13th September."*

14.73 The next paragraph stated that Majid could not provide any additional information in response to the requirements set out in the previous cable as quoted above. The court noted that, according to Mr Keen, none of the other cables produced made reference to Talb or to the PFLP-GC.

14.74 The court considered that what it had to decide was whether the information before it would be sufficient to warrant further investigation into information the CIA held about the activities of Abo Talb or the PFLP-GC in relation to the bombing of PA103. In terms of *McLeod*, the court required to be satisfied that there was a valid basis for ordering the haver to produce documents, that these had a proper purpose and that they would be likely to be of material assistance to the defence. The court observed that the context for these tests was whether the failure to produce any such documents would jeopardise the fairness of the trial. The court concluded that, on the information which had been placed before it, it was not satisfied that the test in *McLeod* had been met. In these circumstances, the court refused the motions made on behalf of both accused.

14.75 Thereafter, counsel for both accused moved the court to grant letters of request in the same terms as their earlier motions. The court declined these motions for the reasons it had already given.

The information contained within the cables

14.76 In order to illustrate the nature and extent of evidence initially concealed from the defence, the following examples are given of information withheld in the first edition of the cables (CPs 804-828, lodged on 5 November 1999) but revealed in the third edition (25 August 2000 – day 44):

- The cable dated 11 August 1988 (CP 805) disclosed Majid's request for help to undergo sham surgery to prevent him having to undertake military service in Libya. It also mentioned that Majid, as a distant relative of King Idris, the former King of Libya, had wanted to work against the Gadaffi regime for years.

- The cable dated 14 September 1988 (CP 806) referred to a meeting with Majid and his CIA handler arranged for 24 September 1988, a meeting to which none of the other cables referred.

- The cable dated 5 October 1988 (CP 810) referred to Majid discussing with his CIA handler the possibility of the CIA permitting or supporting him to leave LAA and the ESO (i.e. the former JSO) altogether, in favour of setting up a small car rental agency in Malta. The section originally redacted indicated that Majid had saved $30,000 from his salary, which it was suspected by his handlers had been acquired from illegal commissions earned as a result of his position at LAA, perhaps through low level smuggling. Majid had estimated his car rental venture would cost $60,000 in start up expenses. According to the cable, he hoped that the CIA would meet the balance.

- The cable dated 19 January 1989 (CP 819) referred to Majid meeting his CIA handler to discuss the purpose of a visit to Malta by Nassr Ali Ashur. It

referred to Majid having been given 500LM (approx $1,500) for "OPS" expenses he would incur in the near future and his being passed the money in an Arab-English dictionary.

- The cable dated 27 February 1989 (CP 823) referred to a planned meeting between Majid and his handler scheduled for 20 March 1989. It referred to 500LM in expenses money having been passed to Majid in a cassette tape case.

- The cable dated 11 April 1989 (CP 824) referred again to the sham surgery, this time giving more detail than did the cable of 11 August 1988. It also mentioned a meeting with Majid scheduled for 15 April 1989, to which none of the other cables referred.

- The cable dated 10 May 1989 (CP 825) referred to Majid providing several items of information about Libya which it was said would be forwarded separately. It also referred to Majid having been paid the $7,200 balance into his "escrow account" (the word "escrow" is an annotation in the cable describing the redacted word or phrase which appears before the word "account") and his receiving advance payment of 705LM (approx $2015) for "Tripoli Ops" expenses and payment for two airline tickets for travel between Libya and Malta. There was also reference to a proposed arrangement to meet with his CIA handlers in June 1989.

- The cable dated September 1989 (CP 828) referred to Majid requesting reimbursement of 1000LM for a second operation on his arm and of 500LM for 20 days of hotel, car rental and per diem expenses encountered on his trip to Malta. It said that the CIA handler planned to provide Majid with the above-mentioned funding, in addition to the $5,000 salary owed to him throughout August 1989, at a meeting on 4 September 1989. According to the cable, Majid was to be advised that the CIA would not provide any additional financial assistance for operations on his arm, and that it would continue his $1000 per month salary payment only for the remainder of 1989. There was

also a reference to the effect that if Majid was not able to demonstrate sustained and defined access to information of intelligence value by January 1990, the CIA would cease all financial support until he could prove such access.

14.77 The Commission does not consider that the fourth edition of the cables contained anything material. However, the following are examples of significant information disclosed in the fifth (18 September 2000) and sixth (21 September 2000) editions of the cables:

- The fifth cable, dated 10 October 1988, indicated that, according to Majid, the co-accused was not an ESO staff officer, but was receiving some financial support from the ESO and that his business would serve as an ESO front company.

- The eleventh cable, dated 15 and 17 April 1989, referred to the sham surgery, stating that, according to Majid, it would cost 2000 LM (approximately $6000), a sum which the handler said the CIA would pay.

- The twenty-second cable, dated 19 September 1989, referred to Majid's failure to identify the photo-fit or sketch of the purchaser prepared on the basis of Mr Gauci's description.

- The twenty-third cable, dated 16 October 1989, stated that Majid had no further information about the applicant beyond his travelling to Malta with the co-accused in late September 1989. It reported Majid's belief that the co-accused was a regular LAA employee while in Malta and that he served as an ESO co-optee.

- The thirty-second cable, dated 20 December 1990, reported that Majid was asked if he had ever placed, or arranged to have placed, a suitcase on an airline from Luqa airport. Majid responded firmly in the negative, adding that if he had been asked to undertake such an operation he would have required to

make a detailed feasibility study for his superiors, which he had never been asked to do. When he was asked who could have been positioned to place a suitcase on a plane at Luqa airport, Majid suggested: "Abd-Albasit Ali (Al-Magrahi) aka Mas'ud M Abu (Aqila) and his partner Lamin (Fhimah), Libyan owners of Medtours in Malta." The cable also referred to Majid's request to obtain $2000 to buy bananas in Malta to sell in Libya, where they would sell at a greater price. According to the cable Majid clearly did not want to be part of the security apparatus in Libya and was milking all of his contacts, including the CIA, for whatever he could get during this transition period.

- The thirty-sixth cable, dated December 1988 (the precise date is not specified), referred to Majid having reported that Nassr Ashur passed through Malta in early November 1988. According to Majid, Ashur, on first arriving in Malta, had intended to travel directly to Belgrade on a Yugoslav flight but owing to weather conditions was obliged to go via Frankfurt.

Further enquiries

14.78 As part of its assessment of this ground, the Commission wrote to Crown Office seeking further information as to the Crown's examination of the cables. By letter dated 28 April 2006 Crown Office confirmed that the six editions of cables referred to in the submissions at trial represented all those considered by the Crown. According to the letter the first edition of these (CPs 804-828) was examined by the Crown on 1 June 2000 in an almost entirely unredacted form, the only blacked out words being cryptonyms and names of agents. The purpose of the examination was to satisfy the Crown's obligations under *McLeod*. They did not obtain the unredacted versions of these cables.

14.79 In a further letter dated 5 May 2006 Crown Office advised that during the exercise which resulted in the disclosure of the additional 36 cables the Crown was shown other cables which it did not consider fell within the calls made through the court. By letter dated 17 May 2006 Crown Office confirmed that they were not given copies of these other cables. Although enclosed with that letter was a one-page note containing details of these cables, in the Commission's view this reveals very little. A

copy of the letter and note are contained in the appendix. Crown Office also provided a confidential file note relating to the examination of the cables on 1 June 2000 and gave the Commission consent to disclose a redacted version of this (see appendix). The note states:

> *"In the case of the productions annotated copies had, with the agreement of the CIA, been made available to the defence. We were able to satisfy ourselves that there was nothing omitted which could assist the defence in itself. There were some references to matters which in isolation might be thought to assist the defence - eg details of payments or efforts by Majid to secure sham surgery - but since evidence was being provided as to the total of payments made and of the requests for sham surgery, the particular material did not appear to be disclosable."*

14.80 Crown Office also confirmed in its letter of 17 May 2006 that although a number of cables relating to Edwin Bollier and MEBO were made available to the Crown, in the event these were not lodged as productions. The Crown was given copies of these cables: one set redacted with no annotations, and the other redacted with annotations. Although the unredacted versions of these cables were considered by the Crown on 1 June 2000 (ie the same date as Mr Turnbull and Mr McFadyen viewed the initial 25 cables relating to Majid) the Crown was not provided with copies of these. In the event, none of the information contained within either set of cables was considered by the Crown to be disclosable in terms of *McLeod*, and Crown Office has no record of them ever having been disclosed. Crown Office supplied the Commission with both sets of cables in its possession (see appendix).

14.81 Crown Office confirmed in the same letter that unredacted versions of cables relating to enquiries in Senegal (CP 273-281 are the redacted versions of these) were also examined on 1 June 2000**.** According to the letter, annotated versions of these cables had been provided to the Crown in early 2000 but Crown Office had no record of these ever having been disclosed to the defence. Again, copies of the annotated cables were supplied to the Commission (see appendix).

14.82 Finally, Crown Office confirmed by e-mail dated 8 June 2006 that the cables referred to in its previous three letters comprised the full extent of the CIA cables made available to the Crown.

The applicable law

14.83 At the time of the applicant's trial, the principles governing the Crown's disclosure of evidence to the defence were as set out in *McLeod v HMA* 1998 SCCR 77. There the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown's duty of disclosure extended to information in its possession that would tend to exculpate the accused or was likely to be of material assistance to the proper preparation or presentation of the accused's defence (per Lord Justice General (Rodger) at p97), and to information in its possession and knowledge which was significant to any indicated line of defence, or which was likely to be of real importance to any undermining of the Crown case or to any casting of reasonable doubt upon it (Lord Hamilton at p100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the Convention (see Lord Rodger's opinion at paragraph 65).

14.84 According to *McLeod* if it emerged at trial that something had gone wrong and a material statement or other document came to light at that stage, the procedure in Scotland was well able to afford the necessary remedy, whether by adjournment, permission to lead additional evidence or in an extreme case by desertion of the diet (Lord Justice General (Rodger) at pp98-99).

14.85 In the Commission's view such an approach is consistent with that taken by the European court which, in determining alleged violations of article 6 of the Convention, views proceedings in their entirety, including the way in which evidence was taken (*Edwards v UK*, at paragraph 34). It is also the approach which has been adopted by the High Court in several recent decisions. In *HMA v Higgins* 2006 SCCR 305, for example, the Crown's failure to disclose information before the trial was held to have been cured by an adjournment during which the defence had an opportunity to

precognosce the relevant witness. On the other hand, in *McClymont v HMA* 2006 SCCR 348, where a failure to disclose material evidence was not discovered until after the relevant witness had testified, the court held that the appellant's trial had been unfair and quashed his conviction.

14.86 Article 6(1) of the Convention provides that in the determination of any criminal charge the accused is entitled to a fair hearing. This has been interpreted by the European court as including a right to disclosure of all material evidence "for or against the accused" in the possession of the prosecution (*Rowe and Davis v UK* 2000 30 EHRR 1; *Dowsett v UK* 2004 38 EHRR 41). It follows that the Crown is under no obligation to disclose information not in its possession (although in terms of *Holland* it seems that in certain circumstances they will require to take appropriate steps to search for information not immediately to hand: Lord Rodger at paragraph 74). In addition, it is clear that in order to hold that there has been a violation of article 6(1) the information in question must be of *some* significance, in that it must be capable of altering the course of the evidence and therefore the eventual outcome of the trial (see *Holland* at paragraphs 82-84; *Sinclair v HMA* 2005 SCCR 446, at paragraph 35). Accordingly, a failure by the Crown to disclose evidence on some entirely insignificant point, not material to the accused's defence, would not amount to a defect (*McLeod*, Lord Justice General at p94).

14.87 However, as the submissions emphasise, it is also necessary in determining whether there has been a violation of article 6(1) to consider the procedures and decision-making processes in cases where evidence has been withheld from the defence on public interest grounds. In *Jasper v UK* (2000) 30 EHRR 441, for example, the applicant sought to establish that the withholding of evidence from him on the ground of public interest immunity undermined his right to a fair trial. After narrating the Crown's obligation to disclose to the defence all material evidence, the European court made the following observations:

> "*[52] However...the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed*

against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

[53] In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, such as the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interest of the accused."

14.88 The European court noted in *Jasper* that at the original proceedings the trial judge had examined the material in question and ruled that it should not be disclosed. Although the defence was not informed of the reasons for the judge's decision, in the European court's view the fact that the issue of disclosure was at all times under his assessment provided a further important safeguard. This was on the basis that the judge could monitor throughout the trial the fairness or otherwise of the decision to withhold the evidence. The judge, the European court observed, was fully versed in all the evidence and issues in the case and was in a position to assess the relevance of the material during the course of the trial. Moreover, during the appeal proceedings, the Court of Appeal had itself considered whether the evidence should be disclosed, thereby providing additional protection of the applicant's rights. In the circumstances, the court was satisfied that the decision-making procedure applied during the proceedings incorporated adequate safeguards to protect the interests of the accused.

14.89 The importance attached to the role of the trial judge in determining whether the withholding of material is justified in the public interest was emphasised in *Rowe and Davis v UK*. During the original trial proceedings in that case in 1990, the Crown withheld certain evidence from the defence on public interest grounds without notifying the trial judge that they had done so. At the subsequent appeal, the Court of Appeal observed that in light of its decision in *R v Ward* [1993] 1 WLR 619, it was now for the court, not the Crown, to decide whether information subject to potential public interest restrictions should be disclosed to the defence. The material in question was thereafter shown to the Court of Appeal, though not to the defence. In the event, the court declined to order disclosure.

14.90 The European court held (unanimously) that the procedure adopted at the applicants' trial, whereby the prosecution itself attempted to assess the importance of information concealed from the defence and to weigh this against the public interest in keeping the information secret, did not comply with the requirements of article 6(1). Although the Court of Appeal had itself examined the material, in the European court's view this procedure was not sufficient to remedy the unfairness caused at trial by the absence of any scrutiny by the trial judge. Unlike the latter, who saw the witnesses give evidence and was fully versed in all the evidence and issues in the case, the Court of Appeal was dependent for its understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the accounts given to them by Crown counsel. In the European court's view the trial judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, and when it was still open to the defence to take a number of different directions. In these circumstances, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. A similar conclusion was reached by the European court in *Dowsett v UK*.

14.91 In *Sinclair*, Lord Hope took from these cases that decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. In Lord Hope's view, there must be "sufficient judicial safeguards in

place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary" (at paragraph 33; see also *Holland* , Lord Rodger at paragraph 71).

14.92 In light of these authorities it seems to the Commission that there are two ways in which the withholding of evidence from the defence can violate article 6(1). The first (referred to below as a "substantive violation") is where the undisclosed evidence is material and was withheld from the defence for reasons other than public interest considerations (*Edwards v UK*; *Sinclair*). In such cases it is necessary to assess whether the evidence is sufficiently material to justify the conclusion that the accused's Convention rights were infringed, and then to consider whether, taken as a whole, the trial was unfair in terms of article 6(1).

14.93 The second way in which a breach of article 6(1) may occur (referred to below as a "procedural violation") is where evidence is withheld on the grounds of public interest, and where the procedures which led to this decision failed to incorporate adequate safeguards to protect the interests of the accused (*Rowe and Davis v UK*; *Dowsett v UK*). In such cases, since the undisclosed evidence may never have been revealed, the correct approach is not to consider its potential materiality, but rather to assess whether the decision-making procedures complied with the requirements of article 6(1). Any procedure whereby the Crown itself attempts to assess the importance to the defence of concealed information, and to weigh this against the public interest in withholding it, will not comply with such standards. In order to satisfy Convention rights, information may be withheld from the defence on the grounds of public interest only where a decision to this effect has been taken by the trial judge who, having seen the material, is in a position continually to monitor the need for disclosure throughout the course of the trial (*Jasper v UK*). Where such procedures are absent or lacking article 6(1) may be infringed and the trial, taken as a whole, may be deemed unfair.

Consideration

14.94 In the Commission's view consideration of the applicant's submissions can be divided into two principal questions:

(1) Do the circumstances surrounding the disclosure of the cables indicate a substantive violation of the applicant's article 6(1) rights?

(2) Do the same circumstances indicate a procedural breach of his article 6(1) rights?

(1) Substantive violation

14.95 It is important to make clear at the outset that the Commission has not seen the complete and unredacted versions of the cables relating to Majid. Accordingly, it is not in a position to assess the potential significance of those passages which remained obscured at the end of the disclosure process.

14.96 Regardless of what occurred subsequently, as at 1 June 2000, when Mr Turnbull and Mr McFadyen viewed largely unredacted versions of the initial 25 cables (CP 804-828) at the US Embassy in The Hague, the Crown had a substantially greater awareness of their contents than did the defence. Although some details of payments to Majid were disclosed in Crown production 863 (as was some information about his sham surgery in Crown production 1486 pp 4-5), it is difficult to understand the Lord Advocate's assurances to the court on 22 August 2000 that there was "nothing within these documents which relate to Lockerbie or the bombing of Pan Am 103 which could in any way impinge on the credibility of Mr Majid on these matters" (41/6101). The matter is all the more serious given that part of the reason for viewing the cables on 1 June 2000 was precisely in order to assess whether information behind the redacted sections reflected upon Majid's credibility. As the above account demonstrates, a substantial number of the passages did just this. Indeed, the information contained in some of the passages, such as Majid's claim that he was related to King Idris and his interest in financial payment, formed the basis of the court's eventual rejection of much of his evidence (see paragraphs 42-43 of the judgment).

14.97 Furthermore, while it was the advocate depute himself who revealed that the Crown had examined the original 25 cables on 1 June 2000, it seems that the

information revealed in the third edition of the cables on 25 August 2000 might not have been disclosed at all without the further efforts of the defence. In the Commission's view there is no reason why the same consideration would not apply to the further 36 cables eventually disclosed on 18 and 21 September 2000. As explained, these latter cables were particularly important as not only did the contents reflect upon Majid's credibility and reliability, they also undermined certain aspects of the libel: namely that the co-accused was a member of the JSO, and that Nassr Ashur's travel arrangements in November 1988 amounted to a rehearsal for the bombing itself.

14.98 It seems clear in terms of the explanations given by the Lord Advocate on 22 and 28 August 2000 (days 41 and 45) that the Crown's failure to disclose details of the initial 25 cables following its examination on 1 June 2000 arose from errors of judgment as to the materiality of the information contained within the redacted passages. However, even if this had been recognised, the Crown's ability to disclose such details might well have been constrained by the written undertaking signed by Mr McFadyen on 1 June 2000 (see appendix; although the Lord Advocate informed the court that Mr Turnbull signed a similar undertaking, the Commission has not seen this). Headed, "Nondisclosure Agreement", clause 2 of the undertaking obliged Mr McFadyen never to "divulge, publish or reveal either by work, conduct or other means [the information in question] unless specifically authorised to do so by an appropriate official of the USG [United States Government]." In terms of clause 4, access to the information was "solely for the purpose of determining whether it contains any information which is exculpatory to the defendants". Mr McFadyen also undertook not to use the information "for lead [*sic*] purposes in furtherance of the Crown's case without the consent of the proper USG official."

14.99 Clearly the terms of this undertaking run contrary to the Crown's obligations of disclosure under *McLeod*. It is important to emphasise, however, that there was no attempt by the Crown to conceal from the defence or the court the fact that such an undertaking had been given. Although the undertaking itself appears never to have been disclosed, the Lord Advocate made several references to it in his submissions (eg 45/6540). He also made clear to the court (45/6540-1) that on 1 June 2000 Mr Turnbull and Mr McFadyen were not in a position to demand access to or disclose

information, but were to ask the CIA whether there was any method by which the Crown could bring to the attention of the defence any matter which might need to be revealed. In the event, of course, neither Mr Turnbull nor Mr McFadyen considered that the material they were shown warranted disclosure. Accordingly, while the giving of such an undertaking was highly unusual, it does not appear, assuming the Lord Advocate's submissions are correct, that its potential for undermining the Crown's obligations under *McLeod* was ever realised. Even if Mr Turnbull and Mr McFadyen had considered that material within the cables justified disclosure, there is no indication that the US authorities would have withheld consent to disclosure, or that the Crown would not have brought this to the attention of the defence or the court. It is also important to bear in mind that the purpose of the Crown's examination of the cables on 1 June 2000 was in order to assess whether information within the redacted passages warranted disclosure under *McLeod*. Leaving aside what the Commission considers were errors of judgment as to the materiality of that information, it seems to the Commission highly unlikely that the Crown would have been able to conduct this exercise in the absence of such an undertaking.

14.100 It is clear even from the brief history of events given above that the manner in which the information contained within the cables came to light was far from ideal. However, in determining whether there was a substantive breach of the applicant's article 6(1) rights, the Commission must consider not just the way in which disclosure occurred but also the outcome of this process and its overall impact upon the fairness of the trial. In terms of the authorities (*Edwards v UK*; *McLeod* and *Higgins*) it is clear that failures to disclose material timeously can be remedied at trial, or even appeal. In the present case, following defence submissions, the trial court granted several adjournments with a view to facilitating the disclosure of further evidence. The overall process may well have been awkward, but the result was that the defence was provided with valuable material for use in its cross examination of Majid. While many of the items were disclosed late in the day (the information contained in the 36 additional cables was disclosed only 5 days before Majid began his evidence) neither defence team indicated that this was inadequate. In the event, Majid's cross examination took place over three days during which the material revealed in the CIA cables was used to significant effect. The end result, of course, was that the court

accepted only one aspect of his evidence, namely his account of the hierarchy within the JSO at the material time.

14.101 Accordingly, not only was significant additional material eventually disclosed to the defence, the evidence of the witness to whom it related was rejected almost in its entirety. In the Commission's view these factors are of decisive significance in determining whether a substantive breach of article 6(1) occurred. The submissions argue that the issues surrounding the disclosure of the cables remain live because the court accepted Majid's evidence that the applicant was a member of the JSO. However, as explained in chapter 27 below, while at no time did the applicant admit that he was a "member" of that organisation, in the Commission's view he was so closely associated with it as to amount to the same thing. For example, as head of airline security with LAA in 1986 he was "seconded" to the JSO during which time he received reports from junior JSO officers. His superior at that time was Said Rashid who in 1986 was also seconded to the JSO as chief of the operations department. In 1987 the applicant became coordinator of the Centre for Strategic Studies, an organisation funded by the JSO which, according to one of his defence precognitions, was effectively part of the intelligence services.

14.102 Viewed in this context, it appears to the Commission that the one aspect of Majid's evidence which the court accepted has some basis in fact.

14.103 The submissions also highlight the cables' wider impact upon allegations that the co-accused was a member of the JSO, and of the "dummy run" involving Nassr Ashur. As explained, however, the Commission has seen only those versions of the Majid cables that were eventually disclosed to the defence. It is therefore in no better a position than the defence was at trial to assess the potential significance of those passages which remained obscured. While the events surrounding the disclosure of the cables do not inspire confidence, the exercise undertaken by the Lord Advocate between 30 August and 21 September 2000 appears to have been capable of detecting any information in the cables which related to the incriminees or to the applicant. Furthermore, having examined all six editions of the cables, it appears to the Commission that the remaining redactions relate to matters such as the names of CIA

officers, "electronic addressing", operational details and place names, none of which would be material to the applicant's defence.

14.104 For these reasons, the Commission does not consider that the events surrounding the disclosure of the Majid cables amount to a substantive breach of the applicant's Convention rights. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred as a result of these events. The Commission has reached the same conclusion in respect of the decision by the Crown not to disclose the annotated versions of the Senegal and Bollier cables referred to above. In the Commission's view, neither set of cables contains information which required to be disclosed in terms of the principles set out in *McLeod*.

14.105 As to the submission that the defence was denied information in the cables which would have strengthened the incrimination defence, this appears to relate to the cable dated 6 September 1989 in which Majid makes reference to an individual by the name of "Tulba". As indicated, this cable was a reply to an earlier one dated 1 September 1989 which requested any information Majid might have about the incriminee Abo Talb or the PFLP-GC. However, while the names "Talb" and "Tulba" are similar, in the Commission's view it is doubtful that Majid was referring to Abo Talb. For example, the reference in the cable to Majid having met Tulba about three times per month from 1986 until 1988 is inconsistent with the available evidence regarding Abo Talb's movements into and out of Malta. Moreover, Majid was unable to recall any other Palestinians who received support while travelling through Malta, and could not provide any additional material on radical Palestinians. In these circumstances, bearing in mind the principles of *McLeod* to which it referred, the court's conclusion that no further investigation was required into information held by the CIA concerning Abo Talb and the PFLP-GC seems justified.

(2) Procedural violation

14.106 As indicated, the European court has emphasised the need for any limitation on an accused's Convention rights to be sufficiently counterbalanced by appropriate judicial procedures. In the context of evidence withheld from the defence on public interest grounds, the European court has made clear that a procedure whereby the

prosecution itself attempts to assess the importance of the evidence, and weigh this against the public interest in its concealment, does not comply with the requirements of article 6(1). Instead, in a number of cases the court has approved a procedure whereby the trial judge considers the evidence and rules upon the issue of disclosure. According to the submissions it is precisely this form of judicial safeguard which was lacking in the approach taken to the cables at the applicant's trial.

14.107 In the Commission's view it is possible to draw a distinction between, on the one hand, the information withheld in cases such as *Jasper v UK* and *Rowe and Davis v UK*, and on the other, the information withheld from the defence in the applicant's case on the other hand. In the former cases the Crown was clearly in possession of the information in question and the decision to withhold it from the defence was taken either by the prosecution itself (*Rowe and Davis*; *Dowsett*) or by the trial judge (*Jasper*). In the applicant's case, while the Crown was given access to largely unredacted versions of the cables, they were not permitted to take copies of these and the final decision as to what should be disclosed appeared to lie with the US authorities. This is reflected by the Lord Advocate's submissions on 28 August 2000 (day 45) that the CIA had now revealed "everything which they feel proper [sic] should be revealed", and on 30 August 2000 (day 47) that the search for additional cables relating to Majid would be carried out by CIA officials but that he would review this. In other words, during the exercises carried out in August and September 2000 the Lord Advocate was responsible for determining issues of relevancy and materiality, while the US authorities determined whether disclosure was consistent with its own national security. It was therefore the US authorities which determined the (US) public interest, not the Crown. In light of this conclusion, the Commission does not accept the suggestion made in the submissions that the Lord Advocate was somehow given a discretion to withhold material on national security grounds.

14.108 In the Commission's view this lack of control over the information makes it difficult to apply the principles in cases such as *Rowe and Davis v UK*. In particular, it does not appear that the present case is an example of a procedure whereby the Crown has taken upon itself the task of assessing the significance of the evidence to the defence and of weighing this against the public interest in withholding it. In terms of the Lord Advocate's submissions the reason that details of unredacted passages

were not disclosed following Mr Turnbull's and Mr McFadyen's examination on 1 June 2000 was not based upon any public interest factor but rather because they were viewed as having no bearing upon the defence case. The subsequent disclosure of less redacted versions of these cables on 25 August 2000 was authorised, not by the Crown, but by the US authorities. With regard to the further 36 cables eventually disclosed, as indicated the Crown was not aware of their existence until they were produced to them by the CIA.

14.109 In these circumstances, the Commission does not consider that the role adopted by the Crown in respect of the cables amounted to a procedural violation of article 6(1). While the Lord Advocate, having viewed the cables, required to assess them in terms of his obligations under *McLeod*, it was the US authorities, not the Lord Advocate, which determined whether disclosure of particular items satisfied (US) national security interests.

14.110 It might be said that, in terms of the principles set out by the European court, the trial court should have insisted that it be given the unredacted versions of the cables in order to assess whether full disclosure was necessary, or at the very least should have granted the letters of request sought by the defence. However, in terms of the Lord Advocate's submissions, it seems unlikely that the US authorities would have been prepared to produce unredacted versions of the cables even to the court. In addition, as Mr Keen himself accepted, in the event that the court had granted letters of request it was likely that the attitude of the CIA to full disclosure would have been material in any ruling by the US courts on the matter. In these circumstances, one can perhaps understand why the trial court decided to rely upon the Lord Advocate's "best endeavours" to encourage the production of further material. As the Lord Advocate suggested in his submissions, the court was faced with two choices: one in which the CIA were relied upon to determine what material should be made available; and the other in which he was involved in reviewing this. Given that the end result of the process was that the defence was given sufficient information to undermine Majid's evidence, it is difficult to see how the trial court's approach to the matter can be criticised from the applicant's perspective.

14.111 It is worth adding that even if it could be said that the Lord Advocate's involvement in the process amounted to a procedural violation of article 6(1), viewed in the context of the court's almost wholesale rejection of Majid's evidence, the Commission does not consider this would have been capable of rendering the applicant's trial unfair.

Conclusion

14.112 Although the manner in which the cables were disclosed was awkward and unsatisfactory, for the reasons given the Commission does not consider that this gave rise either to a substantive or procedural breach of the applicant's rights under article 6(1) of the Convention. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred in this connection.

(3) The Goben memorandum

The applicant's submissions

14.113 It is alleged on behalf of the applicant (see chapter 12 of volume A) that the Crown's approach to the disclosure of a document known as the "Goben memorandum" amounted to a breach of its duty of disclosure as set out in *McLeod*. It is also alleged that the applicant's right to a fair trial under article 6 of the Convention was violated.

14.114 According to the submissions, on 3 October 2000 (in fact it was 9 October, day 58 of the trial) the Lord Advocate informed the court that he had received important information from a foreign government. The trial was thereafter adjourned in order to allow the Crown to carry out investigations. Three weeks later the Crown informed the defence that Palestinian asylum seekers in Norway who were relatives of Mobdi Goben, a deceased senior member of the PFLP-GC, had informed the Norwegian Security Service that they had seen a memorandum which had been written by Goben before his death. One of those seeking asylum was Goben's son, Samir Goben, who claimed to have tape-recorded himself reading out his father's memorandum. That recording was provided to the Crown by the Norwegian

authorities and a transcript of it was subsequently disclosed to the defence. The actual memorandum was believed to be held in Syria.

14.115 According to the submissions the contents of the memorandum included the suggestion that the PFLP-GC was responsible for destroying PA103 and that Abu Elias ([redacted]) had planted the bomb through a passenger on the plane, Khaled Jaafar (see chapter 13). The defence, it is said, was already aware of Marwan Khreesat's claim that he had given an improvised explosive device contained in a Toshiba radio cassette player to Abu Elias. The Crown also revealed that one of the asylum seekers had said that he was responsible for overseeing payments to PFLP-GC members and that Abu Elias and Khaled Jaafar had received regular payments. According to the submissions the person concerned had also seen that a payment of one million dollars was received from the government of Iran. In addition it was revealed that Abu Elias was also known as [redacted] was resident in the US and, according to the submissions, in 1987 had paid into a bank account traveller's cheques purchased by Haj Hafez Kassem Dalkamoni, himself a member of the PFLP-GC.

14.116 It is stated in the submissions that the defence thereafter interviewed [redacted] who denied that he was Abu Elias, or that he was involved in the bombing. In addition, although he had dual US/Syrian nationality, [redacted] refused to provide to the defence his Syrian passport for the period covering 1988 although, according to the submissions, he admitted using it during that period. Subsequently [redacted] claimed through his US attorney that he had mislaid the passport.

14.117 The submissions narrate that motions for the issuing of letters of request were made in respect of Syria, Iran, Sweden and the US. All applications were opposed by the Lord Advocate as unnecessary and as constituting a "fishing expedition". The court refused the defence applications, except for the request to Syria for the original memorandum. Syria declined to comply with the letter of request and according to the submissions no further information was forthcoming from the US. There is also some suggestion in the submissions that the Crown's disclosure of information relating to the Goben memorandum was "late" and that the

defence was refused a further adjournment following the rejection of the motion for letters of request.

14.118 The submissions question why [redacted] had not been mentioned by the US authorities at an earlier stage, particularly as the traveller's cheques referred to had been examined by US officials in 1990. [redacted] had met with FBI special agents in August 1988, but the Department of Justice would not reveal the purpose of this or the identities of the agents involved. According to the submissions [redacted] admitted that such a meeting had taken place. In addition the FBI had apparently investigated [redacted] and knew that he was [redacted] The FBI produced extracts from [redacted]'s diary for part of 1988, receipts which possibly demonstrated an alibi, work records and bank account information. According to the submissions, it is inconceivable that [redacted] did not produce his Syrian passport for examination.

The events at trial

14.119 Before considering these allegations, it is important to set out in detail the sequence of events at trial concerning the Goben memorandum.

Days 58-61

14.120 As indicated, on 9 October 2000 (day 58) the Lord Advocate informed the court that on 4 October the Crown had received important information from a foreign country. He submitted that the Crown should not lead evidence relevant to the incrimination until the issue of disclosure of this new information had been resolved. No details of the new information were provided at that stage and the Lord Advocate moved to adjourn the trial until 17 October in order to allow the Crown to investigate the matter. The court granted the Lord Advocate's motion.

14.121 On 17 October 2000 (day 60) the court granted a further motion by the Lord Advocate to adjourn the trial in order to allow the Crown to complete its enquiries into the matter. On 23 October 2000 (day 61) the Lord Advocate informed the court that the new information had been disclosed to the defence that day. The trial was then adjourned once more in order to allow the defence to consider the information.

The letter from Crown Office dated 23 October 2000

14.122 In its letter dated 23 October 2000 Crown Office informed the defence of the following:

- that the Norwegian authorities had provided information to the effect that notes by Mobdi Goben were understood to exist in which he alleged the involvement of the PFLP-GC in the Lockerbie bombing. According to the letter the notes apparently claimed the involvement of Abu Elias in planting, and Khaled Jaafar in unwittingly transporting, the bomb onto PA103.

- that the full memorandum was in Syria, that it was understood that it could be made available, but that the Crown had been unable to recover it.

- that the Crown had been provided with a tape which Goben's son, Samir, said contained his (Samir's) reading of the notes. It was understood that the tape contained most of the document but not its entire contents. The Crown was able to provide three pages of the notes in Arabic together with a translation of these.

- that it was alleged by some witnesses that Abu Elias was [redacted]

14.123 The letter from Crown Office also provided contact details for five witnesses in Norway whom it was considered the defence might wish to interview. These were Miroslava Goben (Goben's widow), Samir Goben and three witnesses whose true identities had been protected for safety reasons and who were known only as Sidali, Rabbieh and Malek. The letter also provided contact details for an individual in the US who, it was suggested, could be the same [redacted] as was mentioned by the witnesses. It was explained in the letter, however, that [redacted]'s passport and employment records tended to place him in the US at the times relevant to the allegations contained in the memorandum. The letter concluded by saying that

although the Crown did not consider the account attributed to Goben to be a reliable one, it was appropriate that the information be disclosed.

The terms of the Goben memorandum

14.124 On 25 October 2000 the Crown provided to the defence the tape recording of what was alleged to be Goben's memoir as read by Samir Goben. On 30 October the Crown produced a transcript of the recording. The transcript contains *inter alia* allegations that persons named Abu Elias and Khaled Jaafar, both said to be US citizens, were members of the PFLP-GC, that Abu Elias was a relative of Ahmed Jibril, the leader of the PFLP-GC, and that Abu Elias and Khaled Jaafar had travelled to and from various countries including Syria, Yugoslavia, Sweden, West Germany and the US. The memorandum also contains the following passages:

> *"... then Abu Elias, who was fully aware of what he was carrying, placed the device in Jaafar's luggage without his knowledge so that it would be conveyed for him to the destination when they meet in America. This device could not have been detected by any screening process. Although the operation should have been aborted because an identical device had been found with Abu Mohammed Hafez...*
>
> *... The device should have detonated when the plane was over the ocean so that no evidence could be recovered to prove that there was an explosion."*

14.125 In the Commission's view while the terms of the memorandum are often vague the above passages appear to relate to the bombing of PA103.

The chambers hearings

14.126 From 7 to 9 November 2000 private hearings, referred to as the chambers hearings, were held in order to consider four applications made by the defence in light of the contents of the memorandum. The applications consisted of motions in terms of the Criminal Justice (International Cooperation) Act 1990 for letters of request to be issued to Syria, Iran, Sweden and the US. The hearings were held in private

because of the sensitive nature of the information in the memorandum and because of witness safety considerations. Neither the applicant nor the co-accused was present.

14.127 The transcript of the hearing on 7 November 2000 indicates that the defence sought the following information in respect of its application concerning Syria:

- documentation in the possession of the Syrian authorities relating to the possible membership of Abu Elias, [redacted] and Khaled Jaafar in the PFLP-GC;
- records of the movements into and out of Syria of these individuals;
- the original or a copy of Goben's notes (ie the memorandum itself);
- the financial records of the PFLP-GC showing any payments to it by Iran or payments by the PFLP-GC to the same three individuals.

14.128 The application for the letter of request in respect of Iran sought information regarding, *inter alia*, any payments by Iran to the PFLP-GC or to Abu Elias, [redacted] and Khaled Jaafar. The application for the letter of request to Sweden sought *inter alia* records relating to the movements of these individuals. The application in respect of the US sought movement records relating to *inter alia* [redacted] and Khaled Jaafar. So far as the applications regarding Sweden and the US was concerned Mr Taylor, informed the court that discussions were continuing between the Crown and defence and that he was optimistic that both could be dealt with without troubling the court.

14.129 During the first chambers hearing Mr Taylor submitted that the test to be applied in considering whether to grant the applications for letters of request was as set out in *McLeod*. The court then heard detailed submissions on each of the applications. On behalf of the co-accused, Mr Keen said that the information available to the defence and presumably to the Crown was that Ahmed Jibril, the head of the PFLP-GC based in Syria, probably had the original memorandum and that the Syrian government, in the form of one of its agencies, had a copy of it. Mr Keen also referred to the witness known as Rabbieh, whom both the Crown and the defence had questioned, and who said had dealt with the finance department of the PFLP-GC.

According to Mr Keen, Rabbieh could speak to the records of that organisation still being intact when he had left it almost two years before and these would record that payments were made to persons named Abu Elias and Khaled Jaafar. The records would also show the receipt of substantial sums of money by the PFLP-GC from the government of Iran. Mr Keen said that it had been common currency on the internet for ten years that Iran had paid the PFLP-GC to bomb PA103 in retaliation for the bringing down of an Iranian Airbus by a US ship, the USS Vincennes, in July 1988. However, the defence had been unable to recover any evidence to support that claim and Mr Keen presumed that the Crown had also been unable to do so.

14.130 Mr Keen referred to [redacted] whom the Crown had suggested the defence might wish to interview. The Crown had said that there was a possibility that [redacted] might be the [redacted] whom the witnesses suggested was Abu Elias. Mr Keen said that the [redacted] identified by the Crown had made available for inspection and copying his own US passport for the relevant period. However, the defence had discovered when they precognosced him that he also held a Syrian passport which he used for travel and which he thought he might have lost during a house move. The defence had also established that [redacted] was the [redacted] and that he [redacted] had been interviewed by the FBI in February 1989 at which time he was asked about the bombing of PA103 and about Dalkamoni.

14.131 The advocate depute, Mr Campbell, explained that it had initially been impossible for the Crown to pursue the information contained in the memorandum because Goben's widow and son were in Syria. The delay during the initial two week adjournment reflected the need for arrangements to be made for those witnesses to travel from Syria to Norway. Mr Campbell added that it was at a very late stage that the Crown was able to arrange interviews with them and it was at this time that the Crown received from Samir Goben the tape recording which he claimed had been made of the document prepared by his father. According to Mr Campbell it was said that the tape recording contained all but the last four or five pages of the document, and that Samir Goben and certain other witnesses who had seen the document (ie those named above) were able to give an account of the material contained in the last few pages.

14.132 Mr Campbell said that as a result of the information given by these witnesses the name [redacted] had come to the attention of the Crown. Enquiries were made and an individual in the US was identified. Mr Campbell said that the Crown's position, having obtained that information, was to disclose it to the defence. However, in relation to the allegation that Abu Elias placed the bomb in the property of Khaled Jaafar, the Crown's position was that this was untrue.

14.133 In respect of Iran, Mr Campbell said that according to the application the witness Rabbieh had informed the defence that he had been responsible for overseeing payments in one section of the financial department of the PFLP-GC, that he recalled that Abu Elias and Khaled Jaafar had been paid by the PFLP-GC and that regular payments, one of $7 million, were made to the PFLP-GC by the government of Iran. However, when interviewed by the Crown Rabbieh had said:

> *"I can also recall being present in Abu Nidal's office around 1992 to 1993, when Jibril and Abu Nidal returned from Iran with a large quantity of cash in two briefcases. The fact that the money is usually paid through the embassy, as well as the fact that Jibril brought the money back personally, makes me think that this may be of some significance. I do not know what the money was for, or payment for a job. I was not told. I was told to bank the money. I did not count the money."*

14.134 Mr Campbell said that it was plain from this that there was no information to indicate that the payment was in respect of the bombing of PA103. The timing of the payment was also well after the attack. According to Mr Campbell's submissions there was also no information to suggest that the [redacted] and Khaled Jaafar mentioned by Rabbieh as being members of the PFLP-GC were the same [redacted] as had been identified by the Crown and the passenger Khaled Jaafar who died on PA103. In Mr Campbell's submission the defence had failed to satisfy the tests set out in *McLeod* in respect of its applications regarding Iran and Syria and the court should reject these. Mr Campbell added that the appropriate course in respect of the applications concerning the US and Sweden was to continue them pending discussions between the Crown and defence.

14.135 A second chambers hearing took place on 8 November 2000 at which time the court issued its judgment in respect of the applications concerning Iran and Syria. Having regard to the tests in *McLeod*, the court was not satisfied that it would be appropriate to grant letters of request to either country except for one matter. The court said that it had been averred that the original memorandum was with the PFLP-GC and that a copy was with the Syrian government or one of its agencies. The defence did not have a paper copy of the document but merely a transcript of a tape recording which was said to have been made of a substantial part, but not all, of the document. The court therefore considered it appropriate to attempt to recover the document in its full form, in case there was any matter contained therein which was not presently available to the defence. Accordingly, the court granted the letter of request to the Syrian government, restricted to the sole matter of the recovery of the document itself or a true copy thereof. In respect of the applications regarding the US and Sweden, the court noted that matters were still being negotiated and that it might require to return to these at a later stage.

14.136 A further chambers hearing was held on 9 November 2000 at which time the court heard submissions in respect of the application for a letter of request to Sweden. The court refused the application the following day (67/8177). Briefly, Mr Campbell explained that a letter had been sent by the Crown to the defence indicating that the Swedish authorities had found no record of any entry in to or departure from Sweden by [redacted] or [redacted]. The letter also said that a search for records of the movements of Abu Elias into and out of Sweden would be futile. The letter added that the Swedish authorities had looked at the whole issue of Abu Elias many years ago, and had no information which would lead to the identification of such a person. It followed that there were no records of any such movements.

Further events at trial

14.137 On 10 November 2000 (day 67) the advocate depute intimated to the court that the next witness the Crown intended to call was Abo Talb. Mr Taylor objected to this on the basis that the letter of request to Syria was outstanding and that defence enquiries arising from the disclosure of the memorandum were ongoing. After hearing submissions on the matter, the court said there was no reason why the Crown

should not proceed with Talb's evidence. The court indicated, however, that if any information should come into the hands of the defence arising out of ongoing investigations, a motion for Talb to be recalled would receive sympathetic consideration.

14.138 At some stage in November 2000 the letter of request was received by the Syrian authorities who thereafter sought clarification as to its terms. On 29 November 2000 (day 75) the trial was adjourned until 5 December in order to allow time for the request to be dealt with. On 5 December (day 76) evidence was led on behalf of the applicant, following which the trial was adjourned again until 8 January 2001 for the same reason. The court made clear that this continuation was the last chance for the original memorandum to be recovered and that it would only be in the most exceptional circumstances that a further adjournment would be contemplated in this connection.

14.139 On 8 January 2001 (day 77) the Lord Advocate advised the court that Syria had declined to cooperate with the letter of request. The court observed that, as there was no realistic prospect of the document being available within any sort of reasonable timescale, if at all, Mr Taylor should proceed with the defence case.

The Commission's enquiries

14.140 As part of its assessment of this ground, the Commission recovered from the defence files a note by the applicant's trial solicitor Alistair Duff dated 7 June 2001 relating to the Goben memorandum (see appendix). According to the note Mr Duff considered the memorandum to be "hearsay, unreliable and provably wrong in a number of respects and therefore of no value."

14.141 This view was reflected by Mr Beckett at interview with the Commission's enquiry team. According to Mr Beckett, Miroslava Goben had stated that her husband's position was that Khaled Jaafar took the bomb on to the plane as hand luggage. This was inconsistent with what Mr Beckett considered irresistible evidence that the bomb was contained in a luggage container. According to Mr Beckett, this inconsistency could be used to taint anything else in the memorandum.

14.142 In Mr Beckett's view the memorandum was also contrary to the evidence of the witness Hassan El Salheli (days 65-66) who said he had witnessed Mr Jaafar packing only clothing into his suitcase. In addition while there was evidence that Mr Jaafar had travelled from Beirut to Germany and then on to the flight to the US, there was no evidence to support the suggestion that he had undertaken a trip to Yugoslavia, as the memorandum suggested. The court, Mr Beckett said, had accepted that the bomb was not contained in Mr Jaafar's luggage. According to Mr Beckett, there was evidence that Mr Jaafar had two bags and that two bags were recovered at the crash site. Mr Beckett said that in those respects the memorandum contradicted provable facts.

14.143 Another difficulty raised by Mr Beckett was that the basis of what Goben purportedly knew was unexplained. Mr Beckett considered it likely that the memorandum was hearsay. He suggested that, if Goben had said in the memorandum that he had made the bomb then it would have been admissible, but otherwise, if it was just based on information from his colleagues in the PFLP-GC, it was not admissible. Mr Beckett stated that it was hoped that if the original document could be recovered from Syria the missing pages might contain something clear and direct in relation to the bombing. That was why the letter of request to Syria was issued.

14.144 As well as investigating matters with the defence, the Commission also wrote to Crown Office seeking all statements and precognitions obtained by the Crown following its receipt of the information contained in the memorandum, together with any reports or similar relating to [redacted] On 31 December 2004 Crown Office provided 18 documents relating to the memorandum and a further 28 documents concerning [redacted] (indexes of these documents are contained in the appendix). The Commission's conclusions following an examination of these materials are set out below.

14.145 In the letter accompanying these materials, Crown Office advised that [redacted]'s name had never been made public during the Lockerbie investigation and asked that the Commission ensure that "his name is not made public as a result of [its] investigations." On three separate occasions the Commission sought to clarify with

Crown Office precisely what was meant by this request, in light of the fact that the Commission does not publish its statements of reasons. No response was received from Crown Office in this connection. However, given that [redacted]'s name is clearly known to those currently acting on behalf of the applicant, as well as to Crown Office, the Commission did not consider it necessary to delete references to him in its statement of reasons.

Consideration

14.146 The Crown's obligations of disclosure under *McLeod v HMA* and the Convention have been set out in section (2) above regarding the CIA cables. In essence the applicant's submission is that the Crown's approach to the Goben memorandum breached those obligations and has resulted in a miscarriage of justice.

14.147 Although the Goben memorandum was the subject of detailed submissions to the trial court it did not feature in the evidence. As indicated, both the Crown and ultimately the defence were doubtful as to the credibility and reliability of the information contained within the document. Insofar as it is alleged that Mr Jaafar carried the bomb on board PA103A either in his hand luggage or in the baggage he checked in, the Commission shares these doubts. As the trial court recognised, there was acceptable evidence that before travelling to Frankfurt airport Mr Jaafar had two holdalls in his possession. The passenger manifest for flight PA103A indicated that he had checked in two items of luggage both of which had been found close by one another at the crash scene. Neither had suffered any explosion damage. In addition, as Mr Beckett highlighted at interview, any suggestion that Mr Jaafar had carried the device in his hand luggage is countered by undisputed evidence that the bomb was contained in a brown Samsonite suitcase located in luggage container AVE 4041 within the hold of the aircraft. As explained in chapter 13 above the Commission has found no evidence to justify the suspicions that have been raised as to Mr Jaafar's involvement in the bombing.

14.148 The Commission has examined each of the 18 documents received from Crown Office in connection with the memorandum. It is apparent that most of these items were not disclosed to the defence. The Commission has also examined a

number of papers in relation to the memorandum which were extracted from the defence files (again an index of these materials is contained in the appendix). It is clear from these papers that the defence interviewed all the witnesses referred to in Crown Office's letter of 23 October 2000. Having compared the information in the possession of both parties at the time of trial, the Commission is of the view that the defence had all material information that was available to the Crown in respect of the memorandum.

14.149 Likewise, the Commission has examined each of the 28 documents received from Crown Office in relation to [redacted]. Again, most of these items were not disclosed to the defence. The Commission has also examined a number of defence papers in relation to [redacted] (see the index in the appendix). Having compared both sets of information the Commission is of the view that all material information concerning [redacted] which was in the hands of the Crown was also available to the defence.

14.150 The Commission has also examined various items received from Crown Office (see the index in the appendix) and D&G in response to its requests for information regarding Mr Jaafar, as well as the relevant passages from the Crown precognitions and the police report. Again the Commission found nothing material in any of these sources which was not available to the defence at trial.

14.151 The contents of three letters sent to the defence by Crown Office during the trial are worthy of note as they contain additional information regarding [redacted] (see appendix), and are of assistance in addressing the submissions about the FBI's enquiries about him. First, in a letter dated 31 October 2000, Crown Office advised the defence that information had been made available to the Crown by the FBI that on 14 May 1987 [redacted] deposited $5850 in Thomas Cook traveller's cheques in his account with Riggs National Bank. According to the letter a Mr Hafez Hussein purchased the traveller's cheques on 8 May 1987 from the Societe Bancaire Arabe in Cyprus (the Commission notes that Hafez Mohamed Hussein was a name used by Dalkamoni: evidence of Anton Van Treek: 71/8724 and joint minute number 16). Although the information provided by the FBI was that the cheques banked were to the value of $5850, by the Crown's calculations the cheques totalled $5000 which

in its view was the correct sum. According to Mr Keen's submissions at the first chambers hearing the FBI was prompted in December 1990 to carry out a comparison of the handwriting on the traveller's cheques and specimens of Dalkamoni's handwriting. The comparison indicated only that the same person *might* have prepared the documents.

14.152 In a second letter, dated 9 November 2000, Crown Office advised the defence that the Scottish police had interviewed [redacted] about the traveller's cheques the previous month, prior to the defence meeting with him. As far as the Crown was aware, this was the first time that [redacted] had been asked about this matter. According to the letter, [redacted] did not recall depositing this sum. He had explained to the police that when he went home (to Syria) he would get money from his family and that he would not know where this had come from. If he had received $5,800 it would probably have been from his family. He was in the middle of divorce proceedings at the time and would have asked his family for money to help. He needed money for court as he had to pay his wife money. He did not receive any money directly from a Hafez Hussein, who [redacted] said was a well-known person. The letter also said that [redacted] had given his explanation regarding the Syrian passport, that he had been asked to make it available if it was located and that his lawyer was aware of the defence interest in the matter.

14.153 In a third letter, dated 2 November 2000, Crown Office informed the defence that [redacted] was seen by the FBI during the period 1988/1989 when he was considered to be someone who might have had information to impart on a number of matters. According to the letter, on 23 January 1989 [redacted] denied that he had any information about the Lockerbie bombing or that he knew any of the suspects arrested by the BKA in the Autumn Leaves operation. In the Commission's view, although the purpose of that meeting is unclear, there is no evidence to indicate that the discussions connected [redacted] to the bombing of PA103.

14.154 Although the Commission is not aware of the extent of any information held by the FBI on this matter, these letters tend to confirm that no evidence was made available to the Crown as a result of the FBI's enquiries that would link [redacted] to the bombing of PA103.

14.155 Furthermore, although it came to light at an advanced stage in the trial the Commission finds no substance in the complaint that the Crown's disclosure of the information obtained from the Norwegian authorities was late. The sequence of events at trial indicates that information relating to the memorandum and [redacted] was disclosed to the defence once the Crown had investigated the matter. As indicated, the court granted a number of adjournments to the Crown and to the defence to allow them to complete their investigations in this connection.

Conclusion

14.156 For the reasons given the Commission does not consider that the Crown's handling of matters concerning the Goben memorandum gave rise to a breach of the Crown's obligations under *McLeod* or the Convention. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred in this connection.

(4) Information relating to the incriminees

Introduction

14.157 At trial each accused lodged a notice of special defence of incrimination in identical terms. The persons incriminated were (1) members of the Palestinian Popular Struggle Front ("PPSF"), said possibly to include Mohamed Abo Talb and a number of other named individuals; (2) members of the Popular Front for the Liberation of Palestine-General Command ("PFLP-GC"); and (3) an individual named Parviz Taheri, although in the event the defence did not insist on this aspect of the incrimination.

14.158 It is alleged on behalf of the applicant (see chapter 12 of volume A) that the Crown's approach to the disclosure of evidence in respect of the incrimination amounted to a breach of the Crown's duty of disclosure as set out in *McLeod*. It is also alleged that there was a violation of the applicant's right to a fair trial under article 6 of the Convention.

14.159 This section sets out the Commission's conclusions in respect of the following materials obtained from Crown Office and D&G:

(1) the interim and final police reports issued to the Crown in May 1989 and November 1991 respectively;

(2) the Crown precognition volume relating to the incriminees (chapter 15 of the case);

(3) the contents of various HOLMES statements and other witness accounts relative to the incriminees; and

(4) the responses issued to the Commission by Crown Office and D&G in respect of various specific requests for information regarding the incriminees.

14.160 The allegations of non-disclosure in respect of Khaled Jaafar have been addressed in section (3) above regarding the Goben memorandum.

The applicant's submissions

14.161 It is alleged in the submissions that very little of the mass of information available to the Crown in respect of the incriminees was disclosed to the defence. The incriminees, it is submitted, were the main suspects for at least 18 months after the bombing. Reference is made to the minutes of an international Lockerbie conference involving police and prosecutors from various countries which took place on 14 September 1989. According to the submissions the minutes of that conference record that consideration was given by the Crown to bringing charges against the incriminees. The submissions further allege that a draft petition was prepared containing charges against the incriminees. MacKechnie and Associates confirmed by letter dated 12 May 2005 that the latter allegation originated from the Golfer (see chapter 5).

14.162 The submissions argue that there was an "astonishing" lack of information provided to the defence by both the US and UK authorities given that the

investigation had reached the stage when charges were contemplated. It is claimed that the investigating authorities would have had information showing that the bombing was sponsored by an alliance of Iran and Syria and that the PFLP-GC and its leader Ahmed Jibril carried out the attack. According to the submissions such information was reported widely in the press and was recorded in the cables of the US Defense Intelligence Agency ("DIA"). It is also submitted that the authorities must have had information indicating that there was a coalition between the PFLP-GC and the PPSF. According to the submissions information to this effect was noted in the BKA files (see section (1) above).

14.163 It is further alleged in the submissions that evidence must have been available to the authorities regarding the activities of the PFLP-GC in Malta, Cyprus and Yugoslavia. Indeed, it is suggested that at trial Det Chief Supt Henry Bell accepted in cross-examination that PFLP-GC personnel in Malta were under surveillance by the US there. The submissions also allege that CIA personnel interviewed in the US declined to provide information on this matter on the basis that it was "irrelevant" and contrary to national security.

14.164 According to the submissions it was apparent from the international Lockerbie conference minutes that Abu Elias was of great interest to investigators, yet very little information was provided about him.

The events at trial

14.165 Evidence in relation to the incrimination featured prominently at trial and was spoken to by a number of witnesses and agreed in several joint minutes. It was also addressed in detail in the closing submissions by the advocate depute (79/9524-9527) and counsel for the applicant (80/9574-9600). It was not an issue on which the applicant sought to rely at appeal.

14.166 The trial court dealt with the incrimination defence at paragraphs 70-81 of its judgment. Its conclusions were that prior to the Autumn Leaves raid on the PFLP-GC cell in West Germany in October 1988 that cell had both the means and intention to manufacture bombs which could be used to destroy civil aircraft (paragraph 73) but

that there was no evidence that the cell had the materials necessary to manufacture an explosive device of the type that destroyed PA103 (paragraph 74). The court also accepted that there was a great deal of suspicion as to the actings of Talb and his circle, but concluded that there was no evidence to indicate that they had either the means or the intention to destroy a civil aircraft in December 1988 (paragraph 81). At paragraph 82, the court concluded that although there was no doubt that organisations such as the PFLP-GC and the PPSF were also engaged in terrorist activities, there was no evidence from which to infer that those organisations were involved in the bombing of PA103, and the evidence relating to their activities did not create a reasonable doubt about the Libyan origin of this crime.

Consideration

14.167 Before addressing the submission that there must be information about the incriminees that was not disclosed to the defence, it is worth addressing first the allegation that at one stage the Scottish authorities envisaged charges being brought against them. As indicated, in support of this assertion the submissions rely upon the international Lockerbie conference minutes of 14 September 1989 and an allegation by the Golfer. The relevant passage from the conference minutes states:

> "… *With reference to further actions in the international investigation, the Scottish representatives reported on forensic examinations still outstanding, which could lead to new lines of enquiry… <u>According to Scottish law, a charge against certain people is already possible but not envisaged at present</u>*" (underline added).

14.168 The minutes do not name the individuals in question but given that the minutes refer elsewhere to investigations in respect of Talb and the PFLP-GC it is reasonable to infer that the sentence highlighted above relates to them.

14.169 However, the minutes for the next international conference, held on 10 January 1990 (see appendix), record a request by the "Scottish Prosecutors" to replace the sentence in question with the following:

"*... According to Scottish law circumstantial evidence could be used to support charges against some people, but in view of the current state of the evidence there was no prospect of bringing charges against any particular group or individual at this stage.*"

14.170 No objection to the proposed amendment was noted in the January 1990 minutes and the Commission therefore has no reason to doubt that it was accurately recorded. Contrary to the submissions, then, it is clear that the Scottish authorities did not consider the evidence against the incriminees as sufficient to justify charges being brought. It is worth noting that minutes for a number of the international conferences, including the two mentioned here, were referred to in evidence (56/7581, 70/8683-8684 and 71/8729) and during the hearings in chambers (pp 7, 145 and 148 of the transcript). Accordingly, the defence was clearly aware of them at the time of the trial.

14.171 As regards the allegation attributed to the Golfer that a draft petition was prepared containing charges against the incriminees, the Golfer did not adhere to this claim when interviewed by the Commission's enquiry team (see statement dated 14 December 2004, p 23, in appendix of Commission's interviews). He explained, instead, that reports were prepared by the police recommending that arrests be made of the Autumn Leaves suspects (i.e. the PFLP-GC cell in West Germany). According to the Golfer another police officer told him that the reports were submitted personally to the then Lord Advocate at his home. The Golfer said that the news later filtered back that the Crown was not willing to proceed with charges.

14.172 For the reasons given in chapter 5, the Commission has rejected the Golfer's accounts. In relation to the present allegation, D&G advised the Commission by letter dated 11 April 2005 (see appendix) that only two reports were submitted by the police to the Crown or procurator fiscal, namely the interim police report (in May 1989) and the final police report (in November 1991). The Commission has examined both reports and neither recommends the bringing of charges against any of the incriminees. The Commission has seen no other evidence supporting the claim that a draft petition was prepared containing charges against the incriminees.

14.173 The fact that the incriminees were initially the main suspects was abundantly clear at trial, and was spoken to by DCI Gordon Ferrie (3/317-318). DCI Ferrie went on to testify that by June 1990 the direction of the investigation "was changing" (3/330).

14.174 In the Commission's view, the crucial question in relation to this ground is whether there was a failure by the Crown to disclose to the defence material evidence in respect of the incriminees. The law concerning the Crown's obligations in this area is set out in section (2) regarding the CIA cables, above.

14.175 As part of its assessment of this question the Commission examined in some detail the evidence at trial and the closing submissions of counsel. The Commission also examined the interim and final police reports, as well as various Crown precognitions and HOLMES statements considered relevant to the incrimination. Given the sheer volume of material, it was not possible to review all the information held by D&G and Crown Office. In these circumstances the Commission made a series of specific requests to those agencies for information considered relevant to this ground. The Commission also examined numerous papers that were in the possession of the applicant's representatives and which were available to the defence at trial. As well as defence precognitions, these included Crown precognitions, Crown productions (both those which were lodged and those which were not) and police statements, all of which had been disclosed to the defence. The papers also included documents which had been contained in the BKA files.

14.176 Broadly, the approach taken by the Commission was to identify within the materials obtained from the Crown and D&G any information which did not feature in the evidence at trial and which the Commission considered might be material to the incrimination. Where such information was found, the Commission sought to establish whether it was contained in the documentation available to the defence at trial.

14.177 The results of this exercise are referred to below. In short, the Commission did not come across any information of potential materiality which was not available to the defence at trial.

(1) The police reports

14.178 Neither of the two reports submitted by the police to the Crown was disclosed to the defence. One chapter of the interim report and a number of sections of the final report contain material information in relation to the incrimination. However, in light of the evidence led at trial and the information in the possession of the defence in the form of Crown and defence precognitions, the Commission considers that all material information in the reports was available to the defence.

14.179 One section of the final police report concerns Abo Talb and lists over twenty HOLMES documents relating to him and a number of his associates. The Commission obtained prints of all these documents from D&G but does not consider them to contain any material evidence that was not available to the defence. There were no documents listed in the section of the police report dealing with the PFLP-GC.

14.180 The final police report also contains a section concerning the "Miska Company" in Malta. A specific allegation made about this company in the submissions is addressed below.

(2) The Crown precognition volume

14.181 As stated in chapter 4 above, the Commission obtained from Crown Office what appears to be the full collection of Crown precognitions relating to the case. This included three volumes in respect of the incriminees (chapter 15 of the precognition volumes), the first two relating to Talb, the third to the PFLP-GC. Many of the precognitions concerning Talb were disclosed to the defence. However, in some cases the versions provided to the Commission by Crown Office contained passages which were not included in the versions disclosed to the defence. Having conducted a comprehensive comparison exercise, the Commission is satisfied that there is no material information in any of the undisclosed passages or in any of the undisclosed precognitions that was not otherwise available to the defence.

(3) HOLMES statements and other witness accounts

14.182 As indicated in chapter 4 above, the Commission obtained from Crown Office a database containing over 15,000 HOLMES statements. In the course of its consideration of the submissions on the incrimination and the responses from the Crown and D&G to requests made in this regard, the Commission examined a large number of these statements and is satisfied that none of those reviewed contain material information that was not available to the defence. However, one statement of Talb's wife Jamila Moghrabi dated 7 December 2006 (S5080B, see appendix) refers to a telephone conversation she made to her sister-in-law Wafa Toska in terms that are slightly different to the information that appears to have been available to the defence (see appendix). In the Commission's view, however, the discrepancy between the two sources is not material.

14.183 The Commission also requested from D&G any other witness statements that were not included within the HOLMES database. In a response dated 7 November 2005 D&G explained that some reports of interviews carried out by and received from agencies in other countries would be treated as HOLMES "documents" rather than as statements. The documents falling into this category were provided to the Commission by D&G and comprised:

(a) 89 documents in respect of FBI interviews with either passengers on PA103 or Pan Am staff;
(b) 30 FAA (Federal Aviation Administration) interviews or reports of interviews; and
(c) 116 documents in respect of German and Swedish enquiries following up on Autumn Leaves and Abo Talb.

14.184 Having examined these documents, the Commission does not consider any of them to contain material information which was not available to the defence.

(4) The Commission's requests to Crown Office and D&G

14.185 As explained, the Commission made a number of requests to D&G and Crown Office in respect of issues relevant to disclosure and incrimination. The Commission's findings in respect of several of these requests are set out below.

(a) General request regarding Dalkamoni and others

14.186 The Commission requested from D&G and Crown Office all statements and precognitions of Haj Hafez Kassem Dalkamoni, Abu Elias, Ahmed Jibril, Marwan Khreesat and Abo Talb, as well as any reports setting out the outcome of investigations into the possible involvement of these individuals in the bombing of PA103.

14.187 In its various letters dated 15 or 16 November 2005, D&G provided a series of documents relative to each of these individuals. The correspondence from D&G was protectively marked, as were many of the documents provided. In the Commission's view none of these documents contains any information of potential significance. However, the Commission sought D&G's consent to disclose a particular document which contained information relating to Abu Elias. The Commission's request was referred by D&G to the Security Service which ultimately gave consent to disclose only the following passage:

> *"Meeting on 21 February 1990*
>
> *DST* [France's domestic security service] *asked DC Entwistle if he was looking for 'Abu Elias' amongst the names of MAY 15 transferees to PFLP-GC. DST stated that 'Abu Elias' was a central figure in terrorism, that there were numerous people of that name on 'intelligence networks' and that they believed that the PA103 bombing must have had some sort of collaboration at Frankfurt."*

14.188 The Commission has found no evidence to support the claim that the loading of the bomb onto PA103A was achieved through the assistance of a "collaborator" at

Frankfurt airport. Indeed, the defence investigated claims that a baggage handler at that airport had introduced the bomb onto PA103A but found these to be unsubstantiated (see appendix). In these circumstances the Commission does not consider that any decision not to disclose the information contained in this document suggests that a miscarriage of justice may have occurred.

14.189 In its letter dated 18 January 2006 Crown Office confirmed that it had no statements or precognitions from anyone identified as Abu Elias and explained that no individual of that name had ever been identified by the Crown or D&G. In addition, the letter advised that Crown Office did not have any statements or precognitions of Ahmed Jibril. Crown Office confirmed that all of the statements and precognitions held by it in respect of Abo Talb had already been made available to the Commission. In a further letter dated 27 April 2007 Crown Office confirmed that all of the statements and precognitions held by it in respect of Dalkamoni had already been made available to the Commission.

14.190 Crown Office provided a number of documents in connection with Marwan Khreesat. As well as copies of Crown productions 1851-1858 (which relate to Khreesat's FBI interview and various questions the Crown intended to put to him at interview in April 2000) Crown Office provided (1) an additional question put to Khreesat by the Crown along with his answer to this, (2) a statement by DC John Crawford dated 21 April 2000 concerning Khreesat's interview in April 2000, and (3) a statement by Magdy Abbas dated 19 April 2000 concerning the same interview. The Commission does not consider that any of these three documents contains material information that was not available to the defence.

(b) Request regarding RT-SF16 Toshiba radio cassette players

14.191 The trial court accepted that the explosive device used in the bombing of PA103 was housed in a Toshiba twin-speaker radio cassette player known as an RT-SF16 BomBeat. It was therefore different from the device recovered from the PFLP-GC cell in West Germany in October 1988 and the "fifth device" described by Khreesat at interview with the FBI (see the evidence of Edward Marshman: 76/9301; CP 1851) both of which were contained within single-speaker radio cassette players.

14.192 The fact that a particular model of Toshiba cassette player was used in the bombing of PA103 appears to have been a factor in the court's rejection of the incrimination defence. In light of this the Commission requested from D&G and Crown Office any information in their possession regarding the possible use by any country, agency or person of RT-SF16 Toshiba BomBeat radio cassette players or other types of twin-speaker radio cassette players to conceal improvised explosive devices. In its response dated 7 November 2005, D&G indicated that research of the matter had failed to detect the use of an RT-SF16 radio cassette player in any other air incidents. D&G also provided a number of documents considered relevant to the request none of which, in the Commission's view, contain material information that was not already available to the defence. Crown Office subsequently informed the Commission that it had nothing to add to D&G's response.

(c) Request regarding the Miska Bakery

14.193 It is alleged in the submissions that there was a failure to disclose material evidence in respect of surveillance of the PFLP-GC in Malta. Reference is made in this respect to Mr Bell's evidence at trial which according to the submissions was to the effect that PFLP-GC personnel in Malta were under surveillance by the US. In fact Mr Bell gave evidence that the police enquiry was suspended in Malta because of unauthorised telephone tapping, but he did not specify who was responsible for this (32/4887-8). Later in his evidence Mr Bell stated that the incident involved a telephone tap at the Miska Bakery in Malta and that the subject of the surveillance was the owner of the bakery (52/7149).

14.194 A number of the incriminees were directors of, or otherwise connected to, the Miska Bakery, and there was evidence at trial which, according to the defence, indicated links between those individuals and Abo Talb and the PPSF (see eg joint minute number 11; evidence 40/6043). As indicated, one of the sections in the final police report (section 4.15) concerned "the Miska Company Limited." According to the report the company was of interest to the enquiry because of the associations between some of the participants in the company and Abo Talb. The report names these individuals as: Abd El Salam Arif Abu Nada, Jamal Haidar, Magdy Mousa

Ahmed, Dr Khalid Mohamed Salama El Nahhal, Imad Adel Hazzouri, Ismail Hazzouri, Ala'a El Deen M H Sherrab, Saber Shurrab, Hashem Abu Nada alias Hashem Salem, Abou Feyah Selvana and Mohamed Abdallah Haidar. The report states that from enquiries and accumulated intelligence information, there was evidence indicating that the Miska Company was a "front" for terrorist activity. The report does not provide any further information about this intelligence, although it goes on to say that with the assistance of the Maltese authorities it had been confirmed that the participants named above were involved in, or connected to, the company. The police report refers to statements and documents relating to a number of these individuals, some of whom the police interviewed. The Commission obtained those statements and documents and having examined them is satisfied that none of them contains any undisclosed evidence of any materiality.

14.195 The relevant section of the report concludes by saying that although there were indications that the Miska Company was not a bona-fide organisation, there was nothing to implicate the company, its directors or its associates including Abo Talb with any involvement in the destruction of PA103. That conclusion accords with Mr Bell's evidence on the matter (56/7586).

14.196 The police report provides no information about the surveillance mentioned by Mr Bell in his evidence. By letter dated 25 April 2005 the Commission asked D&G and Crown Office to explain the "accumulated intelligence information" referred to in the relevant section of the report. The Commission also requested information regarding the surveillance in Malta referred to by in Mr Bell in evidence.

14.197 In its response dated 17 August 2005 D&G advised that the Scottish police were not involved in the surveillance, nor were they aware of who had carried it out or of the results of the operation. In its letter D&G refers to four HOLMES documents with references D6652, D6755, D6756 and D11932. With the exception of document D11932 all of these are protectively marked. D&G provided details of each document in its response but only document D6755 is significant for present purposes. D6755, it was explained, is a confidential note prepared by DCS Henderson explaining that on 12 November 1990 Mr Grech of the Maltese Police had informed Mr Bell that a device with the appearance of a transmitter had been found in a street telephone

junction box. The device, it was said, looked as if it had been attached to a telephone line belonging to a Palestinian resident in Malta who had been interviewed by Scottish police officers. D6755 also pointed out that reports of the intercept had appeared in a Maltese newspaper, *L'Orizzont*, on 6 and 7 November 1990, but that the issue had only been raised with Mr Bell on 12 November. According to the document Mr Grech believed that the Scottish police might have been responsible for the device, an allegation which Mr Bell immediately and strongly denied. D6755 concluded by saying that a letter by the Scottish police formally denying involvement in the episode had been sent to the British High Commission in Malta.

14.198 In a further response dated 7 November 2005 D&G provided a number of documents relevant to the Commission's request for intelligence information regarding the Miska Bakery. In the Commission's view none of them contains material information that was available to the defence. The Commission also examined a number of other protectively marked documents in connection with its request to D&G. Again, none of these documents contains material evidence that was not available to the defence.

14.199 In its response dated 18 January 2006 Crown Office advised that they had nothing to add to D&G's responses except to point out that "it was never accepted by any individual or agency that phone tapping had occurred" and that it had no information about the "alleged phone tapping" to which the Commission had referred.

14.200 Standing these responses, it appears to the Commission that all material information held by Crown Office and D&G relating to the surveillance was heard at trial.

(d) The return portion of Abo Talb's ticket

14.201 In his closing submissions at the trial, counsel for the applicant referred to joint minute number 11 in which it was agreed that on 26 October 1988 Talb travelled from Malta to Sweden on a return ticket (CP 1277) which was valid until 26 November 1988. According to the submissions it had not been proved that the return portion was not used. The evidence at trial was that the only means of confirming this

was to make enquiries with Scandinavian Airlines (Wilfred Borg at 34/5261). There was no evidence as to whether such enquiries had ever been undertaken.

14.202 The Commission asked D&G to confirm whether investigations were carried out in this regard. In its response dated 18 October 2005 D&G advised that it had been unable to locate any records confirming that the position was checked with Scandinavian Airlines. At the Commission's request D&G enquired with Scandinavian Airlines whether they held any records which might clarify the position. However, the airline confirmed to D&G that any such records would have been destroyed after 10 years. Thereafter, the Commission requested that D&G ask the police officers involved in enquiries relative to Abo Talb (namely Watson McAteer, John McGowan and Pat Ferguson) whether they had established that the position in respect of the return portion of the ticket. D&G confirmed in a letter dated 19 April 2006 that none of the officers could recall making enquiries in this connection.

14.203 There is no evidence to suggest that Abo Talb used the return portion of the ticket. Indeed, the indications are that he did not do so. According to D&G's letter to the Commission dated 29 December 2005 the police searched the embarkation cards in Malta for any relating to Abo Talb (or his aliases) but found none which indicated that he had returned there. There were also no marks in Talb's travel document (CP1249) to suggest that he travelled abroad after returning to Sweden from Malta on 26 October 1988. In addition, there was evidence of Talb's presence in Sweden on particular dates in November and December 1988 but no evidence of his presence in Malta in those months apart from Anthony Gauci's account that he resembled the purchaser of the items.

14.204 In the Commission's view, although it is regrettable that the matter was not checked with Scandinavian Airlines at the time of the police investigation, there was no failure by the Crown to disclose material evidence about the return portion of Talb's flight ticket.

(e) Other matters

14.205 The Commission also requested information from D&G in respect of a number of other issues relevant to this ground. These included:

- All Commissions Rogatoire relating to Sweden and, in particular, Talb.
- Details regarding a report on the BBC news website on 23 August 2002 concerning Atef Abu Bakr who, according to the report, was a former aide of the Palestinian terrorist, Abu Nidal. The report referred to comments by Bakr that Nidal, who had been found dead in Iraq in the week of the report, was behind the PA103 bombing.
- A copy of production DH/25 - a compilation of transcripts of television interviews given by Ahmed Jibril.
- A request regarding section 33.3 of the police report. This section of the report addressed a number of anonymous claims of responsibility for the bombing of PA103.

14.206 The responses from D&G in connection with these matters are contained in the appendix. The Commission's enquiries in respect of these matters did not uncover any material information that was not available to the defence.

Conclusion

14.207 For the reasons given, the Commission does not consider that the Crown's approach to the disclosure of evidence in respect of the above matters amounted to a breach either of its duty of disclosure as set out in *McLeod* or the applicant's Convention rights. Accordingly the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 15
ROBERT BAER

Introduction

15.1 It is alleged on behalf of the applicant (see chapter 16.3 of volume A) that new and important information was obtained after the trial from Robert Baer, a former case officer with the CIA. Mr Baer was employed within a department of the CIA known as the Directorate of Operations which has primary responsibility for the clandestine collection of foreign intelligence, including "human source intelligence". During his time in the CIA Mr Baer worked almost exclusively in the Middle East. Between 1988 and 1991 he was involved in the CIA investigation into the bombing of PA103.

15.2 In January 2002 a book by Mr Baer about his experiences in the CIA was published in the US. Entitled, "See No Evil: The True Story of a Ground Soldier in the CIA's War on Terrorism", the book contained several references to intelligence information which it was suggested might implicate Iran and various incriminees including Abo Talb ("Talb") in the bombing (relevant extracts from the book are contained in the appendix).

15.3 No evidence was led from Mr Baer at either the trial or the appeal, and his name did not feature in the Crown or the defence lists of witnesses. At interview with the Commission's enquiry team Alistair Duff, the solicitor who represented the applicant during the proceedings, was certain that Mr Baer had not been precognosced by the defence. Although the defence files suggest that an attempt was made to investigate the claims made by Mr Baer in his book, it appears that this occurred in the period between the end of the appeal hearing and the issuing of the appeal court opinion (see the letter from Alan Jenkins to Ibrahim Legwell dated 19 February 2002 in the appendix). In the Commission's view, given the timing of the publication of Mr Baer's book it is not surprising that the defence was unable to investigate his allegations prior to the appeal.

The applicant's submissions

15.4 Reference is made in the submissions to notes of four meetings between Mr Baer and individuals representing the applicant. Copies of these notes are contained in the appendix.

15.5 The first note relates to a meeting which took place on 9 February 2002 between Mr Baer and a journalist, John Ashton, who according to the note was an investigator on behalf of the "parallel defence team". The membership and status of this group are not entirely clear to the Commission, although it appears that it was a separate entity from the team which represented the applicant at trial and appeal (see the statements by Mr Duff and Mr Beckett in the appendix of Commission interviews).

15.6 The second note concerns a further meeting between Mr Ashton and Mr Baer on 10 February 2002. Shortly after this meeting, on 17 February 2002, the *Sunday Herald* published an article by Mr Ashton which related to his meetings with Mr Baer (see appendix). The third note contains details of a meeting on 11 October 2002 between Mr Baer, Mr Ashton and the applicant's former solicitor, Edward MacKechnie. The final note refers to a further meeting between Mr Baer and Mr MacKechnie which took place on 15 January 2003.

15.7 According to the submissions Mr Baer provided the following information at these meetings:

- The Popular Front for the Liberation of Palestine-General Command ("PFLP-GC") and Talb both received substantial payments after the bombing of PA103. In particular Mr Baer had details of bank accounts showing payments of $11m to the PFLP-GC in Lausanne on 23 December 1988 and $500,000 to Talb on 25 April 1989 in Frankfurt. According to the submissions Mr Baer believed the payments came from Iran.

- Talb and Haj Hafez Kassem Dalkamoni ("Dalkamoni") appeared on the Iranian "roll of honour" in 1990 for "great service" to the Iranian revolution. According to Mr Baer the list of those honoured was held by the CIA who considered Talb to be an Iranian agent.

- Mr Baer had seen and had details of telephone intercepts involving Palestinian terrorists, including Talb, the terms of which incriminated them in the bombing of PA103. According to the submissions these intercepts were new to the defence and were separate from the limited details of calls made by Talb to his wife and girlfriend from Cyprus in October 1988. The intercepts were said to have been provided by GCHQ, and it is suggested in the submissions that the Commission could obtain these.

- Mr Baer saw evidence that the "main PFLP-GC activists" were operating after the Autumn Leaves raid and, in particular, were "plotting" between October and 21 December 1988.

- Abu Elias was the main focus of the investigation and it was "thought" that the fifth device which Marwan Khreesat ("Khreesat") made for the PFLP-GC (i.e. a device he said he had worked on but which was not recovered during the Autumn Leaves raids, in which only four devices were seized) was the one used in the bombing of PA103, albeit there were differences between this and the other bombs made by him. The components for the bombs were "believed" to have been supplied by Abu Elias.

- The CIA knew of Edwin Bollier long before the US Government sources claimed to have discovered him in the investigation.

The allegations in Mr Baer's book

15.8 Many of the points made by Mr Baer in his book relate to matters of which the defence was aware and to which reference was made at the trial. However, the book also contains certain details of which the defence might not have been aware at

the time of the proceedings. Some of these details reflect those outlined above. They are as follows:

- A few days after the destruction of an Iranian Airbus by the US Navy battle-cruiser, the USS Vincennes, on 3 July 1988, a meeting took place in southern Lebanon between Dalkamoni, an officer of the Iranian Islamic Revolutionary Guards Corps ("IRGC" or "Pasdaran") and another member of the PFLP-GC known only as "Nabil". According to the book, Iran had decided to take revenge for the shooting down of the Airbus and the IRGC officer issued instructions to Dalkamoni and Nabil to "[b]low up an American plane in the air, in order to kill as many people as possible". The CIA was able to identify with "a fair amount of certainty" that Nabil was a PFLP-GC official named Nabil Makhzumi (aka Abu 'Abid) who at the time was an assistant to Dalkamoni. Makhzumi's Iranian case officer was a senior IRGC official named Feridoun Mehdi-Nezhad. According to the book Mehdi-Nezhad had visited Libya in early 1988 and Frankfurt in July of that year.

- On 23 December 1988, two days after the bombing of PA103, a transfer of $11m "showed up" in a PFLP-GC bank account in Lausanne, Switzerland. The money then moved from that account to a PFLP-GC account with the Banque Nationale de Paris and then to another account at the Hungarian Trade Development Bank. According to the book the number of the Paris bank account was found in Dalkamoni's possession when he was arrested. Mr Baer questions in his book whether this payment was made by Iran as a "success fee" for the bombing of PA103.

- Talb received a payment of $500,000 on 25 April 1989.

15.9 It is perhaps worth noting that within Mr Baer's book there is a disclaimer which indicates that, although the contents were reviewed by the CIA's "Publications Review Board", this was not to be construed as an "official release of information, confirmation of its accuracy or an endorsement of the author's views."

The Commission's enquiries

Enquiries with Robert Baer

15.10 Given the nature of Mr Baer's allegations, the Commission considered it necessary to obtain a direct account from him. He was interviewed on three occasions, once by telephone on 20 April 2005 ("the April interview", see appendix of Commission interviews), and twice in person. The first of the personal interviews was informal and took place on 28 July 2005 when notes were taken of Mr Baer's responses to questioning. During this interview Mr Baer made reference to a source from which he had obtained certain information, but said that he was not prepared to discuss this "on-tape". The second of these interviews took place the following day and was recorded ("the July interview", see the appendix of Commission interviews). Members of the Commission's enquiry team also met with Mr Baer on a number of other occasions to clarify matters he had raised and to obtain materials from him.

15.11 During the April interview Mr Baer confirmed that he had worked on the CIA's investigation of the Lockerbie case on a part-time basis from 1988 to 1991. At that time he was based in Paris. He explained that the information in his possession had not originated from his own investigations, but from various CIA telexes containing reports on the case. At the July interview he accepted that the accuracy of this material depended on "the reliability of the information provider" and explained that just because information was reported in a telex did not necessarily mean that the CIA had verified it. Mr Baer said that he had also seen information about the case on CIA databases. He confirmed that none of the information in his possession was based on first-hand accounts such as from witnesses he had interviewed. At the April interview Mr Baer said that he had continued to "go into" the case until 1998.

15.12 Mr Baer referred at interview to various "index cards" on which he said he had made notes about the case. In the July interview he explained that these cards represented the only records he had kept of the matters under discussion and that he did not have any CIA documentation about the case. Mr Baer was asked to produce the index cards to the Commission and he later did so in two batches. Copies of the cards were made and the originals returned to him.

15.13 Further details of Mr Baer's accounts at interview and the relevant index cards (which are produced in the appendix) are contained in the consideration section below.

Enquiries with D&G and the Security Service

15.14 The Commission requested from D&G all information (including intelligence) relating to each of Mr Baer's claims. As well as providing its own responses, D&G referred many of the requests to the Security Service. The results of these enquiries are set out below.

15.15 During the examination of D&G intelligence materials and Security Service items, members of the enquiry team sought to identify materials of potential relevance to Mr Baer's claims. As noted in chapter 4 the Commission requested consent to disclose a number of protectively marked documents viewed at Dumfries and Thames House so that reference could be made to them in the statement of reasons. Where such consent was granted reference is made to these documents in this chapter or alternatively the documents are produced in the appendix of protectively marked materials. In a number of cases this request was refused due to the fact that the Security Service considered the material concerned had originated from sensitive sources and judged its disclosure in the statement of reasons would risk damage to national security.

The applicable law

15.16 By virtue of section 106(3)(a) of the Act the High Court has the power to review an alleged miscarriage of justice based on "the existence and significance of evidence which was not heard at the original proceedings". The tests applied by the court in assessing the significance of evidence led under that provision are set out in *Al Megrahi v HMA* 2002 SCCR 509. For present purposes it is sufficient to note that in order to hold that a miscarriage of justice has occurred in the applicant's case the court would require to be satisfied that the new evidence is (a) capable of being regarded as credible and reliable by a reasonable court and (b) likely to have had a

material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

15.17 The Crown's disclosure obligations under *McLeod v HMA* 1998 SCCR 77 and the European Convention on Human Rights are set out in chapter 14 above.

Consideration

15.18 The approach taken in this section is to first consider the three allegations made in Mr Baer's book as detailed above. Thereafter several other allegations by Mr Baer are addressed, including those raised in the submissions.

The alleged meeting in Lebanon in July 1988

15.19 At the April interview Mr Baer repeated the claim made in his book concerning a meeting which had taken place in July 1988 between Dalkamoni, Nabil and an IRGC officer. Mr Baer reiterated that at this meeting an IRGC officer had instructed Dalkamoni and Nabil to blow up an American aircraft as revenge for the destruction of the Iranian Airbus, although he conceded that the purpose of the meeting might have been for a reason other than to plan the bombing of PA103. Mr Baer also said that the information about this meeting had "surfaced in early July 1988". At the July interview Mr Baer's position was that the CIA had "fairly conclusive evidence" about this meeting. The source of the information was what Mr Baer described as "grade A chatter", which as far as he was concerned was "100% reliable". As noted above, at the meeting which took place on the evening before the July interview Mr Baer specified the source of this information but said that he would not repeat this in his formal, recorded account.

15.20 The Commission enquired with D&G as to whether it had any information, including intelligence, about the alleged meeting. In its response dated 29 May 2006, D&G said that it had no information in relation to this matter, but provided a series of documents regarding the parties said to have attended the meeting, including Nabil.

15.21 On 29 January 2007 a member of the Commission's enquiry team examined Security Service protectively marked material held at Thames House relating to Mr Baer's claim. The notes taken of this material are currently in the possession of the Security Service. The Commission requested consent to disclose a number of the protectively marked documents so that reference could be made to them in the statement of reasons. Consent to disclose was not granted due to the fact that the material concerned had originated from sensitive sources and its disclosure in the Commission's statement of reasons was judged by the Security Service to risk damage to national security. However, the material has been considered by the Commission in arriving at its conclusion.

15.22 In the Commission's view, even if Mr Baer's claim could be substantiated, evidence of such a meeting would not have had a material part to play in the consideration by a reasonable court of a critical issue at trial. There was a good deal of evidence at trial concerning Dalkamoni's leadership of a PFLP-GC cell in West Germany in 1988 and the trial court accepted that in October of that year this cell had the means and intention to destroy civil aircraft (see paragraphs 73 and 74 of the judgment). In the Commission's view, evidence of the alleged meeting described by Mr Baer could, at its highest, be viewed as a precursor to those activities: it is not capable of undermining the factors relied upon by the court in rejecting the incrimination defence.

15.23 In any event, the Commission considers Mr Baer's account of this alleged incident to be inadmissible hearsay.

The alleged payment to the PFLP-GC of $11m

15.24 At all three interviews Mr Baer reiterated that an $11m payment had been made to a PFLP-GC bank account in Lausanne on 23 December 1988 and was thereafter moved to other PFLP-GC accounts. According to Mr Baer the number of one of those accounts was found in Dalkamoni's possession when he was arrested in West Germany. No evidence was led about these alleged transactions at trial or appeal and it does not appear that the defence was aware of evidence in this connection (see Mr Keen's submissions at p 48 of the first "chambers hearing" and

the accounts given by the applicant's former representatives at interview: appendix of Commission interviews).

15.25 However, after the appeal the allegation was the subject of a parliamentary question by Tam Dalyell, formerly MP for Linlithgow. In his response on 23 July 2002, Mike O'Brien, then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, stated:

> "*First,* [Mr Dalyell] *asked whether British security and intelligence services have any knowledge of an $11 million payment, having been received by the PFLP-GC on 23 December 1988.*
>
> *Various reports of PFLP-GC funding emerged after the bombing of Pan-Am flight 103. The intelligence agencies investigated all those reports and found none to have any relevance to the attack. I am informed that there is no connection between the payments and Lockerbie. Indeed, I have been told that the intelligence services are not aware of any payment that corresponds with the details given in the question.*
>
> *I am informed that a similar amount was paid 18 months before the Lockerbie attack, but that there is no connection between the two. The Government's view is that the PFLP-GC did not carry out the Lockerbie bombing. If that payment was related to other issues, we do not know precisely what they are, but it is our view that the lapse of time between the making of the payment and the eventual outrage suggests that the two were not linked."* (See Hansard Debates text for 23 July 2002, Volume No. 389, Part No. 184, Column 960.)

15.26 Initially D&G informed the Commission that there was no "evidence" in its "enquiry system" to support Mr Baer's claim but that a letter would follow to confirm the position. D&G also indicated that the matter would be referred to the Security Service for "intelligence enquiry". In order to assist in this connection the Commission supplied D&G with the following information from one of Mr Baer's index cards:

"Zaki Al-Zayn, - 23 Dec 88 - transfers $11,000,000 to Hungarian Foreign Trade Bank".

15.27 It is worth highlighting that the index card appears to suggest that Zaki Al-Zayn was the PFLP-GC's treasurer.

15.28 In its response dated 29 May 2006 D&G said that it was unable to provide any information about these matters. In a further letter dated 6 April 2007 D&G confirmed that it held no evidence about payments of money by Iran.

15.29 On 18 December 2006 and 2 May 2007 a member of the Commission's enquiry team examined a number of protectively marked documents held at Thames House relating to Mr Baer's claim. Notes were taken of these items which are currently in the possession of the Security Service. The materials show that while initial reports suggested that $11m may have been deposited in a PFLP-GC account on 23 December 1988 it was later revealed that the payment was in fact one of $10m made in June 1987. According to the materials examined by the Commission the source of the payment was not established. The relevant Security Service file containing this information was examined by the Crown on 3 September 1999.

15.30 As with his claim about the meeting in July 1988, the Commission considers Mr Baer's allegation about the payment to be inadmissible hearsay. More importantly the results of the Commission's enquiries refute the allegation that a payment of $11m was made to a PFLP-GC account on 23 December 1988. In addition the Commission has found no evidence to support the contention that the number of one of the accounts was found in Dalkamoni's possession at the time of his arrest.

Alleged payment to Abo Talb of $500,000

15.31 As noted above Mr Baer claimed in his book that Talb had received a payment of $500,000 on 25 April 1989. He repeated that claim at interview. There was no reference to this allegation at trial or appeal and, in terms of the accounts given to the Commission by the applicant's former representatives, the defence was not aware of any evidence in this connection. Moreover, in the parliamentary

response of 23 July 2002 (referred to above) Mr O'Brien stated that the "security and intelligence services" had no knowledge of such a payment.

15.32 Talb presented himself in evidence as a man of limited means (68/8310, 8352, 8355) and was questioned extensively by counsel for both the applicant and the co-accused as to how, in these circumstances, he was able to fund various foreign trips including ones to Cyprus and Malta in October 1988. For example, there was reference to a loan of 45,000 Swedish Kronor ("SEK") (said in evidence to be worth about £4100 at the material time) which Talb had obtained from Uppsala Sparbank in mid-1988 (68/8310). He was also asked about deposits totalling 85,000 SEK made to his bank account in 1988. Talb explained that 45,000 SEK of this sum represented the money he had borrowed from Uppsala Sparbank but he was not sure where the remaining 40,000 SEK had come from. He said he had "lent some money to some people" who had paid him back and that he had deposited these sums in the bank. Asked where he had obtained the 40,000 SEK to lend other people, Talb's only response was that he did not remember depositing this sum. He was also unable to explain the source of a further 16,000 SEK which the police had recovered from his home during a search in 1988 (69/8505-8507). Viewed in that context the suggestion that he was paid $500,000 on 25 April 1989 would no doubt have been deployed by the defence in cross examination.

15.33 The Commission asked D&G to provide all information in its possession regarding Mr Baer's allegation. In order to assist in this the Commission supplied D&G with the following information taken from one of Mr Baer's index cards:

> "*Muhammad Abu Talib, #560-200, Degussa Bank, Frankfurt, 25 April 89: this acct received $500,000 from an account in Paris known to belong to senior members of PFLP-GC.*"

15.34 By letter dated 29 May 2006 D&G provided a number of items relative to this request, namely:

- several documents with police reference DM/103 comprising handwritten notes outlining transactions in an account numbered 20551 held by Joseph and Boulos Ariss at the Indosuez Bank, Lausanne, Switzerland (see appendix); and

- a document with the HOLMES reference D8003 consisting of a report by Detective Sergeant James Russell dated 22 March 1990 regarding bank statements for the Indosuez Bank account 20551 (see appendix).

15.35 Although the HOLMES system indicates that the notes in DM/103 were obtained from the FBI, according to D&G their provenance is unclear in that there are no statements on the system which might account for them. DM/103 contains the following information:

- on 24 April 1989 $490,000 was transferred from account 20551 to the Indosuez Bank in Paris;

- on 25 April 1989 $490,000 was transferred back into account 20551 from the Indosuez Bank in Paris; and

- on 25 April 1989 $500,017.70 was paid from account 20551 to account 560200 at the Degussa Bank.

15.36 According to DS Russell's report, account 20551 was known to have been used on occasions for laundering large sums of money. His report also states the following:

- on 21 April 1989 $500,000 was transferred to account 20551 by individuals named Al Zein Zaki and Shihabi Omar Ali;

- on 24 April 1989 $490,000 was transferred from account 20551 to the Indosuez Bank in Paris and was returned the same day; and

- on 25 April 1989 "the money" was transferred to an account numbered 560200. However, unlike the notes in DM103 which indicate that this account was held at the Degussa Bank, according to DS Russell's report the account was "almost certainly" held at the Indosuez Bank.

15.37 The information in DM/103 appears to confirm Mr Baer's allegation that a payment of $500,000 was made to Degussa Bank account number 560200 on 25 April 1989. However, according to DS Russell's report 560200 was almost certainly an Indosuez Bank account. The Commission enquired with D&G as to whether a link had been established between Talb and account 560200 or any of the other accounts mentioned in the documents. On 2 June 2006 D&G informed the Commission that no such links had been discovered.

15.38 During a visit to Thames House on 2 May 2007 a number of protectively marked documents were examined, one of which was considered relevant to Mr Baer's claim. The notes taken of this item are currently in the possession of the Security Service. The Security Service file which contained the document was examined by the Crown on 16 July 1999.

15.39 The Commission sought the consent of the Security Service to disclose the item in question in order that reference could be made to it in the statement of reasons. However, on 25 June 2007 this request was refused on the basis that the Security Service considered the information had originated from sensitive sources and judged that its disclosure in the Commission's statement of reasons would risk damage to national security.

15.40 It is worth highlighting, however, that the Commission saw nothing in the materials viewed by it to suggest that Talb had access to an account numbered 560200 held at the Degussa Bank or any other bank.

15.41 In the Commission's view the information from Mr Baer connecting Talb to the Degussa Bank account is not admissible evidence. Mr Baer himself accepted that the source of his information was CIA telexes, the contents of which were not necessarily reliable. Given the position Talb adopted when questioned about his

finances in cross examination, it is unlikely that he would simply have accepted the suggestion that he was paid $500,000 on 25 April 1989. In any event the court acknowledged that there was "a great deal of suspicion" as to the actings of Talb and his circle but did not consider there to be any evidence to indicate that they had either the means or the intention to destroy a civil aircraft in December 1988 (paragraph 82 of the judgment).

15.42 In these circumstances the Commission does not consider the fact that the defence was unaware of any of the above information indicates that a miscarriage of justice may have occurred.

15.43 In any other circumstances the Commission would have explained in more detail its reasons for rejecting this ground. However, in light of the restrictions placed upon its disclosure of the item in question it is unable to do so.

Other allegations made by Mr Baer

15.44 The Commission has also examined the following further claims by Mr Baer.

The Iranian "roll of honour"

15.45 It is alleged in the submissions that Talb and Dalkamoni featured on the Iranian roll of honour in 1990 for "great service" to the Iranian revolution. At the April interview Mr Baer accepted that the names of both individuals might have appeared on the list for "anything", although he thought the fact that their names were placed on the list together was significant. At the July interview Mr Baer said that the inclusion of their names on the same roll indicated that the Iranian Government had granted them the "equivalent of martyr status" for an "enormous act" that they had performed. He explained that he had seen this information on the database of the CIA's Directorate of Intelligence in 1995 or 1996. According to Mr Baer no details were provided of the act which had resulted in this alleged award. However, in Mr Baer's view it must have been on a larger scale than the bombings in 1985 for which Talb was convicted and the bombings in 1987 and 1988 for which Dalkamoni was convicted (see joint minute number 16 for details of these convictions). According to

Mr Baer the information on the CIA database about this originated from "chatter", which in his view was of similar value to evidence obtained from a telephone tap.

15.46 By letter dated 5 September 2006, D&G confirmed to the Commission that it holds no information regarding this allegation. The Commission also found nothing in its examination of the protectively marked materials held by D&G and the Security Service that would support the allegation that Talb and Dalkamoni featured on an Iranian roll of honour for "great service" (or similar) to the Iranian revolution.

15.47 In the Commission's view, even if it could be established that the names of these individuals appeared on the Iranian roll of honour, there is nothing in the information provided by Mr Baer that might link this to the bombing of PA103. In any event, Mr Baer's account of this matter, like all the information provided by him at interview and in his index cards, amounts to inadmissible hearsay. For these reasons the Commission does not consider it capable of being regarded as material in terms of the test set out above.

Alleged Iranian efforts to secure the release of Talb and Dalkamoni

15.48 At the July interview Mr Baer informed members of the enquiry team that efforts had been made by the IRGC to secure the release of Talb and Dalkamoni from custody. At the meeting on the evening before the interview Mr Baer provided details about the source of this information but explained that he would not refer to this during his formal interview.

15.49 No evidence was led in respect of this matter either at the trial or appeal and it does not appear from their files that the defence was aware of the allegation. By letter dated 5 September 2006, D&G explained that it held no information in this connection.

15.50 On 29 January 2007 a member of the Commission's enquiry team examined Security Service protectively marked material held at Thames House relating to Mr Baer's claim. The notes of this material are currently in the possession of the Security Service. The Commission requested consent to disclose a number of the protectively

marked documents so that reference could be made to them in the statement of reasons. Consent to disclose was not granted due to the fact that the material concerned had originated from sensitive sources and its disclosure in the Commission's statement of reasons was judged by the Security Service to risk damage to national security. However, the material has been considered by the Commission in arriving at its conclusion.

15.51 In the Commission's view, even if there were admissible evidence to substantiate this allegation, it falls into a similar category to Mr Baer's claims concerning the roll of honour, in that there is nothing to link it with the bombing of PA103.

Alleged telephone intercepts

15.52 According to the submissions Mr Baer has details of telephone intercepts implicating various Palestinian terrorists, including Talb, in the bombing of PA103.

15.53 At the meeting which took place on the evening prior to the July interview Mr Baer informed members of the enquiry team that he was aware of intercepts of telephone calls between "Dalkamoni's gang" and Damascus. According to Mr Baer the calls indicated that Dalkamoni and his associates knew about the operation in respect of PA103 before the bombing took place. There was, Mr Baer claimed, a reference made in one of the intercepts to a "special birthday present for Jibril".

15.54 Mr Baer was asked to provide further details of these claims at a subsequent meeting on 24 March 2006. At that time Mr Baer said that he had also seen information regarding intercepted telephone calls to Syria in which the callers had claimed credit for the bombing. Mr Baer explained, however, that individuals would frequently "brag" about carrying out operations for which they had not been responsible.

15.55 By letter dated 5 September 2006 D&G provided a series of documents relative to the Commission's request for materials in this connection. The documents concern television programmes and police interviews of journalists in which reference

is made to telephone intercepts. None of the documents refers to evidence obtained from telephone intercepts during the investigation.

15.56 The Commission found nothing in its examination of the protectively marked materials held by D&G and the Security Service which would support the allegation that evidence was obtained from telephone intercepts implicating any person or organisation or country in the bombing of PA103. Likewise, the Commission has found no such evidence as a result of any of its other enquiries.

Abu Elias

15.57 According to the submissions Mr Baer alleged that Abu Elias was the main focus of the investigation and that the fifth device made by Khreesat was that used in the PA103 bombing. In the Commission's view, however, any suggestion that the fifth device was the one used in the bombing of PA103 is undermined by information given by Khreesat to the FBI, the terms of which were led in evidence at trial (Edward Marshman at 76/9240 et seq). Khreesat told the FBI that the fifth device was contained in a single-speaker Toshiba cassette player which looked exactly like an RT-F423 model, and that he had never worked on a circuit board of the type used in the twin-speaker RTSF-16 model (ie the model employed in the bombing of PA103). In any event there was no evidence that the fifth device contained an MST-13 timer and, in terms of his accounts to both the FBI and the defence, Khreesat indicated that he did not use digital timers (of which the MST-13 is a type).

15.58 In the Commission's view, even if Mr Baer's claims amounted to admissible evidence they add little, if anything, to the information available to the defence at trial.

Edwin Bollier

15.59 According to the submissions Mr Baer claimed that the CIA knew of Mr Bollier long before the US Government claimed to have discovered him in the investigation. The same point was made by Major Owen Lewis, an expert instructed by MacKechnie and Associates, and is addressed in detail in chapter 8. It is sufficient

to note here that in terms of a CIA technical report lodged as a production a trial, the CIA was aware of Mr Bollier's identity in at least 1985 (CP 285). Accordingly, the allegation adds little if anything to the information known to the defence at trial.

15.60 At interview with the Commission Mr Baer did not provide any other information about Mr Bollier which was not already known to the defence at trial.

MST-13 timers/Udo Schaeffer

15.61 At the July interview Mr Baer maintained that the MST-13 timers obtained by the Stasi could have ended up in the PFLP-GC's hands because of the links between those organisations. Although there was no evidence at trial to suggest that MST-13 timers were supplied to the PFLP-GC, the court accepted that the Stasi was provided with two such timers in 1985 (paragraph 49 of the judgment).

15.62 During a subsequent discussion on 6 February 2006 Mr Baer informed a member of the enquiry team that the two MST-13 timers in the possession of the Stasi had been supplied to a man named Udo Schaeffer. Later, on 3 March 2006, Mr Baer said that he had information to the effect that Mr Schaeffer met Dalkamoni in October 1988. However, Mr Baer did not think it had been established that Mr Schaeffer supplied MST-13 timers to the PFLP-GC or that the latter had obtained such timers.

15.63 Mr Baer's allegation is reflected by the terms of one of his index cards which contains the following entry:

> "*Udo Schaefer, -Dalqamuni met 17, 18, 22 Oct, -22 Oct may have delivered Abu Ilyas device*".

15.64 The reference to the "Abu Ilyas device" appears to be the fifth device because one of Mr Baer's other index cards contains an entry to the effect that the fifth device was "made by Abu Ilyas". As stated above there is no evidence that this device contained an MST-13 timer.

15.65 The Commission enquired with D&G as to whether it knew of any claim, including anything contained in intelligence materials, that the MST-13 timers in the possession of the Stasi were supplied onwards to any other party. The Commission also requested any information in D&G's possession concerning Mr Schaeffer. By letter dated 12 June 2006, D&G provided a series of HOLMES documents in which reference was made to the Stasi. However, none of them refers to the alleged involvement of the Stasi in the distribution of MST-13 timers.

15.66 The Commission also found nothing in its examination of the protectively marked materials held by D&G and the Security Service which would support the allegation that a person called Udo Schaeffer or Schaefer was supplied with MST-13 timers or that he had any involvement at all in the bombing of PA103.

15.67 In the Commission's view, the terms of Mr Baer's index card suggests that he received information linking Mr Schaeffer with the fifth device rather than MST-13 timers. In any event the Commission has come across nothing to link Mr Schaeffer with the Stasi or with the distribution of such timers. Indeed, as noted above, Mr Baer himself accepted that such a link had not been established. In these circumstances, there is nothing in Mr Baer's account to support the allegation that the PFLP-GC was provided with MST-13 timers by the Stasi.

Alleged forensic evidence regarding Talb

15.68 Finally, Mr Baer claimed at interview that there were "forensics which traced a device to Talb". However, he was unable to expand on this allegation.

15.69 The Commission notes that one of Mr Baer's index cards indicates that "[a]luminium was found in Talb's car along with Imandi's". According to a police statement by Mahmoud Mougrabi (S5050, see appendix) aluminium powder was an ingredient in the bombs he and Talb had made in 1985. In the Commission's view it is possible that this information forms the basis of Mr Baer's claim. Whatever the source of Mr Baer's account, the Commission has found nothing to suggest that forensic evidence exists linking Talb to the bomb used to destroy PA103.

Conclusion

15.70 Although in some instances the reliability of Mr Baer's recollections might be open to question, the Commission has no reason to doubt his credibility. However, as he himself acknowledged, he has no direct knowledge of any of the information in his possession, which came largely from CIA telexes. As with all intelligence, the validity of that information was very much dependent upon the reliability of its source which in many cases Mr Baer was unable to vouch.

15.71 For these reasons, as well as those given under the specific headings above, the Commission is satisfied that there is nothing in Mr Baer's allegations which suggests that a miscarriage of justice may have occurred.

CHAPTER 16
"OPERATION BIRD"

Introduction

16.1 In volume A of the application (chapter 16.7) reference is made to what is described as new and potentially important information obtained by Forensic Investigative Associates ("FIA"), a firm of private investigators, during enquiries conducted under the codename "Operation Bird." The enquiries were instructed on behalf of the applicant by Eversheds solicitors and most were carried out post-trial but prior to the conclusion of the appeal hearing. None of the information obtained as a result of the Operation Bird enquiries was led at trial or appeal.

The applicant's submissions

16.2 According to volume A information was obtained by Operation Bird which suggested:

- that in March 1988 Abo Talb ("Talb"), Mohamed Al Mougrabi, the incriminee Abu Nada of the Miska Bakery and an unnamed Iranian were present at a meeting in Malta arranged by the Iranian secret service to plan an operation against the US;
- that the leader of the PFLP-GC Ahmed Jibril ("Jibril") was in control of terrorist cells in Malta, Germany and London;
- that Talb met with a member of the PFLP-GC, Haj Hafez Kassem Dalkamoni ("Dalkamoni"), in Malta in October 1988;
- that Talb returned to Malta at the end of November 1988; and
- that PFLP-GC operatives purchased the items from Mary's House which were established to have been inside the primary suitcase.

16.3 Reference is made in volume A to four reports dated 3, 9, 20 and 31 December 2001 which set out some of the results of the Operation Bird investigations.

The submissions point out that although further enquiries might discover more information, MacKechnie and Associates had been unable to pursue these due to financial constraints.

Materials relevant to Operation Bird

16.4 The following is a summary of the principal materials relating to Operation Bird, including the four reports referred to above and two other documents the Commission obtained from the defence papers.

(1) Eversheds attendance note

16.5 The first document of relevance is an attendance note prepared by Eversheds dated 9 January 2001 (see appendix). According to the note an unnamed source had informed FIA that before Anthony Gauci picked out the applicant from a photo-spread on 15 February 1991, he had been shown another photo-spread containing photographs of both the applicant and the co-accused. The source suggested that Mr Gauci had failed to pick out the applicant or the co-accused on that earlier occasion. The source claimed that a Maltese police officer may have been present on this occasion along with British, American and German officers. According to the note FIA was authorised by the defence to attempt to trace the Maltese officer.

16.6 However, on page 17 of the final Operation Bird report (19 January 2002, referred to below) it is stated that an unnamed source had said that this information was received from a member of the "Lockerbie investigative team". It was said that the nationality of the individual who had reported this to the source was not known but it was not believed that the person was a participant in the "identification sub-group" (the nature of this body is not made clear in the report). According to the report FIA had not attempted to check this information because they were uncertain about its reliability and did not want to disrupt other more important investigations.

(2) Operation Bird Report, Phase 1 (3 December 2001)

16.7 There are two versions of the "phase 1" report, namely a "corrected" version and an earlier version (see appendix). According to both versions FIA had interviewed an individual in the Middle East who is referred to in the report only as "S1".

16.8 The report states that S1 had long been active in the Palestinian Liberation Organisation ("PLO") and appeared to have reliable information about the groups, but not about the individuals, responsible for the bombing of PA103. According to the report S1 believed that Libya, Iran and Syria would all have needed the help of the PFLP-GC and Jibril to carry out such an attack because none of those countries was capable of such an act themselves. According to the report S1 said that all of the information which had been gathered by the PLO suggested that Jibril and Imad Mougnieh (of Hezbollah) were responsible for the PA103 attack and that it was sponsored by Iran. However, the report also states that S1 claimed not to be privy to direct intelligence in support of the PLO's finding. On the other hand, S1 was also reported as saying that almost everybody agreed that Iran was behind the bombing and that Libya and Ahmed Jibril had carried it out.

(3) Operation Bird Report, Phase 2 (9 December 2001)

16.9 The second Operation Bird report (see appendix) states that on 6 December 2001 a different, unnamed individual, referred to as "SII", had informed FIA that he had intelligence about the case which could not be discussed over the telephone. On 8 and 9 December investigators met SII in an unidentified Middle Eastern country. SII was described as the head of an "external country station" for the intelligence service of a liberation organisation in the Middle East. The organisation in question was referred to in the report as "Alpha". According to the report Alpha received financial and other support from Iran and worked with other militant Middle Eastern liberation organisations including the PFLP-GC.

16.10 According to SII a member of the Iranian secret service convened a meeting in Malta in March 1988 which was attended by eight people. They included Talb and

an Alpha representative referred to in the report as "Ivan". The purpose of the meeting was to agree and plan an operation against the US. SII said that Iran was the "proponent" of the operation and would be the paymaster. The precise target of the operation was not specified at the meeting. SII said that Ivan had told Alpha headquarters about the meeting on the day after it had taken place. About 15 days later Alpha headquarters responded saying that it did not want to be officially involved in the operation against the US, but that if individual Alpha members wanted to be involved then that would be up to them.

16.11 The report went on to say that SII was informed that around 20 October 1988 Ivan attended another meeting in Malta. Two Palestinians with Swedish passports, namely Talb and Dalkamoni, were present at that meeting. Dalkamoni, who was said to be very close to Jibril, was described as being over 50 years old and as having had a leg amputated. It was said that Dalkamoni went to Neuss, West Germany, after the meeting.

16.12 According to the report SII was told that Talb travelled to Malta in December 1988 and later flew from there to Frankfurt. SII said that one of Ivan's people drove Talb to the airport. SII said he believed from what he had heard that Talb headed the operation to destroy PA103 and that the bomb was loaded in London. SII was of the view that he could obtain the name and the nationality of the passport which Talb had used to travel to Malta in March and December 1988. SII could also obtain the same for Dalkamoni's visit to Malta in October 1988. He believed he could also obtain intelligence as to how Jibril's people had managed to obtain an MST-13 timer and how the bomb was loaded in London.

16.13 The report concludes by stating that those carrying out the investigations had a three-step operational plan. Stage 1 involved meeting Ivan's brother to verify that the information obtained so far by Ivan was correct and to obtain more information from Alpha intelligence files. If all went to plan, Ivan's brother would provide an assurance that Ivan would be "receptive" and that it would be safe for SII to proceed to the next phase. Stage 2 included a 3-4 day trip to Malta to meet Ivan and two other individuals (said probably to be Palestinian). One of these individuals was said to

have driven Talb to the airport in December 1988 when he flew from Malta to Frankfurt. Stage 3 included a trip to Syria to gain further information.

(4) Operation Bird Report, Phase 2 (20 December 2001)

16.14 The third Operation Bird report (see appendix) states that FIA had obtained a verbatim copy of a report written on 14 March 1988 by Ivan. The investigators considered that it was a reliable transcript of Ivan's original report. That report described the meeting in Malta on 13 March 1988 said to have been attended by Ivan, Talb and Dalkamoni. The transcript of the report suggested that a person named Abd Al Salam had invited Ivan to the meeting. The investigators suggested that this was in fact the incriminee Abu Nada of the Miska Bakery.

(5) Operation Bird Report (31 December 2001)

16.15 The fourth Operation Bird report (see appendix) sets out the results of enquiries in Malta as at 31 December 2001. It does not identify any of the sources of the information but states that on 13 March 1988 Abu Nada met members of the PFLP-GC and the PPSF (the organisation of which Talb was said to be a member). According to the report Abu Nada was no longer resident in Malta at the time of FIA's investigations. The report also said that Talb and various others attended the meeting on 13 March 1988 and that Talb and Dalkamoni knew each other. According to the report Talb was in Malta in March, October and at the end of November 1989 and used a different name on each occasion. The report goes on to say that during his visit to Malta in October 1988 Talb met Dalkamoni. The report adds that two MST-13 timers had been stolen from the Libyans.

(6) Operation Bird Report (19 January 2002)

16.16 The final report (see appendix) contains information said to have come from more than six sources. However, for "security reasons" the report does not attribute information to specific sources except where to do so was essential.

16.17 In the report it is stated that Libya was not involved in the bombing of PA103 which it is said was funded by Iran and planned and executed by individuals representing the PFLP-GC, the PPSF, Hezbollah and Fatah. According to the report Dalkamoni was in charge of the operation and Talb was his deputy. However, after Dalkamoni's arrest in Germany on 26 October 1988, Talb became the leader of the operation. According to the report the MST-13 timer was obtained from the Russian mafia and provided to Iran via Hezbollah.

16.18 The report reiterates that Talb attended a meeting in Malta in March 1988 to discuss and plan an operation against the US. According to the report Talb arrived in Malta on 11 March 1988 and departed on 15 March 1988. It is said that Talb used a Swedish passport in the name "Fred Edwards" to enter Malta on this occasion. The report narrates that Ivan had become a resident of Malta, had seen Talb at the meeting in March 1988 and had also seen Dalkamoni and Talb at a "safe house" in Malta in October 1988. Furthermore, Ivan suggested that Abu Nada had admitted to him his involvement in the Lockerbie bombing. The report suggests that Ivan could be a witness, but says that he could not be recruited without the assistance of the authorities who would have to provide protection for him. The report reveals that Ivan had been paid as an "operative to develop critical intelligence." The report does not specify who made this payment.

16.19 The report repeats the claim that there was a meeting on 20 October 1988 in Malta attended by Dalkamoni and Talb to discuss the plan for the bombing. According to the report Talb was in Malta from 19-26 October 1988. The report alleges that Talb had intended to use a false passport to enter Malta but for unknown reasons was unable to do so. Accordingly he travelled with a Swedish travel document in the name of "Hassan Abu Talb". The report goes on to state that Talb stayed at the home of Abu Nada for two days [redacted] in Malta. However, according to the report he did not stay there and instead stayed at a safe house. The report alleges that [redacted] this arrangement which was intended to deceive the police and divert attention away from the safe house which was where the bomb was kept. The report names [redacted] and suggests that he may have known Talb and Dalkamoni. According to the report [redacted] was a witness to other key

events including the corruption of a police officer and an Air Malta employee "for the purpose of loading the bomb at Malta Airport".

16.20 The report states that Dalkamoni arrived in Malta on 20 October 1988 and met Talb and others that evening. He stayed for two days and departed on 21 or 22 October 1988 travelling under a false East German passport.

16.21 The report narrates that at the meeting on 20 October there were discussions about diverting the blame for the bombing to Libya which, after the US and Israel, was regarded as Jibril's chief government enemy because it had forced out Jibril's cadres in a degrading and humiliating manner in 1987. The report states it was agreed at the meeting that wherever the bomb was launched they would place it in a suitcase which through it contents would be traced to Malta in the event that the bomb was discovered before it exploded. According to the report no one anticipated that any clothing in the suitcase would be identified after the explosion. The report alleges that the conspirators knew at the meeting that the applicant was a member of the Libyan ESO (formerly named the JSO) and also a manager of "Libyan Airways" and that therefore he would be a likely suspect. He also resembled Talb and accordingly it was decided at the meeting that Talb should buy the clothing from Mary's House.

16.22 According to the report Talb arrived in Malta on 25 November 1988 using the passport in the name of Fred Edwards and departed on either 1 or 2 December 1988. During this visit he purchased the items of clothing from Mary's House. The report states that this information was obtained from a "participant to this aspect of the operation". The purchase was made just before lunchtime on an unknown date between 25 November and 1 or 2 December. Abu Nada and one other person drove Talb to the shop in a bakery van and Talb entered the shop alone. According to the recollection of the unnamed driver of the vehicle, Talb purchased a pair of trousers, a winter shirt, a bath towel or a sheet and an umbrella. Talb and the driver then went to Abu Nada's house and put the clothing into the suitcase which contained the bomb. The report states that while ideally one would want the driver of the bakery van as a witness to Talb's purchase of the clothing, this was not possible. According to the report Abu Nada may be dead.

16.23 The report goes on to say that before Talb bought the clothing it was mentioned that Mary's House was near to the Holiday Inn and that the applicant had a mistress whom he sometimes took to the Holiday Inn.

16.24 The report also states that [redacted] was present at the meeting on 20 October 1988 and that he helped to put the bomb together. It is alleged that [redacted] had a Maltese girlfriend [redacted] where the meeting had taken place and so could have met Dalkamoni and Talb there. According to the report FIA was in the process of obtaining her name and address. The report states that Ivan was aware that Talb was present in Malta after October 1988 because Abu Nada had informed him about this. However, Ivan did not actually see Talb after October 1988.

16.25 It is alleged in the report that the bomb was loaded at Heathrow airport and that Talb was in London from 20-22 December 1988 to ensure that it was placed on board PA103. Imad Chabaan and Abu Elias assisted him in this. In the early morning of 21 December Talb and Imad Chabaan arrived in London by merchant ship (the inconsistency between this and the earlier claim in the report that Talb was in London from 20 December is not explained). When the suitcase containing the bomb arrived in London Talb, Chabaan and Abu Elias were waiting for it. They had already agreed to pay a British Airways employee to load it onto PA103 without it being opened or inspected or passing through the x-ray machines.

Further enquiries

16.26 The Commission raised the issue of the Operation Bird enquiries with the applicant's former representatives at interview.

16.27 Mr Beckett said at interview (see appendix of Commission's interviews) that there was no evidence to back up what the Operation Bird reports claimed. He said that he was extremely sceptical about the results of the investigations and that they looked like a concoction based on the submissions at trial. When asked if any of the individuals were precognosced in advance of the appeal he explained that the reports came in very late and there was little pointing to any evidential basis for the claims in

them. He did not have any recollection of precognitions being taken from the informant named Ivan or the individuals designated S1 and SII.

16.28 Mr Duff said that in his view the reports all remained at the level of gossip but that the defence had nevertheless allowed the private investigators to continue with their enquiries (see appendix of Commission's interviews). When asked whether Ivan was precognosced, Mr Duff replied that this was not done to his knowledge. Mr Duff also did not recall issuing instructions for [redacted] to be precognosced.

The applicable law

16.29 By virtue of section 106(3)(a) of the Act the High Court has the power to review an alleged miscarriage of justice based on the existence and significance of evidence which was not heard at the original proceedings. The tests applied by the court in assessing the significance of evidence led under that provision are set out in *Al Megrahi v HMA* 2002 SCCR 509. For present purposes, it is sufficient to note that in order to hold that a miscarriage of justice has occurred in the applicant's case the court requires to be persuaded that the evidence not heard in the original proceedings is: (a) capable of being regarded as credible and reliable by a reasonable court; and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

Consideration

16.30 Bearing in mind that it requires to be satisfied only that a miscarriage of justice may have occurred, the Commission has considered whether the results of the Operation Bird investigations as set out in the various reports referred to above could meet the criteria of section 106(3)(a) and *Al Megrahi*.

16.31 The first issue is whether the reports constitute admissible evidence which the court may hear under section 106(3)(a). In the Commission's view the contents of the reports are generally inadmissible because they contain only hearsay evidence to

which none of the exceptions under section 259 of the Act or under the common law apply.

16.32 In any event, the Commission considers that certain of the allegations made in the reports are implausible. In particular, the allegation that Talb bought the clothing from Mary's House in order to implicate the applicant appears wholly incredible.

16.33 As regards the suggestion that Anthony Gauci was shown a photograph of the applicant prior to 15 February 1991, a similar allegation was made in a separate submission to the Commission which was based on accounts attributed to the Golfer (see chapter 5). At interview the Golfer distanced himself from that allegation. However, as stated in chapter 26 the Commission has found no evidence to suggest that the police showed Mr Gauci a photograph of the applicant on any occasion other than 15 February 1991. Furthermore, it is suggested in the final report that the purchase took place just before lunchtime which is clearly at odds with Mr Gauci's account that it occurred at around 6.30 pm.

16.34 The reports also refer to a meeting in Malta on 20 October 1988 said to have been attended by *inter alia* Dalkamoni and Talb. While Talb accepted at trial that he was in Malta from 19-26 October 1988, there is no evidence that Dalkamoni was present in Malta on 20 October 1988.

16.35 It is also said in the reports that Talb was in London from 20-22 December 1988 to ensure that the bomb was placed on board PA103. However, there is no evidence to suggest that Talb travelled to London at any point in 1988. Nor is the Commission aware of any evidence to support the claim that Talb was in Malta in March 1988 when a meeting is said to have taken place there.

16.36 Moreover the first report also suggests that Libya was involved in the bombing which clearly would not have been helpful to the defence even if any of the information in the reports could have been converted into evidence.

Conclusion

16.37 In the Commission's view, the information in the reports constitutes inadmissible hearsay and as such does not meet the requirements of section 106(3)(a). Furthermore, in terms of *Al Megrahi* the Commission considers that many of the central claims in the reports are incapable of being regarded as credible and reliable by a reasonable court. In these circumstances the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 17
ANTHONY GAUCI

Introduction

17.1 On 4 October 2004 MacKechnie and Associates lodged with the Commission a substantial volume of submissions concerning Anthony Gauci. Many of the points raised, such as those concerning the authenticity of Mr Gauci's initial police statement of 1 September 1989, are based on allegations made by the Golfer and are therefore dealt with in chapter 5. Other points reflect issues which the Commission has already dealt with in its responses to the submissions concerning the Yorkie trousers (chapter 10) and babygro (chapter 11). The submissions also make reference to Mr Gauci having been paid a "reward" for his involvement in the case and to evidence not heard at trial concerning the Christmas lights in Tower Road in 1988. These issues are addressed respectively in chapters 23 and 24. The allegation that the defence ought to have called Mr Gauci's brother, Paul Gauci, as a witness is addressed in chapter 18.

17.2 In the Commission's view there are two matters raised in the submissions which merit close scrutiny. The first is the allegation that in return for his cooperation in the case Mr Gauci was given "hospitality" by the police; the second is an allegation that not all of Mr Gauci's police statements were disclosed to the defence and that two are "missing".

(1) Mr Gauci's visits to Scotland

The submissions

17.3 According to the submissions Mr Gauci was "influenced and manipulated by certain police officers in order to support a circumstantial case which itself is partly a fabrication." This allegation is said to be based partly upon information provided by the Golfer.

17.4 It is alleged that Mr Gauci, accompanied by Paul Gauci and possibly other members of his family, was taken abroad at the "instigation and expense of the Scottish police." The submissions thereafter list a number of dates between 1999 and 2002 on which it is said that Mr Gauci travelled to and from Malta. According to the submissions "it is believed that substantial hospitality was given to Mr Gauci and his family on these trips." It is alleged, for example, that they were taken to "areas of possible interest" such as Inverness and Fort William, were accommodated in expensive hotels and were "chauffeur driven by the police." It is submitted that even in a case like the present one the treatment afforded to Mr Gauci was unusual.

17.5 In support of these submissions reference is made to a transcript of a conversation between Mr Gauci and George Thomson, an investigator employed at one time by MacKechnie and Associates (see appendix). The conversation, which took place on 29 December 2001, was recorded by Mr Thomson without Mr Gauci's knowledge. The background to the incident is contained in a statement made by Mr Thomson, a copy of which is contained in the appendix. According to the statement, in December 2001 Mr Thomson was instructed on behalf of "the defence team" to conduct enquiries in Malta regarding information that Mr Gauci had been offered inducements in respect of his evidence. On 28 December Mr Thomson entered Mary's House and Mr Gauci engaged him in conversation. Mr Thomson did not record what was said on this occasion and the following account is based solely on the contents of his statement.

17.6 According to the statement when Mr Thomson said he was from Scotland Mr Gauci replied that he was going there soon "to climb mountains". Mr Gauci explained that he would be visiting Inverness and that he had been to Scotland on five previous occasions. Mr Thomson asked him whether he had friends or relatives in Scotland, to which Mr Gauci replied, "Yes friends from Scotland Yard". He went on to say that officers from Scotland Yard had taken him "fly fishing for salmon" in Scotland. He claimed to be a very important witness in a terrorist case and that "the police had to look after him 'very good' to keep the man in jail." He explained that the man was due to appeal shortly which was why Scotland Yard were taking him to Scotland. Mr Thomson then asked, "Are you looked after OK, do they give you plenty money?", to which Mr Gauci replied, "They have to, they want this man to stay

in jail". Mr Thomson's impression was that when Mr Gauci said this he was responding to the first part of that question (ie "are you looked after ok…"). Mr Gauci went on to say that he had stayed at the Hilton hotel when his friends took him to Scotland and that he was moved around all the time, staying only two days in any one hotel. He mentioned hotels in Glasgow, Inverness and Perth.

17.7 After leaving Mary's House Mr Thomson contacted Ian Ferguson from the "Defence Investigation Team" and informed him of what had occurred. He was thereafter instructed by Mr Ferguson to develop his relationship with Mr Gauci and to tape-record any future conversations with him. The following morning Mr Thomson returned to Mary's House accompanied by his daughter who was carrying a video camera. The lens cap on the camera remained closed, but the external microphone was activated in order that sound could be recorded. The recording formed the basis of the transcript referred to above.

17.8 Some aspects of the transcript are difficult to follow, but it is clear from the opening passages that Mr Gauci has some familiarity with the River Clyde. He indicates that one year previously he spent a week in the area during which time he went into the hills. There is then the following exchange:

GT - Have you ever fished the Tay, at Pitlochry?

AG - We went to the farm, breeding farm…

AG - There was the Hilton, it was only about a two hour drive

GT - Where from?

AG - I don't know … it's your country

GT - It's only a wee country

AG - Your country … 20 miles … they take me for a drive 4 hours…they take me everywhere and I cannot remember all the…

GT - Is that when you were staying at the Hilton in Inverness?

AG - Uh huh. There is a place. A fishing place. You were there? ...

17.9 Mr Gauci goes on to make references to drinking whisky and going to very old pubs where he ate Scottish food. He claims to have visited a place where birds are bred and to have been taken one day to the cemetery in Lockerbie and to a big church there. He seems to suggest that he was accompanied on these visits by members of his family including his brother and sister. He believed he might be coming to Scotland again in "about 15 days".

17.10 On 27 January 2002 an article appeared in the *Mail on Sunday* in which extensive reference was made to the contents of Mr Thomson's statement and the transcript. Entitled "The High Life of Tony Lockerbie", the article alleged that Mr Gauci had been given "free holidays" and "lavish hospitality" by the police. The journalist responsible for the article was Ian Ferguson.

The Commission's enquiries

Enquiries with D&G

17.11 In March 2005 the Commission requested from D&G copies of all records held by them relating to any visits Mr Gauci and his family had made to Scotland. Arrangements were thereafter made for a member of the Commission's enquiry team to view various protectively marked documents at a police station in Dumfries. Copies of these items were later passed to the Commission by D&G following the signing of the minute of agreement between both organisations (see chapter 4). The Commission sought, and was given, consent by D&G to disclose certain passages from the documents, the terms of which are referred to below. Versions of the documents (in which other passages have been redacted by D&G) are contained in the appendix of protectively marked materials. Because at least one of the officers responsible for preparing the documents continues to work in the field of witness protection, no reference is made here to their identities.

17.12 Following an assessment by officers from Strathclyde Police in 1999, Anthony and Paul Gauci were included in the witness protection programme operated by that force. In terms of a confidential report dated 10 June 1999 (see appendix of protectively marked materials; also chapter 23) the officers concerned identified several stages in the trial proceedings at which it was considered the threat against both witnesses might increase. The report also highlights the potential for "spontaneous difficulties" emerging, "thus creating the need for action ranging from an increase in the attention by local officers, to temporary removal from the island."

17.13 As a result of the publication of the article in the *Mail on Sunday*, one of the officers involved in the initial assessment of the witnesses prepared a further confidential report dated 27 January 2002 (see appendix of protectively marked materials). It is clear from this that Anthony and Paul Gauci visited Scotland on a number of occasions in their capacity as protected witnesses. The report provides details of these visits and explains why they were considered necessary. The visits are listed below under appropriate headings.

- Crown precognition

17.14 According to the report Mr Gauci's first visit to Scotland was in 1999 when he was precognosced by the Crown. He was accompanied on this occasion by Paul Gauci and two Maltese police officers. The visit took place over 2 days (3 nights) and during their stay the witnesses resided at what is described in the report as a "moderately priced" hotel in Glasgow (the Commission sought D&G's consent to disclose the name of the hotel but this was request was declined). The witnesses were driven to Dumfries to be precognosced, but neither was aware of their proximity to Lockerbie. Indeed, it was recognised by the officer who prepared the report that it would have been "wholly inappropriate" for the witnesses to visit Lockerbie at that time. Although the Maltese officers who escorted the witnesses had asked to be taken there, this request was refused and it was explained to them that "such a visit could be misinterpreted" given that they too were witnesses in the case. According to the report this explanation was accepted and there was no further discussion of the matter. At no time did the officer who prepared the report discuss with the witnesses their

evidence or the case in general. The precognition process was concluded in one day and the following day the witnesses, along with their Maltese escorts, were taken sight-seeing in Edinburgh.

- The closing submissions at trial

17.15 As the trial progressed the threat level in respect of both witnesses continued to be monitored. Following discussions between the officer who prepared the report, the senior investigating officer, the Maltese police and the British High Commission in Malta, it was decided that Mr Gauci should be removed from Malta while the closing submissions in the trial were being made. It was thought that detailed references would be made to Mr Gauci in those submissions and that in order to protect his safety and to avoid unwanted media intrusion both he and Paul Gauci should be taken to Scotland.

17.16 During their visit to Scotland on this occasion, which lasted approximately one week, the witnesses spent time in Glasgow and Aviemore, staying in what are described as "moderately priced hotels" (the Commission's request for consent to disclose the names of the hotels was declined by D&G). According to the report, the reference in the *Mail on Sunday* article to the witnesses being taken salmon fishing was a "complete fabrication". Mr Gauci, it is said, "has never held a fishing rod in his hand whilst in Scotland." The report goes on to explain that Mr Gauci in fact visited a fish farm close to the hotel at which he was staying in Aviemore. The entrance fee of £1 was paid by the police. Mr Gauci also learned that there was an osprey sanctuary nearby and asked to visit this. Again the entrance fee to this attraction, £3, was paid by the police. According to the report Mr Gauci was never taken hill-walking but had used the chairlift in Aviemore to view the surrounding scenery.

- The appeal

17.17 A further assessment of the threat level took place following intimation by the applicant of his intention to appeal the conviction. It was learned that the last day for lodging grounds of appeal was 21 March 2001 and it was considered that due to

the potential for "intense media intrusion and issues relating to personal security" it was necessary to remove both witnesses from Malta during the period following the lodging of the grounds.

17.18 The witnesses were taken to Scotland again and stayed for one night in a hotel in Glasgow where a "competitive rate" had been secured. During this visit Mr Gauci asked to be taken to Lockerbie. According to the report, as Mr Gauci had given evidence and the trial had concluded, "this was not felt to be inappropriate". Indeed, it was considered that such a visit would assist Mr Gauci in recovering from the pressure he had been under since 1988 (see below). The visit to Lockerbie took place in March 2001 and, according to the report, was the first and only occasion the witness had been to the town.

17.19 The report points out that, following discussions with the senior investigating officer, a "protective plan" was drawn up for the removal of both witnesses for the duration of the appeal hearing itself. At the time the report was produced that operation was still ongoing (further reference is made to this below).

17.20 The report also describes Mr Gauci's attitude to his removal from Malta:

> *"Anthony Gauci does not want to leave Malta, even for a single day, not only is he reluctant to leave the island, but it causes him great inconvenience in respect of his business and the well-being of his pigeons and other animals (rabbits). He is advised by the police that he should leave the island in the interests of his own personal security and safety and follows this advice reluctantly. He does not regard leaving the island as a holiday or any sort of reward. Whilst he is away efforts are made to ensure he is comfortable and content. This is only achieved when he receives some entertainment and this has been limited to sight-seeing. The costs incurred relate only to entrance fees to modest attractions, the fish farm and osprey sanctuary are examples. It is not practicable to remove this man from his home and lock him in a hotel room. Not only would this be inhumane, but it would have a detrimental psychological impact on the witness and is contrary to recognised best practice for the management of protected witnesses."*

17.21 According to the report Mr Gauci was not "coached" in his evidence at any time during the visits, nor were any inducements offered or promises made of "financial rewards, trips etc". The only assurances given to him were that the Scottish police would continue to work with the Maltese police on matters relating to his security.

17.22 Evidence of Mr Gauci's vulnerability is said to be provided by an incident which occurred following the verdict. This concerned an occasion when two males, one Maltese and the other Sicilian, entered Mr Gauci's shop and informed him that they represented the "Libyan Defence Team". The men requested that he travel to Libya where he would meet with representatives of the "Defence Team" and would be "handsomely rewarded". According to the report Mr Gauci declined the offer, but was greatly alarmed by the approach.

17.23 The report also points out that in 2002 Anthony and Paul Gauci attended counselling sessions with a psychiatrist who specialises in assisting witnesses who are under threat. According to the report the psychiatrist was of the opinion that both witnesses had experienced a "major psychological impact" as a result of their involvement in the case. The psychiatrist also believed that the strategy adopted by the police should continue and that both witnesses found it reassuring. Indeed, according to the report the absence of such a strategy would lead the psychiatrist to have "grave fears for their psychological well-being".

17.24 Other documents provided to the Commission expand on the information given in the report of 27 January 2002. An undated report marked SECRET and entitled "Appeal Hearing – Temporary Relocation Options" (see appendix of protectively marked materials) makes further reference to Mr Gauci's planned removal from Malta for the duration of the appeal hearing. According to the report Mr Gauci "remains vehemently opposed to such a measure" and "concerns remain regarding his ability to sustain a lengthy absence." The report also refers to certain developments which are said to have "heightened concerns" relating to Mr Gauci. The first of these was the "focus of the grounds of appeal". The second concerned information that a terrorist organisation known as the "Revolutionary Organisation 17 November" had published direct references to the Lockerbie trial and to Mr Gauci's

role in the case. It was considered that this was a "sinister development" which reinforced the need for "continual vigilance". The report recommends that for the duration of the appeal hearing Mr Gauci be taken to a country other than the UK**.** The Commission sought D&G's consent to disclose the name of the country but this request was declined.

17.25 Further reference to Mr Gauci's attitude to his removal from Malta is contained in the minutes of a confidential meeting he attended on 23 March 1999 along with Paul Gauci and various Scottish and Maltese police officers (see appendix of protectively marked materials). The purpose of the meeting was to assess the security of both witnesses and to update them on the possibility of a trial in the event that the accused were surrendered to the Scottish authorities. When asked how he felt about the situation Mr Gauci was noted as replying:

> *"I am afraid now, if it comes to a position I will tell lies, I want to stay in Malta, I get homesick if I am away from Malta, twice I have been away and after a couple of days I want to come home, all my life is here."*

The defence files

17.26 Materials relating to Mr Gauci's visits were also retrieved from the defence files. On 29 January 2002 the applicant's solicitor at the time, Alistair Duff, wrote to Norman McFadyen at Crown Office seeking further information regarding the claims made in the *Mail on Sunday* article (see appendix). Specifically, Mr Duff asked for details of the number, nature and duration of Mr Gauci's visits to Scotland and whether there was any truth in the allegation that he had received "treats" on these occasions. Mr Duff also sought clarification as to whether Mr Gauci had been taken to Lockerbie and "shown a lot of things" on his earliest visit to Scotland.

17.27 In his response dated 30 January 2002 (see appendix), Mr McFadyen explained that as there were concerns for Mr Gauci's safety it would not be appropriate to elaborate upon any arrangements which had made to ensure his protection (the implication in the letter is that Mr Duff was aware of these concerns). Mr McFadyen confirmed, however, that Mr Gauci's only visit to Scotland prior to

giving evidence was when he attended for Crown precognition in 1999. The visit, Mr McFadyen said, lasted 2 days (3 nights) during which Mr Gauci, Paul Gauci, and certain Maltese police officers stayed in Glasgow. According to the letter Mr Gauci was not taken to Lockerbie "at any time during that visit". Although Mr McFadyen was not prepared to discuss any arrangements which had been made subsequent to Mr Gauci giving evidence, he had been assured that at no time did Mr Gauci receive any gifts, as was suggested in the article.

17.28 In a further letter to Mr McFadyen dated 1 February 2002 Mr Duff explained that neither he nor the Scottish counsel acting on behalf of the applicant had any idea of the approach made to Mr Gauci before it happened. According to the letter Mr Duff was informed of the allegations shortly before they were publicised and had shared this information with counsel. Mr Duff added that he had no reason to believe that the allegations were to receive publicity.

Consideration

17.29 As a result of its enquiries the Commission has established that between 1999 and 2002 Mr Gauci left Malta on eight occasions for reasons connected with the case. Three of those occasions are explained by his attendance at Crown precognition, the identification parade and the trial. Of the remaining five, one relates to his attendance at counselling, and the other four relate to occasions when it was considered necessary to remove him from Malta. The decisions taken on each of those four occasions are fully justified by the circumstances referred to in the reports narrated above. It is clear from these that the officers responsible for Mr Gauci's protection perceived there to be real risks to his safety and security based on the prospect of media intrusion and potential threats posed from elsewhere.

17.30 In the Commission's view the question to be addressed is not whether Mr Gauci ought to have been removed from Malta on those occasions, but whether during his time away he might have perceived his treatment as being an incentive to give evidence favourable to the Crown case.

17.31 With regard to his stays in Scotland the Commission does not consider that the treatment afforded to Mr Gauci was particularly lavish. Indeed, the cost of the activities described in the report of 27 January 2002 was on any view modest. As the report points out, it would not have been appropriate simply to keep Mr Gauci in his hotel room during the visits. Aside from anything else, to have done so might have resulted in him being even more reluctant to cooperate with the officers in the event that it was considered appropriate to remove him from Malta on a future occasion.

17.32 In any event almost all of Mr Gauci's visits to Scotland took place after he had given evidence. The only exception to this is his visit in 1999 when he attended Dumfries for precognition and was taken sight-seeing in Edinburgh the following day. However, in the Commission's view any possible significance that might have been attached to this by the defence has to be seen in light of the other information contained in the reports described above. It appears from this that far from viewing his visits to Scotland and elsewhere as an incentive Mr Gauci was strongly opposed to his removal from Malta which he regarded as a source of inconvenience. There are references, for example, to Mr Gauci being "homesick" when he is away from Malta and to concerns as to his ability to handle his removal from the island for the duration of the appeal hearing. In these circumstances the Commission does not consider that evidence of a sight-seeing trip to Edinburgh during a visit connected to his Crown precognition would have provided a sound basis for challenging Mr Gauci's credibility as a witness. Accordingly the Commission does not consider the fact that the defence was unaware of this information at the time of the trial suggests that a miscarriage of justice may have occurred.

17.33 As to the visit Mr Gauci made to Lockerbie it is not clear from the report of 27 January 2002 precisely what he did while he was there. However, read alongside the transcript of his conversation with Mr Thomson, it is reasonable to infer that he went to the garden of remembrance for those who died in the disaster. In the Commission's view, given that the visit took place after the conclusion of the trial it cannot be said to have influenced the content of Mr Gauci's evidence. Accordingly the Commission is not persuaded that evidence of the visit suggests that a miscarriage of justice may have occurred.

(2) Mr Gauci's "missing" statements

The submissions

17.34 According to volume A the configuration applied to Mr Gauci's statements by the HOLMES system suggests that two such statements are potentially "missing". It is explained that each statement stored on HOLMES is given the prefix "S" (for "statement") and a number unique to the particular witness (in Mr Gauci's case, 4677). The first statement given by any witness consists simply of the prefix and the number (in Mr Gauci's case, S4677). However subsequent statements by the same witness are given an alphabetical suffix to indicate their place in the sequence. Thus, according to the submissions, Mr Gauci's statement, S4677R, is his 18th statement.

17.35 According to volume A the sequence of Mr Gauci's statements runs from S4677 to S4677U. It is pointed out, however, that no statements were disclosed to the defence bearing the references S4677J and S4677S. It is acknowledged that this might simply be down to poor record keeping and that even if such statements exist they might not be of any significance. However, it is suggested that S4677S would have been taken in the period just before Mr Gauci identified the applicant from a photograph on 15 February 1991.

17.36 The issue is raised again in the further submissions concerning Mr Gauci. It is pointed out there that the HOLMES computer will not "skip" a letter in the alphabet ie S4677K should not follow S4677I. It is submitted that at trial Mr Gauci was referred to a photo-spread containing an image of the incriminee Mohammed Abo Talb ("Talb") which he had been shown by police on 6 December 1989. In evidence the police officer who interviewed Mr Gauci on this occasion, Henry Bell, agreed that he had shown the photo-spread to Mr Gauci on this occasion. However, the submissions point out that there is no statement by Mr Gauci dated 6 December 1989. The suggestion is then made that if a statement of that date exists it "would or could be" S4677J. According to the submissions "nothing has emerged… to cause a retraction of the allegation that some police statements have been withheld".

17.37 In support of this ground MacKechnie and Associates submitted to the Commission a statement by Leslie Bolland, a retired Det Supt from Hertfordshire Constabulary who has specialist knowledge of the HOLMES system (see appendix). Mr Bolland was given copies of Mr Gauci's handwritten statements and noted that S4677J was missing from the sequence. He accepted that this might have occurred as a result of an attempt to register an original version of one of Mr Gauci's statements when a faxed version of the same statement had already been registered. However, according to Mr Bolland this would mean that the faxed version of the statement was one of those already registered on the system. In such circumstances Mr Bolland would expect to have seen the reference, S4677J, written in pencil on one of Mr Gauci's other statements. However, none of the other statements bore that reference. In addition, Mr Bolland said that if a reference such as S4677J is wrongly used by a HOLMES operator it is normal to re-use that reference in connection with later statements made by the same witness. In the case of Mr Gauci's statements this raised the question as to why statement S4677K was not simply allocated the reference S4677J.

17.38 In Mr Bolland's view the same considerations would apply in respect of S4677S which he noted was also missing from the sequence.

The Commission's enquiries

17.39 The HOLMES database does in fact contain a statement bearing the reference S4677S (see appendix). The statement, which was not lodged as a production, is dated 8 October 1991 but describes the occasion on 6 December 1989 when Mr Gauci was shown a photo-spread containing twelve photographs, including one of Talb. According to the statement Mr Gauci was shown a selection of photographs (CP 1246) but could not identify anyone as the man who purchased the items from his shop. At the foot of the statement there is a note in the following terms:

> *"Statement submitted by DS Byrne as continuity for final report, no statement having been submitted from Gauci. Gauci has not been re-interviewed for this additional statement."*

17.40 As noted in chapter 6, production of the final police report sometimes involved an element of rewriting and rewording of statements based upon earlier accounts given by witnesses or other available records. It appears that S4677S is an example of this in that it is based not upon Mr Gauci's own words but rather on the statements submitted by the officers who spoke to him on 6 December 1989 (see eg Mr Bell's statement S2632H in appendix). There is little doubt that Mr Gauci was seen on this occasion as the police label attached to the photo-spread is dated 6 December 1989 and is signed by him. In evidence Mr Gauci was referred to the photo-spread and accepted that as his signature did not appear against any of the photographs, he had not picked anyone out as the purchaser (see also the evidence of Mr Bell 32/4852-4853). Accordingly, even though S4677S was not lodged as a production the defence was aware of what had occurred when Mr Gauci was seen on this occasion.

17.41 However, as the submissions point out, the Crown also did not lodge any statement with the reference S4677J. Although a statement bearing that reference is held on the HOLMES database, it contains only Mr Gauci's name and the words "Registered in Error" (see appendix). Another statement attributed to Mr Gauci, S4677V (see appendix), is blank but was also registered in error (see action A11783 in appendix).

17.42 The Commission raised this and other matters with D&G whose response is contained in a letter dated 11 August 2005 from (retired Supt) Thomas Gordon (see appendix). The letter provides a very detailed account of the use of HOLMES during the police investigation and the possible reasons why witness statements were at times registered on the system in error. In order properly to understand these reasons it is necessary to set out briefly Mr Gordon's account of the procedure for registering statements on HOLMES and the difficulties caused in the present case by the fact that enquiries were being pursued outside the UK.

17.43 Generally, the first stage in the process of registering statements on HOLMES occurs when the statement is given to a "receiver" in the incident room. The role of the receiver is to read the statement in order to establish whether it

requires any urgent "actions" (ie instructions for further enquiries by officers). If no such actions are required, the statement is passed to an "indexer" whose job is to register the statement on the system. If the witness is already known to the system, the indexer will also update his "nominal" index (ie the record containing, among other things, the witness's personal details and details of his previous statements). In such circumstances the indexer can view the text of any other statements given by the witness in order to ensure that the statement about to be registered has not already been entered on the system.

17.44 In the present case, given the scale of the enquiry and the fact that it brought together officers from a number of different forces, on-site training was provided to those employed in the incident room. According to Mr Gordon the sheer volume of paper meant that mistakes were made in terms of the registration of particular items. However, the supervisory structure of the incident room was designed to detect such errors, which is why items found to have been wrongly recorded were designated as "registered in error".

17.45 Matters were further complicated by the fact that the incident room was also receiving materials from Malta. The enquiry team in Malta would often spend up to 20 days at a time there and on their return would deposit with the incident room manuscript statements and other items recovered by them. In some cases documents would be faxed from Malta so that they could be entered on the system more quickly.

17.46 Mr Gordon points out in his letter that in the present case there were two particular factors which might have contributed to errors in registration. The first concerns the large volume of typing required to enter the information on the system. This meant that the text of statements would not be available on the system for several days, particularly where a back-log existed. The second difficulty arose from statements being faxed to the incident room. Because faxed statements were often difficult to read, typists would on occasion wait for the original versions to be delivered before entering the text on the system.

17.47 As a result of both these factors, indexers would be able to see from the nominal records that a statement had been registered, but would not be able to see the

text of that statement. According to Mr Gordon's letter the most common mistake made by an indexer in such circumstances was to assume that an original of a statement was the first version received by the incident room, when in fact a faxed copy had already been registered. The result of this was that statements might be recorded on the system in duplicate. The mistake would thereafter be detected and one of the statements marked as "registered in error". Indeed, as a result of an exercise undertaken by Mr Gordon on 4 October 1991 he established that there were 39 statements registered in this way, one of which was S4677J. A list of the statements is contained in Mr Gordon's letter.

17.48 Mr Gordon explains in his letter that Mr Gauci's statements S4677H (undated but relating to an interview on 27 September 1989) and S4677I (dated 4 October 1989) were both registered on the HOLMES system on 6 October 1989. S4677J was registered on 20 October 1989 and S4677K (undated but relating to an interview on 2 October 1989) was registered on 27 October 1989. According to Mr Gordon there are two possible reasons as to why S4677J was registered in error:

(1) A duplicate of either S4677H or S4677I was mistakenly registered as S4677J.

(2) A statement by another witness was mistakenly attributed to Mr Gauci's nominal.

17.49 Mr Gordon points out in his letter that as S4677J was already recorded on the system, the next statement from Mr Gauci required to be given the reference S4677K. According to Mr Gordon it was not the practice to reattribute statement references which had been used in error as this would indicate that a statement had been registered on the system before it was taken.

17.50 With regard to S4677V Mr Gordon explained that this was registered on the HOLMES system on 30 April 1999. In his view the error might have had something to do with Mr Gauci's statement S4677U (dated 13 April 1999) which was registered on the system on 15 April 1999. Mr Gordon points out that S4677U relates to Mr Gauci's attendance at the identification parade on 13 April 1999 and was taken by a DC Stevenson. DC Stevenson's own statement in relation to the matter, S5710, was

registered on the HOLMES system on 29 April 1999. In Mr Gordon's view a likely explanation for the error was that when DC Stevenson submitted his statement to the incident room he included a copy of the statement he had taken from Mr Gauci. In these circumstances it was possible that the copy of Mr Gauci's statement was wrongly registered as a new statement. Another possibility was that an indexer had wrongly registered to Mr Gauci's nominal record a statement given by another witness.

17.51 As part of its assessment of this issue the Commission obtained from D&G copies of the HOLMES logs showing all the actions raised in respect of Mr Gauci. One of the actions, A11783, is in the following terms:

> *"RESULT: S4677 to S4677U (minus S4677V) passed to* [the procurator fiscal] *Mr Brisbane as per receipt no E0048, S4677V is recorded on HOLMES as error"* (see appendix).

17.52 Mr Gordon was referred to this action and his attention was drawn to the fact that it contains no reference to S4677J as having been registered in error. Mr Gordon was asked for his views on this and to provide a copy of the receipt no. E0048.

17.53 Mr Gordon explained that action A11783 had been raised following receipt of a letter from Crown Office requesting copies of all Mr Gauci's statements (see appendix). He pointed out that the indexer who processed this request had noted on the letter the references "S4677 – S4677U". Mr Gordon suggested that the indexer might have seen from Mr Gauci's nominal record that S4677V was registered in error, but might simply have failed to notice that an earlier statement, S4677J, was also marked in this way. According to Mr Gordon there can be doubt that S4677J was registered in error at that time as it was one of the items he had identified as a result of the exercise he undertook in 1991.

17.54 Mr Gordon also produced the receipt no. E0048 (D11559) which lists the statements ultimately passed to the Crown as a result of the action (see appendix). There is no reference to S4677J in the list and the reference S4677V has been overwritten so as to read S4677U. The amendment has been initialled by Mr

Brisbane, the procurator fiscal who received the statements. In Mr Gordon's view this indicated that when Mr Brisbane checked the statements he noticed that the statement marked S4677V on the receipt was in fact S4677U. He added that the only reasonable explanation for the reference to S4677V on the receipt was that this had been mistakenly inserted instead of S4677U.

17.55 Mr Gordon was also asked whether it was possible to recover from the HOLMES system an audit trail which might give further information as to why S4677J and S4677V were registered in error. According to Mr Gordon, however, difficulties encountered when transferring the information held on HOLMES to its successor, HOLMES II, meant that the retrieval of such information would not be possible. Mr Gordon added that even if these problems could be overcome the only additional information which could be provided was the identifying number of the HOLMES operators who had made the errors. Mr Gordon suggested that given the passage of time it was unlikely that the individuals responsible would be able to explain the occurrence of the errors.

17.56 In conclusion Mr Gordon was "absolutely certain" from his knowledge of the HOLMES system and the investigation in general that no statements by Mr Gauci exist under the references S4677J and S4677V.

Consideration

17.57 The Commission has found nothing which might support the allegation that the police have withheld statements given by Mr Gauci. In terms of Mr Gordon's letter the existence of S4677J and S4677V might be explained either by the registration of earlier statements already on the system, or by statements from another witness being wrongly attributed to Mr Gauci's nominal index. Neither of those explanations appears implausible to the Commission, particularly when one considers the task faced by the incident room in entering information on the system and the further complications caused by the receipt of original and faxed versions of statements.

17.58 In any event if the reference to S4677J on the HOLMES system is truly evidence of an attempt to withhold one of Mr Gauci's statements it is difficult to see why those responsible did not simply allocate that reference to one of Mr Gauci's later statements, as suggested by Mr Bolland in his statement. If that had been done there would have been nothing in Mr Gauci's nominal index to suggest that the statement originally given reference S4677J had ever existed. In the Commission's view it is also important to bear in mind that by 1991 there were a total of 39 "statements" registered in error on the HOLMES system, some relating to witnesses who on any view were not vital to the police investigation.

17.59 In these circumstances the Commission is satisfied that S4677J and S4677V are not additional statements by Mr Gauci and that the appearance of those references in Mr Gauci's nominal index arose from administrative errors.

Conclusion

17.60 In the Commission's view neither of the matters described in this chapter is capable of supporting the allegation that a miscarriage of justice may have occurred in the applicant's case.

CHAPTER 18
ALLEGED DEFECTIVE REPRESENTATION

Introduction

18.1 A substantial part of volume A (chapter 13 and parts of chapters 10 and 11) is dedicated to allegations of inadequate representation against the applicant's trial representatives. The allegations are wide-ranging and cover failures both to prepare and present the defence and to advance legal argument or assert "legal rights" on behalf of the applicant. The issues relate to many aspects of the case but in the main concern the approaches taken to the incrimination defence, the applicant's movements on 20-21 December 1988, the identification evidence of Anthony Gauci and the conduct of the appeal. It is submitted that as a result of each and all of the alleged failures the applicant was denied a fair trial.

18.2 The Commission undertook a range of enquiries in this connection. The files prepared by the firm of solicitors which represented the applicant at trial (McCourts) were examined, as were certain of those prepared by the firm which represented the co-accused (McGrigors). Extensive interviews were conducted with several of the applicant's trial representatives, namely his senior counsel William Taylor QC (on two occasions), his junior counsel John Beckett QC and his solicitor Alistair Duff. Copies of their statements are in the appendix of Commission interviews. The Commission originally intended to interview all members of the applicant's defence team but in light of the information obtained from Mr Taylor, Mr Beckett and Mr Duff this was not considered necessary.

18.3 It is appropriate to note that Mr Taylor is a former member of the Board of the Commission who tendered his resignation immediately upon the Commission receiving the submissions on behalf of the applicant.

18.4 In addressing the allegations the Commission has applied the following principles derived from previous decisions of the court:

(1) The conduct of an accused's defence can be said to amount to a miscarriage of justice only where it has deprived him of a fair trial (*Anderson v HMA* 1996 SCCR 114; *E v HMA* 2002 SCCR 341; *Jeffrey v HMA* 2002 SCCR 822).

(2) A fair trial is denied to an accused where his defence was not presented at all (*Anderson v HMA*; *McIntyre v HMA* 1998 SCCR 379) or was not properly presented (*Garrow v HMA* 2000 SCCR 772; *E v HMA*; *McBrearty v HMA* 2004 SCCR 337; *Grant v HMA* 2006 SCCR 365); a fair trial may also be denied where counsel's exercise of discretion in conducting an accused's defence was "contrary to the promptings of good reason and sense" (*McIntyre v HMA*).

(3) The entitlement to a fair trial should not be viewed as involving a right to a retrial simply because things might have been done differently by counsel; there can be no miscarriage of justice if counsel conducts the defence within the instructions given to him according to his own professional judgment as to what is in the best interests of his client (*Anderson v HMA*; *Grant v HMA*).

(4) An accused who argues that his defence was inadequately prepared must show what would have been revealed had there been adequate preparation (*McIntosh v HMA* 1997 SCCR 389).

(5) An appeal based on alleged defective representation should not be put forward unless the grounds specify the allegation on all material points and there is objective support for it (*Grant v HMA*).

18.5 The Commission has also sought to assess the allegations in light of the facts and circumstances known to the defence at the particular point when decisions or approaches were taken, rather than with the benefit of hindsight (*McBrearty v HMA; Strickland v Washington* 466 US 668, as quoted in *Anderson v HMA*).

18.6 Each of the allegations made on behalf of the applicant is addressed in turn below. In the final section of this chapter the Commission sets out its conclusions in respect of several matters not raised in the submissions.

(1) The incrimination defence

Background

18.7 Before considering the allegations made under this heading it is worth detailing the terms of the notice of incrimination and the trial court's approach to the evidence led in this connection.

18.8 The schedule to the notice included reference to the following incriminees:

- *"Members of the Palestinian Popular Struggle Front which may include Mohamed Abo Talb, Crown witness no 963, Talal Chabaan, present whereabouts unknown, Mohammed Ghaloom Khalil Hassan, present whereabouts unknown, Hashem Salem also known as Hashem Abu Nada, present whereabouts unknown, Madieha Mohamed Abu Faja, present whereabouts unknown, Abd El Salam Arif Abu Nada, Magdy Moussa, Jamal Haider, all present whereabouts unknown but all formerly directors of the Miska Bakery, Malta and Imad Adel Hazzouri, Gawrha, 42 Triq Patri, Guzi Delia Street, Balzan.*

- *Members of the Popular Front for the Liberation of Palestine-General Command (PFLP-GC)."*

18.9 According to the trial court's judgment (paragraphs 73-81) evidence was led that a cell of the PFLP-GC was operating at least up until October 1988 in what was then West Germany. The evidence showed that at least at that time the cell had both the means and intention to manufacture bombs which could be used to destroy civil aircraft. On 26 October 1988, as part of an operation code-named "Autumn Leaves", the German police (the "BKA") raided premises in Frankfurt and the home of Hashem Abassi in Neuss and seized a car which had been used by the leader of the cell, Haj Hafez Kassem Dalkamoni ("Dalkamoni"). As a result of the operation the BKA found, among other things, radio cassette players, explosives, detonators, timers,

airline timetables and seven used Lufthansa luggage tags. There was a considerable amount of evidence at trial of bombs being manufactured so as to be concealed in Toshiba radio cassette players. The models being used were, however, different from the RTSF-16 model used in the bombing of PA103 and the timers were known as "ice cube" timers which were different from MST-13 timers.

18.10 Among those arrested during the raids were Dalkamoni, Hashem Abassi, his brother Ahmed Abassi and a bomb-maker for the PFLP-GC named Marwan Khreesat ("Khreesat"). Dalkamoni was later convicted of various offences and sentenced to 15 years imprisonment. The Abassi brothers and Khreesat were among those released by the BKA shortly after the arrests took place.

18.11 The trial court concluded that although the cell could have regrouped by 21 December 1988 there was no evidence that it had the materials necessary to manufacture an explosive device of the type that destroyed PA103. In particular there was no evidence that the cell had an MST-13 timer.

18.12 The court also narrated the evidence given at trial by the incriminee, Mohammed Abo Talb ("Talb"). Talb had joined the Palestinian Popular Struggle Front (the "PPSF") in about 1972 and was based in Lebanon and latterly Damascus. In 1983 he left Damascus for Sweden where he had lived ever since. In evidence he said that after arriving in Sweden he did not belong to any Palestinian organisation and ceased all activities in relation to Palestine. However, in 1989 he was convicted of a number of serious offences arising from the bombing of targets in Copenhagen and Amsterdam in 1985 and was sentenced to life imprisonment. He was still serving that sentence at the time he gave evidence.

18.13 Before his imprisonment Talb lived in Uppsala, Sweden with his wife Jamilla Mougrabi and their children. When he was arrested in 1989 his wife's brothers, Mahmud and Mustafa Mougrabi, were also arrested along with Talb's friend, Martin Imandi.

18.14 Although the court accepted that there was a great deal of suspicion surrounding the actings of Talb and his circle, it concluded that there was no evidence

to indicate that they had either the means or intention to destroy a civil aircraft in 1988.

The submissions and the Commission's responses

(a) Alleged failure to pursue the disclosure of evidence

18.15 It is alleged that the defence failed to pursue the disclosure of materials which might have implicated the PFLP-GC in the bombing. Reference is made, for example, to the terms of various cables prepared by the US Defense Intelligence Agency (the "DIA") and to the minutes of the International Lockerbie Conferences held by police and prosecutors from various countries in the years following the bombing. According to the submissions those sources demonstrate that the incriminees were the main suspects for many years and that there must therefore have been considerably more information that could have been sought by the defence. Reference is made to a particular DIA cable (see appendix) in which it is reported that the bombing of PA103 was conceived, authorised and financed by a former Minister in the Iranian government, Ali-Akbar (Mohtashemi-Pur), and was contracted to the PFLP-GC. The same individual is reported in another DIA cable (see appendix) to have paid $10m for the bombing of PA103 in retaliation for the shooting down of an Iranian Airbus by a US Navy battle cruiser, the USS Vincennes, in July 1988. According to the submissions the DIA cables "specifically discounted" Libyan involvement in the bombing. It is submitted that at the very least the cables themselves could have been led in evidence to show that intelligence opinion had focussed on the incriminees.

Consideration

18.16 In the Commission's view it is appropriate to categorise the non-disclosure of material evidence as a breach of the Crown's duties under *McLeod v HMA* 1998 SCCR 77 rather than as a failure on the part of the defence to pursue such evidence (*Sinclair v HMA* 2005 SCCR 446, Lord Hope at paragraph 34). The Commission's conclusions as to whether the Crown satisfied its obligations in respect of material concerning the incriminees are set out in chapter 14.

18.17 As to the allegation that the defence did not lead the contents of the DIA cables, there was evidence before the court that the PFLP-GC had been the main focus of the police investigation and that many Scottish officers were engaged in enquiries in this area over a considerable period of time (Gordon Ferrie: 3/330-331). There was also evidence that the BKA became involved in enquiries into the bombing of PA103 because it was considered that there might be a link between this and the Autumn Leaves suspects (Anton Van Treek: 71/8720). In light of that evidence, and given the circumstances of the operation and its proximity to the bombing of PA103, it must have been plain to the court that the PFLP-GC were the initial suspects in the investigation.

18.18 Although certain of the DIA cables suggest that in 1989 there was no credible intelligence implicating Libya in the bombing, it has to be remembered that these were produced well before the link was made between the fragment PT/35(b) and the MST-13 timer by forensic scientists in June 1990 (see chapter 8) and therefore before any major link to Libya was established. Moreover, information contained in certain other cables would clearly not have been helpful to the defence. For example, in one of the cables dated 24 September 1989 there are references to Libya, Iran and Syria having signed a "cooperation treaty for future terrorist acts", and to the bomb used to destroy PA103 as having been constructed in Libya. In these circumstances it is understandable that the defence did not seek to lead evidence of the cables.

(b) Alleged failures to present the incrimination defence

18.19 It is alleged that the incrimination defence was not properly presented and that this resulted from failings on the part of the defence and also on the part of the Crown in respect of its obligations of disclosure (as to the latter see chapter 14). Although it is acknowledged that many of the important features of the evidence were presented at trial it is submitted that this was done in a way which did not properly reflect the strength of the evidence. For example, it is said that the greater part of the evidence was contained in joint minutes and that the inferences to be drawn from these were not at all obvious. It is also alleged that the closing submissions on the

incrimination were "extremely brief" and involved little attempt to present the "whole picture".

18.20 According to the submissions the consequence of those alleged failures was that the link between the PPSF and PFLP-GC – and hence the link between the individuals based in Sweden and those in Germany – was "not realised", although it is acknowledged that such a link was admitted in evidence by Talb and "was evident from all the circumstances". Furthermore, it is alleged that evidence concerning the links between Talb and Dalkamoni, and between the various alleged terrorist cells in Malta, Cyprus and Yugoslavia, was not presented by the defence.

18.21 It is also submitted that there was no proper context given to the incrimination evidence and no attempt to "tie it together" for the court. It is said that this was "disastrous" in that it rendered much of the information presented as "meaningless" and made it easier for the court to view each of the parties incriminated as entirely separate and therefore to dismiss them individually. Such a context could, it is submitted, have been established by expert evidence on the structure and coalitions understood to exist between the various terrorist groups operating at the time. According to the submissions, MacKechnie and Associates were unable to provide any expert opinion in support of these allegations. However, it is suggested that such evidence "could" be obtained and "would" show the following:

- that the PFLP-GC and the PPSF operated together at the relevant time, have a long history of terrorist activity and had the means and intention to bomb PA103;

- that in the view of the intelligence community both organisations were the prime suspects for a considerable period;

- that at the relevant time there was a political coalition of Palestinian, Syrian and Iranian forces against the US and Israel, and that in December 1988 a coalition organised by the leader of the PFLP-GC, Ahmed Jibril ("Jibril"), was expected to carry out a terrorist act against the US;

- that the "combined operation" (ie the bombing of PA103) was "probably" supported and financed by Syria and Iran and had a cell structure covering Sweden, Denmark, Greece, Germany, Cyprus, Malta and Yugoslavia;

- that individuals within those cells were trained (mainly in Syria and eastern Europe) in the making and use of explosive devices for attacks on airlines, and that the method used included hiding Semtex within Toshiba cassette recorders;

- that "they could have ingested the bomb either at Frankfurt or Luqa"; and

- that in 1991 Iraq invaded Kuwait and the political context changed in that during the Gulf war the US maintained "relatively good relations" with Syria and Iran.

18.22 According to the submissions it is easy to make a "different and compelling" defence case once the links are made between the activities of the various individuals associated with the PPSF and the PFLP-GC. The submissions thereafter narrate in detail the features of what is said to be an "alternative" incrimination defence which could have been presented. Included in this is a section dealing with the figure known as Abu Elias who was referred to on several occasions in the trial evidence, mainly by FBI Special Agent Edward Marshman who testified as to what Khreesat had told him at an interview in 1989.

18.23 The submissions conclude that the conduct of the incrimination defence fell short of what was reasonable and defied "the promptings of good reason and sense."

Consideration

18.24 In the Commission's view the most surprising feature of the allegation concerning expert evidence is that it appears to be based on nothing more than speculation as to its likely content. It seems doubtful, for example, that any "expert"

on terrorism could give competent evidence as to whether in December 1988 a coalition led by Jibril was expected to carry out an attack against the US, or that the terrorist operation in respect of PA103 had a cell structure covering specific countries, or that members of those cells were trained elsewhere in the use of explosives, or that the operation was supported and financed by Syria and Iran. Likewise, it is difficult to see what an expert on terrorist matters might have added to the existing evidence as to whether the bomb was ingested at Frankfurt, Luqa or Heathrow airports. Although the political situation prevailing in the Middle East in 1991 would have been a competent subject for expert evidence, again it is difficult to see how in itself this might have undermined the available evidence concerning MST-13 timers and their links to Libya, let alone the evidence implicating the applicant in the bombing.

18.25 It is also important to bear in mind that expert evidence of the kind described in the submissions might well have suggested Libyan involvement in terrorism. Evidence was led at trial that the PFLP-GC was "apparently … dependent upon Syria, and also has contacts with Libya" (Anton Van Treek: 71/8741). According to Mr Duff the defence was aware of those links through its own enquiries. The defence had also precognosced an officer in the British Security Service, known as "Mr A", who had experience in Middle Eastern affairs and who suggested that Libya, along with Iran, Iraq and Syria, was a known sponsor of terrorism. Although evidence of Libya's alleged links to terrorism might not have assisted the Crown in demonstrating that the applicant was responsible for this particular terrorist act, in the Commission's view the concerns on the part of the defence as to what such an expert might have to say are entirely understandable (see Mr Beckett's statement at paragraph 45).

18.26 In any event the vast majority of the matters to which it is claimed such an expert would have spoken featured clearly in the evidence at trial. It is alleged, for example, that the defence failed to realise the links between the PFLP-GC and the PPSF. However, as the submissions appear to acknowledge, evidence as to the relationship between those organisations was given by Talb in cross examination. Both organisations, Talb agreed, shared "the same goal" (68/8272). Later in cross examination Talb provided a brief account of the history of the PPSF and accepted that what marked out the PPSF and the PFLP-GC in the 1970s and 1980s was their rejection of any political settlement which would allow the state of Israel to exist in

the Middle East (68/8496-8500). There was also evidence led as to the history and structure of the PFLP-GC and its involvement in previous terrorist attacks on aircraft (Anton Van Treek: 71/8739-8741).

18.27 In these circumstances the Commission does not consider there to have been any failure on the part of the defence to "realise" the links between the two organisations. Their shared objectives at the time were the subject of submissions and were acknowledged by the trial court in its judgment.

18.28 It is also alleged that the defence failed to present evidence of the links between Talb and Dalkamoni and between various individuals who were based in Sweden and Germany. However, although Talb denied any knowledge of Dalkamoni (68/8352) there was evidence that his visit to Cyprus between 3-18 October 1988 coincided with Dalkamoni's apparent presence there on 4 October (Hans Rustler: 72/8840-41). There was also evidence that Talb had met Dalkamoni's brother, Bilal Hassan, in Uppsala in 1987 (69/8523). As to the links between the individuals in Sweden and Germany, there was clear evidence of these in joint minute number 16 and they were acknowledged by the court at paragraph 77 of its judgment.

18.29 A further allegation is that expert evidence would have shown that the plot to bomb PA103 involved a cell structure covering countries such as Malta, Sweden, Denmark, Germany, Cyprus and the former Yugoslavia. As noted above the Commission is doubtful that expert evidence could competently have shown any such thing. In any event there was evidence at trial as to the links between the various individuals of interest in those countries. In respect of those in Sweden and Malta, there was evidence in joint minute number 16 that Talb's return ticket from Malta to Stockholm was purchased by the incriminee, Abd El Salam, whose flat in Malta was owned by the PLO. There was also evidence in the same joint minute from which one could infer that on 11 December 1988 Abd El Salam telephoned Talb in Sweden.

18.30 In respect of Denmark, there was evidence in joint minute number 11 as to the suspicious actings of two of the incriminees, Talal Chabaan and Magdy Moussa, who flew to Malta on different dates in December 1988 and returned to Denmark shortly after the bombing.

18.31 There was also evidence of investigations conducted in Cyprus by the BKA along with Scottish and American police officers. Following the Autumn Leaves operation the BKA suspected that a Syrian who lived in Cyprus, Habib Dejani ("Dejani"), was involved with those arrested and had links with Dalkamoni (Anton Van Treek: 71/8726-8730). Talb was cross examined extensively on his visit to Cyprus between 3 and 18 October 1988 but denied having met Dalkamoni during that time or indeed on any occasion (68/8312). Talb was also asked in cross examination why his brother in law, Mahmud Mougrabi, had told the police that Talb made regular visits to Cyprus in order to uplift funds from the PPSF. Talb denied that this was the purpose of his visits. He accepted that during his stay in Cyprus in October 1988 he had resided at the Nicosia Palace Hotel. However, he was unable to recall whether the Swedish police had asked him about a restaurant close to that hotel which he had visited regularly and which was said to be owned by Dejani (69/8522-8524). There was also evidence that while in Cyprus on that occasion Talb had made a number of telephone calls to Abd El Salam in Malta.

18.32 In respect of Yugoslavia there was evidence that Yugoslavian currency was found by the BKA in a car which had been used by Dalkamoni (Hans Rustler: 72/8845). There was also evidence that Mobdi Goben, a deceased senior member of the PFLP-GC, had resided in Yugoslavia and was in charge of the PFLP-GC sector there (Edward Marshman: 76/9245-9246). Khreesat was also said to have been to Yugoslavia along with Abu Elias (76/9244).

18.33 With the exception of that concerning Cyprus and Yugoslavia, all of the above evidence was referred to by the defence in closing submissions. It does not appear to the Commission that those submissions were "extremely brief", as is alleged on behalf of the applicant. The defence accepted that there was no evidence that any of the incriminees were at Luqa airport on 21 December 1988 but submitted that there was nevertheless "something of a web" linking those in Malta, Sweden and Neuss whose intentions were only too clear. Reference was also made to the Autumn Leaves suspects as being "but one cell of a much larger organisation" (80/9599). Bearing in mind the limitations of the available evidence it is difficult to see what more the defence could have done in this connection.

18.34 As noted earlier, the submissions go on to detail what is referred to as an "alternative" incrimination defence which it is said could have been presented at trial. Again, however, the vast majority of the evidence narrated in this part of the submissions was before the court. While certain matters, such as Dalkamoni's apparent financial connections to Cyprus on behalf of the PFLP-GC, were not led in evidence the Commission does not consider that in themselves these were significant to the applicant's defence.

18.35 Part of the so-called alternative defence case relates to Abu Elias. However, the defence led evidence as to what Khreesat had told the FBI about this individual (Edward Marshman: 76/9240). According to the statement given by Khreesat on this occasion, Abu Elias was an expert in airport security who, Dalkamoni said, had arrived in Germany on 22 October 1988. Dalkamoni visited Khreesat in Neuss that day and told him that he was leaving to go to Frankfurt. Thereafter Khreesat noticed that an explosive device on which he had been working (known as the "fifth device") had been removed from his workroom. According to the evidence Khreesat "speculated" that Dalkamoni had taken the device with him, as only he and Dalkamoni ever went into that room. Khreesat also assumed that the device had gone to Abu Elias. Four days later Khreesat and Dalkamoni were on their way to meet Abu Elias when they were arrested as part of the Autumn Leaves operation.

18.36 In the Commission's view any suggestion that the fifth device was the one used in the bombing of PA103 is undermined by other information given by Khreesat to the FBI, the terms of which were also led in evidence. Khreesat told the FBI that the fifth device was contained in a single-speaker Toshiba cassette player which looked exactly like an RT-F423 model, and that he had never worked on a circuit board of the type used in the twin-speaker RTSF-16 model (ie the model employed in the bombing of PA103). Although in his defence precognition (see appendix) Khreesat said that the fifth device was contained in a twin-speaker Toshiba cassette player, the defence was unable to explore this with him given his refusal to testify at the trial. In any event there was no evidence that the fifth device contained an MST-13 timer and, in terms of his accounts to both the FBI and the defence, Khreesat indicated that he did not use digital timers (of which the MST-13 is a type).

18.37 The only other available information tending to implicate Abu Elias in the bombing of PA103 is contained in the Goben memorandum in which it is suggested that he placed the explosive device in the luggage of one of the passengers on PA103, Khaled Jaafar. However, as explained in chapter 14 above, the defence considered this allegation to be unreliable, a conclusion which in the Commission's view is justified. In any event, for the reasons outlined in that chapter the Commission is doubtful that the contents of the memorandum amount to admissible evidence.

18.38 In conclusion the Commission does not consider that there was any failure on the part of the defence to present such material evidence in respect of the incrimination as was available to them at the time of the trial. Although different approaches could doubtless have been taken as to the particular evidence deployed and the way in which this was presented, there is nothing in the submissions on this issue which leads the Commission to conclude that the applicant was denied a fair trial.

(2) The applicant's movements on 20-21 December 1988

The applicant's submissions

18.39 The following allegations are made under this heading:

(a) The defence failed to lead any evidence to explain why the applicant possessed a coded passport (the "Abdusamad passport") and why on 20-21 December 1988 he used this in connection with a visit to Malta. In particular the defence failed to lead evidence from the applicant to the effect that he had been issued with the Abdusamad passport for use in "sanctions-busting" activity. The applicant's own account could have been confirmed by Khalifa Masoud Abu Aisha Ferjani, the administrative director of the Libyan intelligence service (the "JSO"). The defence attempted to lead similar evidence from the witness, Miloud Omar El Gharour, but abandoned this following an objection by the Crown.

(b) The defence failed to lead any evidence to explain the purpose of the applicant's visit to Malta on 20-21 December. Evidence could have been led from the applicant in this connection and from the Crown witness, Vincent Vassallo, whose home the applicant visited on the evening of 20 December.

(c) The defence failed to lead any evidence to contradict the Crown's position that the applicant was a member of the JSO. Evidence to this effect could have been given by Mr Gharour and Mr Ferjani who would have been able to confirm, first, that the issuing of coded passports does not infer membership of the JSO and, second, that in any case the applicant was not a member of that organisation.

Consideration

The advice given to the applicant

18.40 It is appropriate to deal first with the allegation that the defence ought to have led evidence from the applicant, as this underpins many of the issues raised under this heading. According to the submissions the applicant was willing to testify at trial but accepted the advice of his former representatives not to do so. Reference is made to a defence discussion paper which sets out the reasons for and against the applicant giving evidence (see appendix) and it is alleged that the reasoning employed in this is unsatisfactory. Although it is acknowledged that the advice given by the defence in this connection cannot "in itself" amount to defective representation, according to the submissions it forms part of the "general failure to present any evidence in explanation of pertinent matters."

18.41 Summaries of the various accounts given by the applicant at precognition (and at interview with the Commission's enquiry team) are contained in chapter 27 below and there is no need to repeat them here in any detail. In respect of the Abdusamad passport the applicant explained at precognition that this had been issued to him in connection with his obtaining spare parts for aircraft operated by Libyan Arab Airlines ("LAA"). As to his use of that passport on 20-21 December the applicant provided several possible reasons for this, ranging from it having been the

first one that came to hand to his desire to hide from his wife that he was paying an overnight visit to a place where Libyans went to drink and womanise.

18.42 In respect of the purpose of his visit to Malta on 20-21 December 1988, and what he did while he was there, the applicant gave varying and sometimes inconsistent accounts over the course of his precognitions. The applicant also provided information that might actively have assisted the Crown case had it featured in evidence. For example, he said in his twelfth supplementary precognition that while in Malta on the evening of 20 December he had purchased two carpets. The following morning he took the carpets to Luqa airport and told the LAA station manager there, Mustapha Shebani, about them. Mr Shebani informed the applicant that he would arrange for the carpets to be placed in the hold of the LAA aircraft on which the applicant was due to fly that morning (flight LN147 to Tripoli). According to the precognition Mr Shebani must have done so as the applicant collected the carpets upon his arrival in Tripoli later that day.

18.43 However, the evidence at trial indicated that the applicant did not check in any luggage on flight LN147 (Anna Attard: 36/5508). Accordingly, if the applicant had given evidence in those terms it might have assisted the Crown in showing, first, that he received special treatment at Luqa airport by means of his relationship with persons who worked there and, secondly, that he could arrange for items to be placed on board aircraft without there being any record of this. Although there is no indication in the precognition that the applicant would receive favourable treatment at Luqa airport from airlines other than LAA, nevertheless such evidence would clearly not have been helpful to his defence.

18.44 With regard to his connections to the JSO the applicant admitted in his first defence precognition that as head of airline security in 1986 he was seconded to that organisation. He explained that his position as head of airline security involved him training JSO officers and receiving reports from such officers who were positioned as assistant station managers at foreign airports. The applicant was also associated with or related to individuals such as Ezzadin Hinshiri ("Hinshiri") and Abdullah Senoussi ("Senoussi") who at one time occupied senior positions in the JSO. Indeed, Senoussi had been instrumental in the applicant's appointment to the Centre for Strategic

Studies ("CSS") in 1987. In his fifth supplementary precognition the applicant is noted as saying that because the funding for the CSS came from the JSO "the [CSS] therefore became part of the security or intelligence service. I therefore accept that I was effectively working in an office which was part of the security or intelligence and that I was the coordinator."

18.45 Although at no point in his precognitions does the applicant say explicitly that he was a "member" of the JSO, in the Commission's view any evidence he might have given on this issue would have been likely only to confirm his associations with that organisation and its senior officials.

18.46 In considering the allegation that the defence ought to have led evidence from the applicant it is also important to consider some of the other concerns expressed by his former representatives, both in the defence discussion paper and at interview.

18.47 According to the discussion paper, by giving evidence the applicant would have opened himself up to cross examination on issues which were not at that time considered by the defence to be major problems. Reference is made in the paper to such matters as the JSO, the CSS, the Salinger interview and the applicant's finances which, according to the paper, "make other peoples' finances pale into insignificance" (see chapter 27 below). The paper also highlights the importance to the Crown case of the applicant's movements on 20-21 December and acknowledges that his explanations for these have "some deficiencies as [the applicant] recognises." There is also reference to the applicant's close relationships with Hinshiri and Said Rashid ("Rashid") both of whom the Crown considered to be "key players in the saga". According to the paper it was expected that the applicant might also be subject to lengthy cross examination as to his knowledge and understanding of airline security.

18.48 Those concerns were repeated and in some cases expanded upon by the representatives at interview. All those interviewed recalled that the defence had sought to get the trial under way in order to prevent the Crown from lodging the applicant's Swiss bank accounts. The sums of money held in these accounts, and the points at which particular sums were deposited, were said to be a source of concern to

the defence and it was felt that if the applicant testified the Crown might seek to lead evidence of these in replication.

18.49 There was also concern expressed as to the following comment by the applicant in his first supplementary defence precognition:

> *"…as a Libyan Arab Airlines employee and as someone well known, both at Tripoli airport and at the airport in Malta, I could get away with not using a passport or an identification card at all, but simply by wearing my Libyan Arab Airlines uniform. This may sound ridiculous but it is true. If I wanted to do something clandestine in such a way that there would be absolutely no record at all of me going from Tripoli to Malta and back again, I could do it."*

18.50 Mr Beckett considered that if the applicant had spoken to this in evidence it would have removed the need for the Crown to establish the date of purchase of the items from Mary's House as 7 December 1988. According to Mr Beckett, if it was possible for the applicant to enter Malta in the manner he described then the clothing could have been purchased on any day within the relevant time frame. Mr Duff and Mr Taylor recalled having similar concerns.

18.51 Mr Beckett said that although there were some references to Hinshiri, Senoussi and Rashid in the evidence, the applicant's connections to them would have been augmented by his own evidence. According to Mr Beckett the applicant might also have revealed his connection to Mohammed El Marzouk (aka Mohammed Al Nayil and Ahmed Ali Wershefani), one of the two Libyans arrested in Senegal on an occasion when an MST-13 timer was recovered on board a passenger aircraft. In Mr Beckett's view the more the applicant could be linked to such persons the worse it would have been for his defence.

18.52 Another matter raised by the former representatives at interview concerned the applicant's account that the CSS was simply an academic institution. In his first precognition the applicant described the CSS and its role in monitoring the worldwide media, and how people around the world collected articles from newspapers and magazines and sent them there. The precognition goes on: "I remember that there was

a man in Spain who used to send back articles from the Spanish media. Sometime during the 1990s it turned out that he was an American spy and he was assassinated." In Mr Beckett's view such information was not helpful to the defence.

18.53 Both Mr Duff and Mr Beckett also recalled concern as to the possible involvement of Mohammed Abouagela Masud ("Masud") in the bombing, with whom the applicant is alleged to have travelled on a coded passport from Malta to Tripoli on 21 December 1988. According to Mr Duff the defence gained access to many individuals during its pre-trial preparations but the applicant said he knew nothing about Masud. Enquiries by the applicant's Libyan lawyers also failed to trace this individual despite the fact that a passport number existed for him. Mr Beckett suggested that the Crown might have explored this issue in its cross examination of the applicant.

18.54 The matters detailed above are merely examples of the difficulties which might have faced the defence in the event that the applicant had given evidence. Although it is conceivable that other representatives might have taken a different approach, in the Commission's view the advice given to the applicant in this connection was based on a careful consideration of what was in his interests at that time and was entirely sound.

18.55 The remaining evidence which it is alleged the defence ought to have led under this heading is considered below.

<u>The issuing and use of the Abdusamad passport</u>

18.56 It is alleged that a witness on the Crown list, Khalifa Masoud Abu Aisha Ferjani, who was the administration director of the JSO, could have testified that the applicant was issued with the Abdusamad passport for use in "sanctions busting" activity.

18.57 According to his defence precognition (see appendix) Mr Ferjani said that when the JSO was involved in obtaining spare parts for aircraft they sought assistance from various people in this field. As the applicant had lectured in airline security the

JSO asked him to cooperate, and gave him a coded passport for this purpose. A note at the foot of the precognition inserted by Mr Duff indicates that Mr Ferjani was considered to be a good witness who came across as "fairly credible". According to a letter sent by Mr Duff to Crown Office dated 12 September 2000 (see appendix) it appears that the defence at one stage expected to call Mr Ferjani.

18.58 Mr Beckett was asked about this issue at interview. He explained that there was a lot of "shadow boxing" between the Crown and defence at trial, particularly in relation to whether the applicant was to give evidence, and that this might be the reason why Mr Duff had intimated to the Crown the possibility of calling Mr Ferjani. Looking at the situation now, however, Mr Beckett saw difficulties in leading evidence from this witness. For example, Mr Ferjani had denied in his precognition that the applicant was head of airline security, when it was clear from the evidence and from the applicant's own accounts that he had occupied this position. In Mr Beckett's view there was therefore an "obvious problem of credibility" in relation to Mr Ferjani. Mr Beckett also queried the significance of Mr Ferjani's account in the absence of evidence from the applicant on the matter. He acknowledged that there might have been some value in obtaining an explanation as to why the applicant had been issued with the Abdusamad passport. However, in Mr Beckett's view Mr Ferjani's evidence might have underlined the absence of any explanation from the applicant as to why he had used this passport on 20-21 December 1988 and had never used it again. According to Mr Beckett only the applicant could explain this and he had never said that the reason for the visit was in order to obtain aircraft parts. The defence, he pointed out, did not know at the time what the court's approach was going to be to the evidence. It was, Mr Beckett said, easy to query decisions once it was known what evidence had been accepted. Mr Beckett was in no doubt that the applicant's instructions would have been taken about potential defence witnesses.

18.59 In addressing this allegation it is important to consider the relevant passages of the trial court's judgment. The court pointed out at paragraph 87 that there was no evidence as to why the Abdusamad passport was issued to the applicant and that his only use of it in 1988 was in connection with the overnight visit to Malta on 20-21 December, following which it was never used again. The court went on to say the following at paragraph 88:

"It is possible to infer that this visit under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device. Had there been any innocent explanation for this visit, obviously this inference could not be drawn. The only explanation that appeared in the evidence was contained in his interview with Mr Salinger, when he denied visiting Malta at that time and denied using the name Abdusamad or having had a passport in that name. Again, we do not accept his denial."

18.60 In the Commission's view the above passage demonstrates that the critical issue, so far as the court was concerned, was the applicant's presence under a false name at Luqa airport at the time when the device must have been planted on KM180. Accordingly, although evidence from Mr Ferjani might have been helpful in showing that the Abdusamad passport was issued to the applicant in connection with his role in obtaining spare parts for LAA aircraft, it would have done nothing to explain why the applicant had used it to travel to Malta on 20-21 December 1988, or why on the night of his arrival he checked in to the Holiday Inn using the name Abdusamad rather than his own. Only the applicant could have explained these matters and as indicated there were good reasons why he was advised not to do so.

18.61 In view of these factors the Commission does not consider that the decision by the defence not to call Mr Ferjani in this connection resulted in the applicant being denied a fair trial.

<u>The purpose of the applicant's visit to Malta on 20-21 December</u>

18.62 It is alleged that, aside from the applicant himself, the defence could have led evidence from Mr Vassallo as to the purpose of the applicant's visit to Malta on 20-21 December. However, while Mr Vassallo could (and did) speak to the applicant visiting his home on the evening of 20 December, again only the applicant could have explained whether this was the purpose of his trip or whether he had some other reason for being in Malta. As noted earlier, the perceived deficiencies in the

applicant's explanations for this visit were a key factor in the advice of his representatives not to give evidence.

The applicant's membership of the JSO

18.63 It is also alleged that the defence could have led evidence from Mr Gharour and Mr Ferjani in order to contradict the Crown's position that the applicant was a member of the JSO.

18.64 In the Commission's view there is nothing in Mr Gharour's evidence or defence precognition to indicate that he could have assisted the defence in this connection.

18.65 Mr Ferjani denied in his defence precognition that the applicant was a member of the JSO but said that when Rashid became the manager of the technical administration department of that organisation he had asked the applicant to give some lectures concerning flight security. As noted above Mr Ferjani also denied that the applicant was head of airline security but said that between 1984 and 1986 he was in charge of training. Mr Ferjani did not think that the applicant had any connection with the JSO after that time but as Mr Ferjani was posted abroad in 1987 he did not have so much knowledge of what was going on.

18.66 In the Commission's view the fact that Mr Ferjani denied that the applicant was head of airline security raises questions as to his overall reliability. Furthermore, as he was posted abroad in 1987 he would not have been able to say whether the applicant had continued his association with the JSO in the period leading up to the bombing. In any event the question as to whether Mr Ferjani ought to have been called in this connection must be viewed in the light of the information known to the defence at the time, including what the applicant had said at precognition. As stated above the applicant informed his representatives that he was seconded to the JSO in 1986 and that the CSS, where he was appointed in 1987, was effectively part of the intelligence services. It was no doubt this information which led the defence to accept in closing submissions that the applicant "may have been in the JSO" in 1986 (80/9538).

18.67 In the Commission's view, although the applicant might not have been a "member" of the JSO he appears from his own account to have been so closely associated with that organisation as to make any distinction meaningless in terms of his defence to the charges. Viewed in that context, evidence from Mr Ferjani that the applicant was not a member of the JSO would have been of little, if any, value to the defence.

18.68 In these circumstances the Commission does not consider that the decision not to call Mr Ferjani in this connection resulted in the applicant being denied a fair trial.

(3) The identification evidence of Anthony Gauci

General

18.69 It is alleged in the submissions that at both the trial and appeal there was an "extraordinary failure" on the part of the defence to challenge Mr Gauci's identification of the applicant as the purchaser of the items. A substantial number of issues are raised under this heading but broadly it is alleged that the defence failed to do the following:

(a) obtain and lead expert evidence on Mr Gauci's identification of the applicant;
(b) object at trial to the admissibility of evidence of the identification parade;
(c) object to Mr Gauci's dock identification of the applicant; and
(d) adequately challenge Mr Gauci's evidence in cross examination.

18.70 The allegations made under each of these headings are addressed in turn below. A further allegation that the defence failed to pursue what is described in the submissions as Mr Gauci's "missing statements" is addressed in chapter 17.

(a) *Alleged failure to obtain and lead expert evidence*

The applicant's submissions

18.71 According to the submissions there is now a well-established set of criteria relied upon by psychologists to assess the reliability of identification evidence. Reference is made to a report by Professor Elizabeth Loftus of the University of Washington ("the Loftus report": see appendix) which appears to have been obtained prior to the applicant's appeal. The identity of the party who instructed the report is not entirely clear from the submissions, or from the report itself, but it does not appear that the applicant's trial representatives were directly involved in this.

18.72 According to the submissions the report details the presence of key factors which undermine the reliability of Mr Gauci's identification evidence. The submissions acknowledge that "in one sense these matters are obvious" but point out that their recognition in the findings of scientific research is properly a matter for expert evidence. Such evidence, it is said, "could" be admitted and is material to the determination of a critical issue at the applicant's trial.

The Loftus report

18.73 The report itself is fairly brief and is based upon what Professor Loftus herself describes as limited information. Reference is made to the discrepancies between certain aspects of Mr Gauci's early description of the purchaser and the applicant's characteristics in 1988. The report also refers to the cross-racial nature of the identification and explains that more mistakes are made in identifications of this kind. It is pointed out that Mr Gauci's identification of the applicant from a photo-spread on 15 February 1991 occurred more than two years after the purchase of the clothing and that this constitutes an "extraordinary long retention interval." According to the report it is well known in the research literature that memory fades over time and that substantial fading occurs over a two year period when memory becomes more susceptible to "post event suggestion" such as exposure to photographs and media coverage.

18.74 The report also refers to the evidence at trial that in late 1998 or early 1999 Mr Gauci saw a photograph of the applicant in a magazine. Reference is made to a phenomenon known as "photo-biased identification" in which the viewing of a photograph can make someone look familiar when they are seen again at a later stage. It is said that this phenomenon would apply to Mr Gauci's identification of the applicant at the identification parade.

18.75 Professor Loftus concludes that the existence of these factors gives rise to "quite a bit of scepticism" about the reliability of Mr Gauci's identification of the applicant. According to the report although the trial court expressed concern about certain aspects of the identification evidence it does not appear fully to have appreciated the substantial difficulties that can occur when so many problematic factors are present.

The views of the former representatives

18.76 According to Mr Taylor and Mr Duff the defence did not consider leading evidence from an expert such as Professor Loftus. Mr Taylor said that the reason for this was that the trial was before a panel of judges who it could be assumed were aware of the fallibility of eyewitness identification evidence. According to Mr Taylor, judges know the difficulties associated with dock identifications and direct juries on such issues all the time. Because of this Mr Taylor did not consider that expert evidence of this kind would have assisted the defence. A similar position was adopted by Mr Duff.

18.77 Mr Beckett recalled discussing the leading of expert psychological evidence with one of the solicitors in the defence team, Mr Prentice. However, Mr Beckett considered it doubtful that such evidence would be admissible even now. He also questioned the value of such evidence in that it would have involved asking the judges to take account of matters that they already knew. According to Mr Beckett the most an expert would have been able to say was that Mr Gauci's identification of the applicant might be mistaken. However, at trial the defence used the discrepancies between Mr Gauci's description of the purchaser and the applicant's characteristics at the time to demonstrate the same possibility. Mr Beckett emphasised that Mr Gauci's

identification of the applicant was one only of resemblance and that it was difficult to cross examine a witness in such circumstances. He questioned how much "damage" could have been done with expert evidence and said that there was better evidence available with which to challenge Mr Gauci.

Consideration

18.78 In the Commission's view it is difficult to see how any decision not to lead evidence of the kind described in the Loftus report might have resulted in the applicant's defence not being properly presented. The discrepancies between Mr Gauci's early descriptions of the purchaser and the applicant's characteristics in 1988 were brought out clearly in evidence and in closing submissions, and were acknowledged by the trial court in its judgment (paragraphs 68 and 69). Likewise, the court was plainly aware of the intervals between the purchase and Mr Gauci's identifications of the applicant by photograph (in 1991), at the identification parade (in 1999) and at trial. The court was also aware of evidence concerning Mr Gauci's exposure in late 1998 or early 1999 to a photograph of the applicant in a magazine, and reference to the potential effect of this upon the reliability of the parade and dock identifications was made by Mr Taylor in closing submissions (82/9916-9919). Although there was no evidence or submissions on the cross-racial nature of the identification, the Commission understands that research findings in this area are far from conclusive as to its effect upon the reliability of eye-witness identifications (see p 14 of the report obtained by the Commission from Professor Ray Bull: see appendix to chapter 22).

18.79 In the Commission's view none of the matters raised by the defence in evidence and in submissions required the leading of expert evidence in order to confirm or explain their significance. Moreover, it seems unlikely that the terms of the Loftus report would be admissible in evidence. As the submissions frankly accept, the matters raised in the report are in many respects obvious and therefore fall within the common knowledge and experience of a judge or jury (*R v Turner* [1975] QB 834). In that sense they can perhaps be distinguished from the expert psychological evidence led in *Campbell v HMA* 2004 SCCR 220.

18.80 In these circumstances the Commission does not consider that any decision by the defence not to lead evidence from an expert such as Professor Loftus resulted in the applicant being denied a fair trial. In reaching this conclusion the Commission has had regard to the terms of the reports it obtained from Professor Bull and Professor Tim Valentine during the course of its enquiries (see appendix to chapter 22).

(b) *Alleged failure to object to evidence of the identification parade*

Background

18.81 Before setting out the applicant's submissions on this issue it is appropriate to detail the objections made by Mr Duff at the parade itself (evidence of Inspector Brian Wilson: 32/4892). These consisted of challenges to the inclusion of four of the stand-ins by reason of their age, as well as the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten years ago. In these circumstances, a witness acting in good faith and genuinely trying to recall the event is likely to be guessing rather than making a true and reliable identification;*

- *"In November 1991, when Mr Megrahi was named as an accused in this case, his photograph was released to the press either by the police or the prosecution along with details of the alleged evidence in the case. Since November 1991, the photograph of Mr Megrahi has appeared thousands of times in the printed and electronic media with the acquiescence or connivance of the Lord Advocate, who has failed to take any action under the Contempt of Court Act when it was applicable and, despite requests to do so, has failed to make any effort to restrain the media. Publication of the photograph has continued right up to the day the accused left Libya for the Netherlands. It is inconceivable that the witness will not have seen the photograph on many*

occasions. To ask the witness to make an identification now, or even at the trial, is grossly unfair and liable to lead to a miscarriage of justice;

- *"Finally, in my view, the stand-ins available in the original pool of 11 were not sufficiently similar to the accused, particularly in terms of age and ethnic background. There is a difference in appearance between someone of Libyan background and someone from Algeria, let alone Holland or Italy"* (32/4899-4900).

The applicant's submissions

18.82 It is alleged in the submissions that the objections taken by Mr Duff at the parade ought to have been renewed at trial with a view to challenging the admissibility of Mr Gauci's identification of the applicant. The following points are made in this connection:

(i) The length of time between the purchase and the parade was so extreme that no reasonable jury would be entitled to rely upon Mr Gauci's identification, and evidence of the same ought not to have been admitted.

(ii) The prejudicial publicity prior to the parade, including the identification of the applicant as "the bomber" in a magazine photograph (the "*Focus* article"), was such that any identification of him could not be obtained fairly and therefore ought not to have been admitted.

(iii) The identification procedure was subverted by the "manner and number" of photographs shown to Mr Gauci prior to the parade. In particular the police had shown him a photograph of the applicant and he had also seen the photograph in the *Focus* article.

(iv) The objections taken at the parade to the fact that none of the stand-ins were Libyan and many were of ages different to the applicant could have been repeated at trial. The submissions also refer to an objection that was not

taken at the parade, namely that the applicant wore distinctive red shoes during those proceedings whereas all the stand-ins wore trainers.

The views of the former representatives

18.83 At interview Mr Taylor was unable to recall whether an objection to the admissibility of the parade evidence had been considered by the defence although he felt it must have been. He was referred to the test for determining the admissibility of such evidence which at the time of the trial (and the interview) was that set out in *Howarth v HMA* 1992 SCCR 364 and in *Lord Advocate's Reference (No 1 of 1983)* 1984 SCCR 62. In *Howarth* it was held that a trial judge will normally be justified in withholding identification evidence from a jury only if he is satisfied that no reasonable jury could have reached any other conclusion than that the identification evidence was so tainted that it must be rejected as unreliable. Asked whether the defence considered the circumstances of the parade had met this test, Mr Taylor said that he did not think the parade was of as great significance as Mr Gauci's identification of the applicant by photograph. He was unable to recall whether the defence had considered the matter but his view now was that the circumstances of the parade were not so tainted that Mr Gauci's identification of the applicant must be rejected as unreliable. Mr Taylor repeated that the defence was dealing with judges at the trial. In his view the judges, having heard evidence of the parade, would have realised its worthlessness.

18.84 Mr Beckett said that he had thought about the possibility of an objection to the admissibility of the parade evidence but, like Mr Taylor, did not consider there to be any basis for saying that it was so tainted that it must be rejected as unreliable. He believed that the matter was considered prior to the trial but he could not remember now what had been discussed. He could not see any basis in law for keeping the parade evidence out.

18.85 Mr Duff could not remember the defence considering an objection to the admissibility of the parade evidence but believed that the judges would have ruled that the evidence was perfectly legitimate. In Mr Duff's view it was an issue for cross

examination and in a normal case a judge would have allowed a jury to hear the evidence.

Consideration

18.86 The question raised by this allegation is whether the conduct of the defence in not objecting to the parade evidence resulted in the applicant's defence not being properly presented and in his being denied a fair trial. This requires an assessment of whether in terms of *Howarth* the defence was justified in taking the view that Mr Gauci's identification of the applicant at the parade was not so tainted that any reasonable jury would have rejected it as unreliable. The Commission is aware that following the decision in *Britz v HMA* 2007 SCCR 21 the test set out in *Howarth* is no longer applicable. Nevertheless it seems to the Commission, notwithstanding the decision in *Boncza-Tomaszewski v HMA* 2000 SCCR 657, that any allegation of defective representation concerning decisions taken by the defence at the applicant's trial must be considered in light of the test applicable at that time.

18.87 It is clear from the objections taken at the time by Mr Duff that the defence was aware of the potential challenges that might have been made to the admissibility of the parade evidence. Although Mr Taylor and Mr Duff had no recollection of such an objection being considered, according to Mr Beckett it appears that the matter was discussed.

18.88 In the Commission's view the extraordinary length of time between the purchase and the parade, and Mr Gauci's exposure to the photograph of the applicant in the *Focus* article in relatively close proximity to the parade, cast doubt upon the reliability of that identification, even though it was one of resemblance only. The Commission is not of the view, however, that these circumstances were such as to render the conduct of the parade, or indeed the holding of the parade itself, improper, or to render Mr Gauci's identification of the applicant at the parade so unreliable that any reasonable jury would have rejected it. Although it is not clear what factors were taken into account by the defence when it considered the matter, in the Commission's view it can be assumed that these included Mr Gauci's identification of the applicant from a series of photographs shown to him by the police in 1991. Like his

identifications of the applicant at the parade and at trial, Mr Gauci's identification of the applicant in 1991 was one of resemblance and was qualified and equivocal. It was also made over two years after the event and was undermined by Mr Gauci's initial descriptions of the purchaser, particularly of his height and age. Nevertheless it was made at a time when Mr Gauci was not at risk of exposure to the applicant's photograph in the media and at a point significantly closer to the purchase than his later identifications. In light of that identification it seems unlikely that the trial court would have upheld an objection to the admissibility of the parade evidence.

18.89 In these circumstances the Commission considers that the defence was entitled to confine itself to challenging the reliability of the parade evidence in closing submissions. In the Commission's view, given the nature of the submissions ultimately made in this connection (see below), this aspect of the applicant's defence was properly presented.

(c) *Alleged failure to object to evidence of the dock identification*

The applicant's submissions

18.90 It is submitted that two separate objections ought to have been made by the defence to Mr Gauci's dock identification of the applicant. The first of these relates to the fact that prior to that identification Mr Gauci was shown the photographs of the applicant which he had previously identified. According to the submissions an objection ought to have been taken either to the showing of these photographs or to the dock identification on the basis that evidence of the photographs had been led. It is submitted that photographs of the kind shown to Mr Gauci by the police are produced for the defence to use as appropriate: they are not expected to be led at all by the Crown in evidence and are certainly not to be used as "prompts". Reference is made in this connection to *MacDonald v Herron* 1966 SLT 61 and to the Guidelines on the Conduct of Identification Parades issued by the Scottish Home and Health Department in 1982.

18.91 The second objection which it is submitted ought to have been taken was to the dock identification itself on the basis that such a procedure is in principle unfair.

It is submitted that the circumstances of the applicant's case are extreme in that evidence of the dock identification was obtained some 11 years after the event and in the aftermath of considerable prejudicial publicity.

The evidence at trial

18.92 Before being asked whether he was able to see the purchaser in court, Mr Gauci was referred by the advocate depute to a number of his police interviews in which he had been shown photographs of potential suspects. In one of his statements, dated 14 September 1989 (CP 458), Mr Gauci had identified the photograph of a man (Mohammed Salem: CP 426) as being similar to the purchaser but "too young". According to the statement Mr Gauci told the police that if the man in the photograph was older by about twenty years he would look like the man who bought the clothing. In evidence Mr Gauci confirmed that the man in the photograph was "a little bit young" to be the purchaser (31/4758).

18.93 Mr Gauci accepted in evidence that about the end of 1989 or the beginning of 1990 his brother had shown him a newspaper article about the case. The article, which appeared in *The Sunday Times* (CP 1833), contained photographs of two men both appearing under the caption "bomber" (CP 1833). Mr Gauci said about the man pictured in one of the photographs: "I thought it was the one on this side, I thought. That was the man who bought the articles from me" (31/4768). The photograph in question was of Talb.

18.94 Mr Gauci was also referred to his statement of 15 February 1991 (CP 470) in which he picked out the applicant's photograph from a photo-spread containing a total of twelve images (CP 436). Mr Gauci said in the statement that the photograph of the applicant showed him in "his thirty years" and that "he would perhaps have to look about ten years or more older and he would look like the man who bought the clothes." He also said that, of all the photographs he had seen, the one of the applicant "is the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me." In evidence Mr Gauci confirmed that what he had said to the police in this connection was the truth.

18.95 Mr Gauci was also asked about an occasion towards the end of 1998 or the beginning of 1999 when another shopkeeper in the street showed him the *Focus* article which contained a photograph of the applicant. In evidence Mr Gauci recalled showing the photograph to a Maltese officer, Mr Scicluna, and telling him "this chap looks like the man who bought the articles from me." He did not remember saying to Mr Scicluna "that's him".

Consideration

18.96 For the same reasons as it doubts the reliability of Mr Gauci's identification of the applicant at the parade, the Commission also has significant doubts as to the reliability of his later identification of the applicant in court. In the Commission's view that identification is further undermined by the highly suggestive context in which it took place and by the manner in which Mr Gauci's evidence on this issue was led by the Crown. In particular, given the risk that Mr Gauci's identification of the applicant might be affected by his exposure to the photograph in the *Focus* article it is difficult to understand why the advocate depute considered it appropriate to show him the same photograph prior to asking him whether he could see the purchaser in court (see chapter 21).

18.97 In the present context, however, the Commission requires to consider whether the lack of any objection to the way in which this aspect of Mr Gauci's evidence was led by the Crown resulted in the applicant's defence not being properly presented and in his being denied a fair trial.

18.98 In his closing submissions Mr Taylor referred to the "notoriously unreliable nature of eyewitness identification", which in the present case he said was compounded by the "large intervals between the incident and the so-called identifications" (82/9912). The identifications of the applicant at the parade and in court were described as "worthless pieces of evidence" and reference was made to photographs of both accused having been shown on television and in newspapers across the world since 1991, and to the photograph Mr Gauci had seen in the *Focus* article. Mr Taylor also referred to previous authorities in which it was held that the publication of such photographs was capable of prejudicing a trial by affecting the

identification evidence of witnesses (82/9918). Mr Gauci's identification of the applicant was said to be further undermined by his identification of Talb. However, according to Mr Taylor's submissions the "fatal undermining" of Mr Gauci's identification of the applicant was his initial description of the purchaser's height, age and skin colour. It was clear from this, Mr Taylor submitted, that Mr Gauci was describing someone other than the applicant (82/9926).

18.99 In the Commission's view, based on the above account, it is difficult to maintain that this aspect of the applicant's defence was not properly presented. It is clear that the approach taken by the defence to the dock identification was that it was wholly unreliable and ought to be rejected. The factors in support of that approach were highlighted both in the evidence and in closing submissions. Although other representatives might have opted to combine that approach with an objection to the manner in which Mr Gauci's evidence was led by the advocate depute, in the Commission's view this was not essential to the proper presentation of the applicant's defence. In terms of the approach taken in submissions it appears that the defence considered the reliability of any dock identification to be undermined regardless of the manner in which Mr Gauci's evidence on this issue was obtained. In the Commission's view, given the length of time which had elapsed since the purchase, and the evidence of Mr Gauci's exposure to the *Focus* article in 1998 or 1999, this was not an unreasonable approach to take. In any event, for the same reasons as the court was unlikely to uphold an objection to the admissibility of the parade evidence the Commission considers that any objection to the admissibility of the dock identification was also unlikely to succeed.

18.100 In these circumstances the Commission considers that the defence was entitled to allow Mr Gauci's evidence to be led and to confine itself to challenging the reliability of the dock identification in submissions. Ultimately, of course, the court rejected those submissions but in the Commission's view this does not imply that the approach taken by the defence was unjustified or contrary to reason.

18.101 The second allegation under this heading is that the defence ought to have objected to the admissibility of the dock identification on the basis that such a procedure is in principle unfair. The same point was argued before the Privy Council

in *Holland v HMA* 2005 SCCR which was decided after the submissions in the present case were made to the Commission. The Privy Council made clear in *Holland* that it was concerned only with circumstances in which a Crown witness who identifies an accused in court has previously failed to pick him out at an identification parade, a situation that does not arise in the present case. It was held that "except perhaps in an extreme case" there is no basis either in domestic law or in the European Convention on Human Rights for regarding evidence of dock identifications as inadmissible per se (Lord Rodger at paragraph 57).

18.102 In the Commission's view the arguments advanced in *Holland* were fairly novel, and even if the decision in that case had been more favourable to the appellant it would be difficult to maintain that a similar objection was essential to the proper presentation of the applicant's defence. In any event it is clear from papers extracted from the defence files that a great deal of consideration was given to challenging Mr Gauci's dock identification. An opinion was obtained in this connection from a senior counsel not involved in the case which, although supportive of a challenge, was not considered by the defence as presenting a sound basis for doing so. A further opinion was obtained from Professor Christopher Gane of the University of Aberdeen, the terms of which were not supportive of such a challenge. The defence also undertook an extensive exercise in which it sought to establish the legal status of dock identifications in several other European countries.

18.103 Ultimately no objection was taken to the dock identification but it is clear that this decision was reached only after careful consideration of the potential merits of such a challenge based upon the authorities and other materials available at that time. Although other representatives might have taken a different course, in the Commission's view there is no basis for saying that the approach taken by these particular representatives was unwarranted or contrary to reason. Accordingly the Commission does not consider that the applicant was denied a fair trial in this connection.

(d) *Alleged failure adequately to challenge Mr Gauci in cross examination*

The applicant's submissions

18.104 It is alleged that there was a failure by the applicant's senior counsel (Mr Taylor) to put basic and important matters to Mr Gauci in cross examination. Although it is acknowledged that the content of questions put to witnesses is a matter for counsel's discretion, it is submitted that there was such a failure in the present case that it can properly be said to amount to defective representation. According to the submissions the conduct of the cross examination was "so completely inept that it could be said to defy 'all good sense'."

18.105 It is alleged that the following matters should have been put to Mr Gauci:

(i) his previous identification of Talb as the purchaser;

(ii) his prior statements to the effect that the purchaser may have returned to Mary's House on other occasions;

(iii) the inconsistencies in his prior statements such as his references to the purchaser having hired a taxi;

(iv) the fact that 8 December 1988 was a public holiday in Malta "which did not fit with the description of the date of purchase";

(v) the basis for his identification of the purchaser as a Libyan;

(vi) his previous description of the purchaser which did not fit that of the applicant;

(vii) his previous statements in which "the only date he had specified was 'in November'"; and

(viii) his prior statements concerning the question of whether the Christmas lights in Tower Road were up at the time of purchase.

Consideration

18.106 Points (vi), (vii) and (viii) can be dealt with easily as the matters which it is alleged were not put were plainly raised with Mr Gauci (see in relation to point (vi) 31/4790-4797, 4812-4813; point (vii) 31/4802; and point (viii) 31/4802, 4809).

18.107 Each of the remaining allegations is addressed in turn below. It is worth noting that many of them appear in the form set out above and are unaccompanied by submissions.

(i) Mr Gauci's previous identification of Talb as the purchaser

18.108 This allegation relates to an article about the case published in *The Sunday Times* which Mr Gauci was shown about the end of 1989 or the beginning of 1990. As noted earlier, the article contained photographs of two men, one of whom was Talb. When asked by the advocate depute whether he saw any similarity between either of those photographs and the purchaser, Mr Gauci replied: "I thought it was the one on this side [Talb], I thought. That was the man who bought the articles from me" (31/4767). He was then asked what it was about Talb's photograph that made him think that he "looked similar" to the purchaser, as a result of which an objection was made by Mr Taylor on the basis that Mr Gauci's earlier answer had been that Talb "was the man who bought the articles". The advocate depute rephrased the question and Mr Gauci went on to say that Talb "resembled" the purchaser (31/4768). Earlier in examination in chief Mr Gauci was referred to a number of instances in which he had failed to identify Talb from photographs shown to him by the police (31/4764-4765).

18.109 The matter was raised again in cross examination by counsel for the co-accused at which time Mr Gauci said of Talb's photograph in the article, "He resembles [the purchaser] a lot."

18.110 In the Commission's view, given what Mr Gauci had said in examination in chief, it is understandable why Mr Taylor did not seek to question him further on the matter. Mr Gauci's initial identification of Talb in examination in chief was more certain than what he had told the police about the same photograph in his statement of 5 March 1990 (CP 467). There he said that he thought the photograph "may have been" the purchaser, which was effectively the position he adopted latterly in examination in chief. In these circumstances Mr Taylor was entitled to take the view that there was nothing to be gained from further questioning on this matter.

18.111 Accordingly the Commission does not consider that the approach taken by the defence to this issue resulted in the applicant being denied a fair trial.

(ii) Mr Gauci's other "sightings" of the purchaser

18.112 It is alleged in the submissions that the defence failed to put to Mr Gauci the terms of his prior statements in which he described having seen the purchaser, or a man or men who resembled him, on other occasions.

18.113 In order to address this allegation it is necessary to summarise the relevant passages in Mr Gauci's statements on this issue. Neither the defence nor the Crown sought to lead the contents of these passages in evidence.

The terms of Mr Gauci's statements

- The sighting in Tony's Bar

18.114 In his statement of 13 September 1989 (CP 456) Mr Gauci told the police that "about three months ago" he was in Tony's Bar in Sliema when he recognised a man as looking like the purchaser. The man was about 50 years of age and Mr Gauci heard him talking to three other men. According to Mr Gauci "they spoke as Libyans. That was their own language." Mr Gauci could not be positive that it was the same man who bought the clothing but he looked "very similar." He had not seen this man since.

- The sighting in Mary's House

18.115 In his statement of 26 September 1989 (CP 459) Mr Gauci told the police that at about 11.30am on Monday 25 September 1989 he was alone in Mary's House when a man entered. Mr Gauci was immediately startled as he believed that this man was the "same man" as he had described in his previous statements (ie the purchaser). He had the same colour and style of hair, had no hair on his face and had dark skin. He was around 6 feet in height or just under and was about 50 years of age. The man walked straight into the shop and immediately asked Mr Gauci for a dress. Mr Gauci asked him what type and for what age, to which the man replied "for 4 years". Mr Gauci thereafter sold him four dresses. The man asked for a reduction and according to the statement "he asked for a reduction the first time he was in the shop". Mr Gauci followed the man out of the shop to see if he got into a car but was frightened to get too close in case the man noticed him watching. The man had spoken English and had a Libyan accent and Mr Gauci was convinced that he was a Libyan.

18.116 At the foot of the HOLMES version of this statement (see appendix) there is a note by the police to the effect that when initially seen Mr Gauci said that the man described in the statement had visited his shop on 21 or 22 September 1989. However, when the statement was noted he said that the visit had taken place on 25 September and was not questioned about the date change. The note also refers to evidence that the applicant was in Malta on 21-24 September 1989.

18.117 Further reference to this incident is made by Mr Gauci in his statement of 4 October 1989 (CP 462) but on this occasion he referred to the man who bought the dresses as being only "similar" to the purchaser. According to the statement the man had come to his shop "last Monday" ie 25 September 1989.

18.118 Mr Gauci was re-interviewed about this sighting on 10 September 1990 (CP 469) at which time he repeated that the man who bought the dresses was only "similar" to the purchaser and he could not say for definite that it was the same person.

18.119 Mr Gauci was questioned on the matter once again on 4 November 1991 (CP 471) at which time he said the following:

> *"I can say that the man who bought the damaged clothing you brought to me at first must have been a twin because if he was killed in the plane, then it must have been his twin that bought the dresses, they really looked like the same person."*

18.120 Mr Gauci was asked in this statement to explain why on the morning of 26 September 1989 he had told the police that the man who purchased the dresses had come into his shop on 21 or 22 September, but when seen that evening had said that the incident had taken place on 25 September. Mr Gauci was unable to explain this. He could only say that he had problems at the time with his father and brother who did not want him to speak to the police any more, and that he might have got things mixed up.

- The sighting at the Hilton Hotel

18.121 According to his statement of 21 February 1990 (CP 466) after closing his shop in Valletta in about May 1987 Mr Gauci was working in his shop in Sliema when a Libyan man came in and bought two or three "Whitney" make blankets. The man did not have any transport and asked Mr Gauci to deliver the items. He showed Mr Gauci a piece of paper with an Arabic name written on it and "Room 113, Hilton Hotel". Later the same day Mr Gauci went to the Hilton Hotel and asked for the man at reception. The man came down to reception and Mr Gauci handed over the blankets. Mr Gauci thought that this man "may have been the man" who purchased the clothing from him in November or December 1988.

18.122 According to the statement Mr Gauci had not mentioned this before "because he did not remember it". He had thought about it the previous week and had remembered it then. He could not be certain that it was the same man who had purchased the clothing but it could have been. He could not remember the man's name and had no record of the sale.

18.123 Mr Gauci referred to this incident again in his statement of 5 March 1990 (CP 467). There he said that he was sure that the man who purchased the blankets had come to his shop in 1987 and that it might have been June of that year. He had closed his shop in Valletta in April 1987 and it was sometime after that. He could not remember if it was summer or not. The man who bought the blankets had come into his shop straight away without looking at the displays as if he knew where he was going. The man who purchased the clothing in November/December 1988 had done exactly the same thing which was one of the reasons he thought it might be the same man. Mr Gauci thought the man who bought the blankets was "similar" to the man who bought the clothing in 1988 "if not the same man."

18.124 It is important to note that the applicant was established to have been in Malta between 29 March and 4 April 1987 staying from the former date until 3 April in room 140 at the Hilton Hotel (see CP 571, 573, 727 and 728).

<u>The views of the former representatives</u>

- William Taylor QC

18.125 Mr Taylor's memory of the approach taken by the defence to these issues was poor. He was unable to remember whether the defence had considered cross examining Mr Gauci in relation to the sighting in September 1989. He agreed that the inconsistencies in Mr Gauci's accounts on this issue gave rise to issues concerning his reliability, but other than this he was unable to assist with the question. When asked whether he considered as significant Mr Gauci's varying accounts as to whether the man he saw on this occasion was the same man who visited his shop in 1988, Mr Taylor said that in order to answer this question he would need to find his notes for this part of the trial. He could not think of any reason why the defence would not have used this information in cross examination.

18.126 In respect of the 1987 sighting Mr Taylor confirmed that the defence was aware that the applicant had stayed in the Hilton Hotel and he had some memory that the applicant was in Malta more often than the Crown could prove. Mr Taylor believed that there would have been consideration given to cross examining Mr Gauci

on this issue, as it was an obvious line to take, but without his notes he was unable to assist further. He added that if the matter was not dealt with in cross examination there would be good reasons for this.

- John Beckett QC

18.127 In Mr Beckett's view it was naïve to suggest that evidence of Mr Gauci's other sightings of the purchaser would have assisted the defence. It was, he said, a tactical decision not to refer to them at trial.

18.128 With regard to man who purchased the children's dresses from Mary's House in September 1989, Mr Beckett referred to the fact that the applicant was in Malta on 21-24 September 1989. It was suggested to Mr Beckett that Mr Gauci's change in position within the space of a day, from initially telling the police that he had seen the man the previous week, to saying that he had in fact seen the man the previous day, perhaps said something about Mr Gauci's reliability or even credibility. In reply Mr Beckett said that if the defence had led this evidence it would have been open to the court to choose the version of events which coincided with the applicant's presence in Malta. Had the court done so then in Mr Beckett's view this would have provided strong support for Mr Gauci's identification of the applicant as the purchaser. Mr Beckett explained that if the defence could have shown that Mr Gauci had always said he had seen the man on 25 September 1989 they would have used the evidence of the sighting. However, as the evidence stood it could have gone either way for the applicant. Although the court ultimately accepted Mr Gauci's evidence the defence did not know at the time what its attitude would be. In Mr Beckett's view it was legitimate for the defence not to gamble on leading evidence of the sighting. He added that if the defence had led evidence of the other sightings and the court had been convinced by the version that supported the Crown case then the applicant had "had it".

18.129 Mr Beckett considered the sighting most dangerous to the defence was the one that Mr Gauci described as having taken place in 1987 when a man residing at the Hilton Hotel had bought some blankets from him. Mr Beckett said that although Mr Gauci did not get the room number of the hotel "correct" and the date was not exact,

there was evidence that the applicant had stayed at the Hilton Hotel around that time. According to Mr Beckett, if the Crown had led this evidence the defence would have sought to challenge it, and it would have been a very big gamble to raise the matter themselves. Mr Beckett accepted this meant that certain aspects of Mr Gauci's accounts which might have reflected upon his reliability were not brought out in court, but said that these were the judgments that had to be made. Although looking back in the knowledge that the applicant was convicted one might say that the defence ought to have gambled on this, there was a possibility at the time that it might have shored up the identification. In Mr Beckett's view Mr Gauci needed to be out by only one month, and to have got the hotel room number wrong, and the evidence of this particular sighting would have been a "very damaging connection to the applicant."

18.130 In respect of Mr Gauci's possible sighting of the purchaser in Tony's Bar about three months prior to being interviewed by the police on 13 September 1989, Mr Beckett explained that there was a CIA cable in which the witness Abdul Majid Giaka ("Majid") had said that the applicant was in Malta on 10 April 1989. Although looking back Majid's evidence was not accepted by the court there was a danger at the time that his evidence might have been accepted "for such an innocuous thing as this date". Mr Beckett pointed out that Mr Gauci's cross examination had taken place a long time before Majid gave evidence. The defence, Mr Beckett said, had to assess whether it would constitute a good attack on Mr Gauci's reliability and decide whether to gamble or not to gamble. In the event the decision was taken not to gamble.

- Alistair Duff

18.131 Mr Duff said that the defence had agonised over whether to cross examine Mr Gauci on the terms of his statement of 26 September 1989. The defence, he said, was operating on the basis that the judges were "desperate" to convict and so wanted to avoid providing them with material that would have given them confidence to do so. This was one of the judgments which had to be exercised during the day-to-day process of defending. Mr Duff accepted that the consequence of this approach was that the court was not made aware that over a short period of time Mr Gauci had

altered his position as to when the incident had occurred. However, in his view it would have been open to the judges to say that the man had come to the shop in a time-span in which the applicant was in Malta. The question the defence had to address was whether to bring this out to demonstrate Mr Gauci's unreliability and at the same time run the risk of the judges being given something else on which to hang the conviction.

18.132 Mr Duff was also referred to the fact that over the course of his statements of 26 September 1989, 10 September 1990 and 4 November 1991 Mr Gauci had variously described the man who bought the dresses as "the same man" as the purchaser, as "similar" to him though not definitely the same, and as being the "twin" of the purchaser. Mr Duff did not consider these differences in Mr Gauci's accounts to be significant.

18.133 In respect of the 1987 sighting Mr Duff recalled that this too was debated by the defence. Although the defence was aware that the applicant used to stay at the Hilton Hotel and was in Malta in 1987, Mr Duff did not recall whether they knew at the time that the applicant had stayed in a different room to the one that Mr Gauci had mentioned. Either way, he said, the judges could have ignored this discrepancy to the prejudice of the defence. In Mr Duff's view the question was where the advantages and risks lay for the defence and how they balanced.

Consideration

18.134 In the Commission's view there is little doubt that evidence of Mr Gauci's other possible sightings of the purchaser was of potential value to the defence. The account given by Mr Gauci in his statement of 26 September 1989 concerning the man who purchased the children's dresses amounts to his only positive identification of the purchaser ("I believe this man was the same man I have described in my previous statements"). Moreover, his recollection that this sighting had occurred on 25 September 1989 would effectively have ruled the applicant out as the purchaser given that there was no evidence that he was in Malta on that date. The same might be said of the sighting in Tony's Bar in around June 1989 when again there was no evidence that the applicant was in Malta.

18.135 In the Commission's view there are also a number of inconsistencies in Mr Gauci's accounts of the sightings which could have reflected upon his reliability or even his credibility. Of particular concern is the fact that over the course of 26 September 1989 Mr Gauci altered his position from saying that the man who bought the children's dresses had come to his shop the previous week, to saying that he had come the previous day. A further cause for concern is Mr Gauci's varying accounts as to whether the man who bought the children's dresses was the "same man" as the purchaser or whether he was only similar (see chapter 26 below).

18.136 However, as Mr Beckett and Mr Duff made clear at interview, there were also very good reasons why the defence sought to avoid leading evidence of the other sightings. It is clear from their accounts that the matter was given careful consideration and that a tactical decision was made on the basis of what was perceived to be the best interests of the applicant at that time. In the Commission's view, given the risks associated with leading the evidence, it is difficult to see how that decision could be described as contrary to reason, as is alleged in the submissions.

18.137 In these circumstances the Commission does not consider that the approach taken by the defence in this connection resulted in the applicant being denied a fair trial.

(iii) <u>The purchaser's use of a taxi</u>

18.138 According to the submissions the defence failed to put to Mr Gauci the inconsistencies in his statements surrounding the purchaser's use of a taxi after leaving his shop. Again, in order to address this allegation it is necessary to set out the relevant passages in Mr Gauci's statements and evidence as well as the views of the former representatives on the matter.

The applicant's statements and evidence

- Statement: 1 September 1989 (CP 452)

"I asked him if I would carry his parcels to the car as I assumed he had a car. He said that he was in a taxi and he took the parcels from me and he walked out of the shop. I followed him to the door and he turned left and walked up the street. I saw a white coloured Mercedes taxi parked at the corner. I then came back into the shop. I cannot recall anything in particular about the white Mercedes. This type of car is used as a taxi in Malta. I assume the man got into the taxi, it was an old type ……

I cannot state that this man entered the taxi I can only say that he walked towards the car."

18.139 A similar account was given by Mr Gauci in his statement of 21 February 1990 (CP 466).

- Statement: 5 March 1990 (CP 467)

"I have been asked to go over again the circumstances of the man (suspect) arriving and leaving my shop and the sighting of the white Mercedes taxi. I now remember that when the man left my shop he walked downhill in Tower Road towards the sea front. At that time it was raining.

About fifteen minutes later I was standing near the shop front when I saw a white Mercedes taxi driving up Tower Road. I could see that the man who had bought the clothing was seated in the front passenger seat of the taxi. I went back inside the shop, but before I did so I saw the taxi pull into the kerb, on the same side of the road as my shop about twenty yards up the street, where I have shown you. I then saw the man get out of the front passenger seat and start walking towards my shop. I went to get his parcels and he came into the shop.

I handed over the two parcels and the man left the shop walking back up the road to the taxi. He put both parcels on the back seat of the taxi before climbing back into the front passenger seat. The taxi then drove off up Tower Road.

I have been asked why I have not mentioned this before and I can only say that I did not think you asked me directly about it. I have been thinking about the man and I remember this now."

- Statement: 10 September 1990 (CP 469)

"I made up the clothing the man had bought into the parcels which I wrapped. In my original statement I said that I next saw the man when he returned to the shop but subsequently I said that I had seen him sitting in the front seat of the taxi which was driven up Tower Road. What happened was I went to the front of the shop and was looking out and saw the taxi being driven up the street. As it passed my shop I recognised that the front seat passenger was the same man who had bought the clothing. I saw the taxi at the corner, where I pointed out to the officer, (top of Tower Road) and I went back into the shop to collect the parcels. The man came back down to the shop and I met him in the hallway. I asked if I could carry the parcels to his car and he said he had a taxi. The man walked up to the taxi, put both parcels on the back seat and he got into the front seat beside the driver. I can't say anything more about the taxi, it's just as I described to you, the old type."

- Evidence in chief

Q. After you made the sale to the Libyan man, did he leave the shop?

A. Yes. He ordered a taxi from the Strand, I think it's from the ferries he got it. He went downwards. He went down the hill.

Q. And did he, when he left at that stage, take with him the clothing, or did he return to pick it up?

A. *No, he came back. I took the items to the taxi. He was parked a bit upwards from our shop.*

Q. *So do I understand you to say that he left your shop to go to the taxi rank to get a taxi?*

A. *Exactly.*

Q. *And he came in the taxi to collect the clothing?*

A. *Yes. Yes. I took the things myself to the taxi.*

The views of the former representatives

- William Taylor QC

18.140 Mr Taylor considered Mr Gauci's accounts of the purchaser's use of a taxi to be peripheral to his identification evidence. He questioned what could have been made of the issue and said that on the face of it the witness "must just be recollecting more clearly the incident with the taxi". Mr Taylor was doubtful whether the accounts given by Mr Gauci on this issue were really that different from one another. When it was suggested to him that there were certain irreconcilable differences between them Mr Taylor supposed that this might suggest some form of "prompting" by the police. However, he could not recall what had gone through his mind at the time. He knew about it and he recalled looking at it but in a normal case he would probably have anticipated a "put-down" by the bench to the effect, "What does this matter?" In Mr Taylor's view even if Mr Gauci's accounts had been prompted by the police it did not really matter. In terms of criminative evidence he questioned whether they went anywhere.

- John Beckett QC

18.141 Mr Beckett explained that although the defence was aware of the inconsistencies in Mr Gauci's accounts on this issue they did not think much of them. Mr Beckett had provided Mr Taylor with a note containing details of various matters on which Mr Gauci had changed his position which included the purchaser's use of a taxi. Mr Beckett considered these matters to be weaker than the inconsistencies regarding the identification. As Mr Taylor had not referred to them during cross examination Mr Beckett presumed that he too had preferred to concentrate on matters relating to the identification. According to Mr Beckett it would have been difficult to cross examine Mr Gauci about issues such as the use of the taxi and it was a question of what "damage" one would be able to do. In his view it was a judgment for the cross examiner to make. If Mr Gauci's accounts concerning the taxi had somehow borne upon the identification then in Mr Beckett's view it would have been "fair enough" to lead this evidence. However, he did not consider that it would have been an effective form of cross examination as it stood.

18.142 It was suggested to Mr Beckett that although Mr Gauci's description of the use of the taxi did not relate to the identification, it nevertheless pointed to an individual who was prepared to give detailed accounts of matters when in reality he might not be certain of his own memory. Mr Beckett accepted this point but said that it was for Mr Taylor to address. In Mr Beckett's view it was the identification evidence which had to be attacked and the defence had to use its best weapons in that connection. He questioned whether it would have been any better for the defence if other aspects of Mr Gauci's accounts had been brought out. In his view the approach taken by the defence in this connection did not amount to an unreasonable exercise of discretion.

- Alistair Duff

18.143 Mr Duff was unable to remember whether the defence had considered cross examining Mr Gauci on this issue. He recalled that the defence was aware of the various accounts Mr Gauci had given but he could not remember what consideration

was given to putting these to him. He accepted, however, that there would have been no risk to the defence in doing so.

Consideration

18.144 Although the circumstances surrounding the purchaser's use of a taxi are not germane to Mr Gauci's identification of the applicant as the purchaser, nevertheless the inconsistencies in his accounts of this incident are striking. In the period between his statements of 1 September 1989 and 5 March 1990 Mr Gauci's description of events changed from one in which he could only assume that the purchaser got into the taxi, into one in which he saw the purchaser sitting in the front passenger seat, getting out of the taxi, picking up the parcels of clothing, placing these on the backseat and climbing back into the front passenger seat. His only explanation for never having mentioned the latter account on any previous occasion was that it was not something he had thought about or been asked directly about. Given the terms of his statements of 1 September 1989 and 21 February 1990, however, this is clearly not the case. By the time he gave evidence Mr Gauci's account had developed further into one in which he, and not the purchaser, had taken the parcels out to the taxi.

18.145 In these circumstances, if Mr Gauci had been cross examined on this issue it might have assisted in casting further doubt upon his reliability as a witness. Although such questioning would not directly have undermined his identification of the applicant it was perhaps capable of showing Mr Gauci to be a witness prone to embellishing his accounts of events over relatively short periods of time. It might also have been capable of showing him to be someone who was at ease with describing particular events in detail when in reality his memory of those events might not have been clear.

18.146 However, in the present context the Commission requires to consider whether the decision by Mr Taylor not to cross examine Mr Gauci on this basis was contrary to reason and resulted in the applicant's defence not being properly presented. It has to be said that Mr Taylor's account at interview in this connection was not convincing. Nevertheless both he and Mr Beckett were of the view that it was Mr Gauci's identification evidence which mattered and that his accounts of the

purchaser's use of a taxi were peripheral to this. Such an approach is reflected in the terms of Mr Taylor's cross examination of Mr Gauci, the clear focus of which was the identification of the applicant and matters concerning the date of purchase.

18.147 In the Commission's view it is difficult to see how such an approach can be said to be contrary to reason since these were precisely the factors capable of implicating the applicant in the bombing. Even if Mr Gauci could have been shown to be unreliable in his recollection of the purchaser's use of the taxi, it does not by any means follow that the court would have taken the same view of his identification of the applicant. In the Commission's view cross examination on such matters was not essential to the proper presentation of the applicant's defence. Accordingly, although different approaches might have been taken by other representatives, the Commission does not consider that the approach taken by the defence to this matter resulted in the applicant being denied a fair trial.

(iv) The Feast of the Immaculate Conception

18.148 A further allegation is that the defence failed to put to Mr Gauci the fact that 8 December 1988 was a public holiday in Malta. There are no submissions on this matter and all that is said is that such evidence "did not fit with the description of the date of purchase."

The evidence at trial

- Major Joseph Mifsud

18.149 The defence led evidence from Major Mifsud who confirmed that 8 December was a public holiday in Malta known as the feast of the Immaculate Conception. Aside from stationers who were permitted to stay open until midday, the shops in Malta closed on that date. Major Mifsud was shown a copy of the co-accused's 1988 diary which had been recovered by the police in Malta (CP 517). He confirmed that the words "The Immaculate Conception" were printed on the page of the diary relating to 8 December, as were the words "Public Holiday" (76/9210-9212).

- Anthony Gauci

18.150 In cross examination Mr Gauci was referred by Mr Taylor to his statement of 19 September 1989 (CP 454) in which he said that he was "sure it was midweek when [the purchaser] called". It was suggested to him that by "midweek" he did not mean a Monday or a Saturday, to which he replied "No, certainly not a Saturday" (31/4810-4811). He then went on to say that by "midweek" he meant Wednesday (31/4819-4820). There was then the following exchange:

> *Q. ... Would another way of approaching it be this: that midweek entails being separate from the weekend; in other words, the shop would be open the day before and the day after? And that would give me a clue to what you mean.*
>
> *A. That's it. Exactly. Tuesday and Thursday.*
>
> *Q. It would include Tuesday and Thursday. So we narrow it down to Tuesday, Wednesday or Thursday.*
>
> *A. I think Wednesday is midweek* (31/4821*).*

<u>The defence closing submissions</u>

18.151 Mr Taylor submitted to the trial court that Mr Gauci had never said that the purchase of the clothing took place on the day before a public holiday, and that this was something he would have been "highly likely" to do if the incident had occurred on such a day. Mr Taylor accepted that the issue of a public holiday had not been raised with Mr Gauci in evidence but sought to explain that questioning on this issue would have been "futile" as Mr Gauci had no recollection of the date of purchase. In Mr Taylor's submission he had put to Mr Gauci the only matter which he had a prospect of remembering, namely whether his shop was open the day before and the day after the purchase (82/9884-9885).

18.152 It was submitted by Mr Taylor that the feast of the Immaculate Conception would be of significance to a shopkeeper and that Mr Gauci's failure to "make the

connection" was something that the court could take into account. Put another way, Mr Taylor said, the day before a public holiday is "something that would stick in your mind", and if the purchase had taken place at such a time Mr Gauci would have remembered this. However, despite repeated questioning on the matter by the police Mr Gauci had never once mentioned the public holiday (82/9887-9888).

18.153 In Mr Taylor's submission Mr Gauci's evidence was that the shop was open the day before and the day after the purchase. Accordingly, given that 8 December was a public holiday, the court could reasonably conclude that the purchase date was not 7 December (82/9888-9889).

The trial court's approach

> *"He* [Mr Gauci] *was also asked in cross examination what he meant when he used the word 'midweek' and he responded by saying that he meant a Wednesday. It was put to him that midweek meant a day which was separate from the weekend, in other words that the shop would be open the day before and the day after. To that Mr Gauci said 'That's it. Exactly. Tuesday and Thursday.' But he then went on to say that for him midweek was Wednesday. It was not put to him that Thursday 8 December 1988 was a public holiday, it being the feast of the Immaculate Conception on that day… We are satisfied that when Mr Gauci was asked whether the shop would be open the day before and the day after he was being asked what he meant by the word 'midweek', and not whether the day after the purchase of the clothing was made in his shop, the shop was open for business"* (paragraph 64).
>
> "*We are unimpressed by the suggestion that because Thursday 8 December was a public holiday, Mr Gauci should have been able to fix the date by reference to that. Even if there was some validity to that suggestion, it loses any value when it was never put to him for his comments"* (paragraph 67).

The appeal court's approach

18.154 At appeal it was argued that the trial court had erred in dismissing the defence submission concerning the public holiday. In support of this ground Mr Taylor made similar submissions to those he had made before the trial court.

18.155 In reply the advocate depute said it was clear that the decision not to put the issue of the public holiday to Mr Gauci was a deliberate tactic by the defence. In the advocate depute's submission the failure to cross examine Mr Gauci on this issue was a factor which the trial court was entitled to take into account in rejecting criticism of his evidence.

18.156 In the appeal court's view the advocate depute's submissions were well founded. Mr Taylor had submitted to the trial court that the fact that the day after the purchase had been a public holiday would stick in Mr Gauci's mind. However, that was all the more reason for putting the point to Mr Gauci in cross examination. The defence had led evidence from Major Mifsud that 8 December was a public holiday but had failed to put that to Mr Gauci. Accordingly the trial court had been correct in taking the view that the failure to cross examine Mr Gauci on the matter resulted in the point losing any value which it might otherwise have had (paragraph 345).

The views of the former representatives

- William Taylor QC

18.157 Mr Taylor confirmed that the decision not to ask Mr Gauci about the issue of the public holiday was a tactical one. In his view it was important to consider the answer one might get to a question of that kind. The witness might have given a very definite answer to the question "and then all our work would have been undone". In Mr Taylor's view the closest one could get was what he had obtained from the witness, namely that his shop was open the day before and the day after the purchase. Mr Taylor felt that what the trial court had said about the matter not having been put to Mr Gauci really only applied to a civil proof in which there is a duty to put one's

position to a witness and to rely upon the response given. In Mr Taylor's view it would have been very risky to put the point directly to Mr Gauci in cross examination.

- John Beckett QC

18.158 Mr Beckett thought that the Crown had lost sight of the fact that 8 December was a public holiday in Malta and recalled that they were very surprised when evidence of this emerged. The defence had asked Major Mifsud about the issue of the holiday because "that way we avoided alerting anyone else to it". The defence was satisfied that it could prove the matter in evidence without first alerting the Crown and therefore had not flagged it up in advance by, for example, exploring it with Mr Gauci at precognition. The intention, he said, was to "keep our powder dry" and to use a potentially powerful weapon to best effect. The defence had to consider whether to ask Mr Gauci "straight out" whether or not the day after the purchase was a public holiday. If Mr Gauci had accepted that it was not then it would have indicated that 7 December was not the date of purchase. According to Mr Beckett, however, the defence could only suspect that the Crown had not canvassed this matter with Mr Gauci. The defence believed that the police knew about it, and the danger was that if the matter had been put to Mr Gauci directly he might have given the "wrong" answer. There were, Mr Beckett said, "live risks with this unpredictable witness". Accordingly the defence had tried to "elicit this from the witness indirectly via his statements".

18.159 Mr Beckett considered the trial court's attitude to this issue as "a little harsh". However, the defence appreciated that by trying to elicit the evidence obliquely from Mr Gauci it might not get the point across. With hindsight Mr Beckett considered that the defence should perhaps have asked the question straight out. If in response Mr Gauci had confirmed 7 December as the date of purchase the defence could have cross examined him on the contents of his prior statements. However, in Mr Beckett's view the trial court had not been unduly troubled by differences between Mr Gauci's evidence and his prior statements.

18.160 Mr Beckett said that in light of the trial court's apparent criticism of the defence on this point he had wondered at the time whether the decision not to put the

matter directly to Mr Gauci in cross examination amounted to a potential ground of appeal in terms of *Anderson v HMA*. However, after the matter had been discussed with two other members of the defence team the view taken was that it "got nowhere near" defective representation. Mr Beckett recalled that the defence was disappointed that its approach had not worked and added that if this had been considered sufficient for an *Anderson* ground then he would have withdrawn from acting.

18.161 As far as Mr Beckett was aware the applicant had not instructed the defence to cross examine Mr Gauci on the issue of the public holiday. In Mr Beckett's view the discovery of this information by the defence was a "smart piece of detective work" and would not have been possible if the applicant's defence team were "grossly incompetent".

- Alistair Duff

18.162 Mr Duff considered that the trial court's criticisms of Mr Taylor's approach to cross examination were used simply as "a way out". For example, although the court pointed out that Mr Gauci had never been asked directly about the public holiday, it "knew fine that as a defence lawyer you always ask the questions up to, but never ask the final question of, the witness." If Mr Gauci had been asked whether the day after the purchase had been a public holiday, the danger was that he would "suddenly come out and confirm that it was, that he now remembered it." In Mr Duff's view the judges knew that, and had only criticised the approach taken because they wanted to convict.

18.163 Mr Duff was asked if consideration had been given to raising the issue of the public holiday with Mr Gauci at precognition. Mr Duff could not say that he had specifically thought of this issue at the time. Indeed, he could not recall whether he knew about the public holiday at the time he precognosced Mr Gauci. Mr Gauci had been precognosced in the presence of two Maltese police officers throughout the precognition and so even if Mr Duff had known about the public holiday at that time he would not have wanted to raise the issue in case the officers reported this to the Crown.

18.164 It was suggested to Mr Duff that he could simply have asked Mr Gauci at precognition whether or not his shop was open on the day after the purchase without raising the issue of the public holiday itself. Mr Duff accepted that he could have done so but considered it to be a "pretty fine point."

18.165 In Mr Duff's view although the defence knew why Mr Taylor had asked the questions that he did, it "perhaps came across somewhat opaquely to the court."

Consideration

18.166 The question raised by the submissions is whether the decision not to put directly to Mr Gauci the issue of the public holiday was contrary to reason and resulted in the applicant being denied a fair trial.

18.167 It is true that if the matter had been raised with Mr Gauci, and he had replied that his shop was open on the day after the purchase, this would have significantly undermined 7 December as the date of purchase. Equally, however, if Mr Gauci had said that his shop was closed on that day this would have provided very powerful support for the Crown's position as to the date. In light of that risk the defence adopted a tactical approach whereby Mr Gauci was questioned only on what he meant by the word "midweek". In the Commission's view, although such an approach relied heavily on the possible inferences from Mr Gauci's response, it avoided the risks associated with a more direct approach and allowed the defence to present a submission which was capable of casting further doubt on 7 December as the date of purchase. Given the adverse consequences to the defence of an unhelpful answer from Mr Gauci, it would be difficult to describe the conduct of the defence in this connection as contrary to reason.

18.168 Depending on the point at which the defence became aware of the public holiday it would have been possible for the defence to raise the matter with Mr Gauci at precognition. Although Mr Beckett and Mr Duff suggested at interview that by doing so the defence might have alerted the Crown to the evidence of the public holiday, this was hardly inevitable and in any case could have been avoided by simply asking Mr Gauci whether he could recall his shop being open the day after the

purchase. Mr Gauci's answer to that question might have allowed the defence to reach a more informed view as to the best approach to be taken with the witness in cross examination. However, it obviously would not have provided any guarantee that Mr Gauci would adopt the same position in evidence. As Mr Beckett said at interview, the impression the defence had of Mr Gauci was that he was "liable to say anything." Accordingly, even if Mr Gauci had said at precognition that his shop had been open on the day after the purchase, in the Commission's view the defence would still have been justified in taking the approach it did.

18.169 For these reasons the Commission does not consider that the manner in which this aspect of Mr Gauci's cross examination was conducted led to the applicant being denied a fair trial.

(v) The "Libyan" identification

18.170 It is alleged in the submissions that the defence failed to clarify with Mr Gauci the basis for his identification of the purchaser as a Libyan. In particular it is said that the Maltese commonly refer to all persons of Arab extraction as "Libyan" and that the term is used generically. It is also pointed out that although in cross examination counsel for the co-accused, Mr Keen, established that Mr Gauci had no recollection of the languages which he and the purchaser had used, in terms of his statement of 1 September 1989 Mr Gauci's only basis for identifying the purchaser as Libyan was the language spoken by him. Reference is also made to a number of Mr Gauci's other statements which it is said reveal a "sinister" attitude towards Libyans as well as the suggestion of racism.

18.171 In order to address this allegation it is necessary to set out the relevant passages of Mr Gauci's statements and evidence, the trial court's approach to this issue and the views of the former representatives at interview.

Mr Gauci's statements

18.172 In his statement of 1 September 1989 (CP 452) Mr Gauci said the following about the purchaser's appearance and nationality:

"His hair was very black. He was speaking Libyan to me. He was clearly from Libya. He had an Arab appearance and I would say he was in fact a Libyan, I can tell the difference between Libyans and Tunisians when I speak to them for a while. Tunisians often start speaking French if you talk to them for a while. He was clean shaven with no facial hair. He had dark coloured skin… The man spoke to me all the time as a Libyan."

"On picking out the trousers I asked him what size and he said 'more or less my size'. The Libyans do not really know their sizes or bother. The Libyans normally just put their elbow into the trousers and if it fits both sides, they say they will take it. I do not know how they do this."

18.173 Mr Gauci's statement of 13 September 1989 (CP 456) has already been referred to in the context of his other possible sightings of the purchaser. The statement describes an occasion about three months previously when he saw four men in Tony's Bar in Sliema, one of whom he recognised as looking like the purchaser. Mr Gauci described this man as a Libyan and said that he and the other men in his company "spoke as Libyans. That was their own language."

18.174 As noted earlier Mr Gauci's statement of 26 September 1989 (CP 459) relates to the occasion when a man who he thought was the "same man" as the purchaser bought a number of children's dresses from his shop. According to the statement:

"The man spoke English when he came into my shop yesterday. He had a Libyan accent and I am convinced that he is a Libyan."

18.175 In his statements of 21 February 1990 (CP 466) and 5 March 1990 (CP 467) Mr Gauci makes reference to the man who purchased blankets from his shop in 1987 who he believed may have been the purchaser. In the former statement he describes this man as a Libyan and as having shown him a piece of paper on which was written an "Arabic name" and "Room 113, Hilton Hotel". In the latter statement he said of

what was written on the piece of paper "I cannot read Arabic but it was a Libyan name".

18.176 In his statement of 10 September 1990 (CP 469) Mr Gauci said that he was "positive" that the purchaser was a Libyan.

Mr Gauci's evidence

- Examination in chief

  Q. Did you recognise his nationality?

  A. Yes

  Q. What nationality was it?

  A. To me he was a Libyan

  Q. Are you familiar, from the experience in your shop and in Malta, with Libyans?

  A. Many come, and I recognise them (31/4731).

- Cross examination by Mr Taylor

  Q. ... Let me just deal with one last area, Mr. Gauci. You've been very helpful to me, and I'm grateful to you for answering all of my questions. Malta is a stopping-off point, is that right, for many people from North Africa who are en route for Europe?

  A. That's it, sir.

Q. And it's also a holiday destination for North Africans who want to come to have a good time in the beauty of Malta before going back home again?

A. That's it, sir.

Q. Would I be right in thinking that at any time, almost throughout the entire year, a visitor to Malta would notice that there was a large population of people from North Africa and the Middle East, Arab in appearance, on the island?

A. However, however, people like me, in business, we immediately notice Arabs. We know – we can distinguish between -- at the moment, we have Russians coming over. We have experience in business, so we know exactly who are Europeans, who are Arabs.

Q. Indeed. And I don't seek to suggest otherwise. In North Africa there are Arabs who -

A. We are talking in a straightforward manner, sir.

Q. Thank you. There are Arabs in North Africa who are former colonists of the French and who therefore tend to speak French as a second language rather than English; isn't that right?

A. Algiers and Tunisia, yes. Italians -- Libyans sometimes talk English in the same way as we do -- Maltese, I mean.

Q. And Egyptians?

A. That we recognise Egyptians. Obviously, they speak different from Libyans. My own experience, I can distinguish between Libyans and Egyptians.

Q. But you are not an expert? In Maltese.

A. I am not an expert, obviously.

Q. As a matter of interest, do you speak Arabic yourself?

A. I can manage.

Q. And on the day of the clothing purchase, was the conversation in English, or in Arabic?

A. In both languages.

Q. In both (31/4821-4823).

- Cross examination by Mr Keen

Q. Mr. Gauci, a few moments ago you told us that you couldn't speak Arabic and you understand very little.

A. It's not that I don't know. But I can manage. I can manage a lot. I do a lot of speaking with them, because with a bit of Maltese and a bit of Arabic, and we can manage.

Q. So do I take it you understand sufficient Arabic to be able to sell clothes?

A. Certainly. Of course, yes.

Q. You told us you do not read English. Is that correct?

A No. That's true.

Q. But do you understand sufficient English to sell clothes?

A. Oh, yes, of course. Yes.

Q. The man who came into your shop to buy the clothes that you have been talking about spoke to you in Arabic, or in English, or in Maltese?

A. I believe we spoke Maltese and Arabic that day. That's 11 years ago. That's the way I recollect we spoke.

Q. And yet just a moment ago, you recollected that you spoke in Arabic and English, Mr. Gauci. Would it be fair to say that you in fact have no recollection of the conversation or the language which was employed?

A. Well, exactly. Exactly. All these years -- I mean, you can't remember everything precisely, but that's -- most of the time that's the way we speak with them, in our language and their language, and we understand each other quite well. We even have the same sort of character. We get on well together.

Q. So if the man who came into the shop to buy the clothes was an Arab, you believe you would have spoken to him in a mixture of Arabic and Maltese; is that the position, Mr. Gauci?

A. That's the way we speak to them most of the time. That's the way I -- that's what I do, at least. I -- I look -- I try and see what they prefer. Some of them, they say they want to speak Arabic, and I say, do you understand me, and he says yes, and we talk. Some others say, speak English, because they do speak English too. Last week I had one, and he said he wanted to speak English, and I said, okay, I'll speak English. Do you understand?

Q. So you might have spoken to this customer in Arabic, or in Maltese, or in English, or in a mixture of these languages; is that fair, Mr. Gauci?

A. Yes, it could be. Yes.

Q. And, as you say, it could be, but it was many years ago?

A. Yes. Yes. 11 years. So many years. I would like to have a computer in my head instead (31/4823-4825).

The trial court's approach

"The clear impression that we formed was that he was in the first place entirely credible, that is to say doing his best to tell the truth to the best of his recollection, and indeed no suggestion was made to the contrary. That of course is not an end of the matter, as even the most credible of witnesses may be unreliable or plainly wrong. We are satisfied that on two matters he was entirely reliable, namely the list of clothing that he sold and the fact that the purchaser was a Libyan" (paragraph 67).

The accounts of the former representatives

- William Taylor QC

18.177 Mr Taylor was asked whether the defence had considered the possibility that in some of Mr Gauci's statements he appeared to conflate "Arab" with "Libyan". In response Mr Taylor said that "every Arab in Malta was in fact Libyan" and that "nobody went to Malta except the Libyans, who got all the goods they needed from there." Mr Taylor did not recall being pre-occupied by Mr Gauci's description of the purchaser as Libyan and did not think that much turned on it.

18.178 Mr Taylor questioned whether if he had persuaded the court that the purchaser was Arab rather than Libyan this would have prevented a miscarriage of justice. He agreed that any acceptance of the Libyan identification would have assisted in the identification of the applicant as the purchaser. However, he said that Mr Gauci would have been re-examined on the matter "and the advocate depute would have made a mockery of it" by referring to "the fact that Moroccans speak with a French accent, or that Egyptians do not travel to Malta."

18.179 Mr Taylor pointed out that, in any event, the applicant's instructions were simply that he was not the purchaser and accordingly the defence did not know

whether the purchaser was Libyan or Arab. In Mr Taylor's view even if the Libyan identification had been undermined the court could simply have concluded that the purchaser was an Arab; and Libya is an Arab country.

- John Beckett QC

18.180 Mr Beckett was referred to the relevant passages in Mr Gauci's statements and was asked if the defence had any concerns regarding the reliability of his identification of the purchaser as Libyan. Mr Beckett pointed out that the applicant's position was simply that he was not the purchaser and the defence therefore had nothing from him with which to cross examine Mr Gauci in this connection. In these circumstances, he said, the defence just had to use what factors it had. Mr Beckett did not personally think there was anything suspicious about this aspect of the evidence and pointed out that Mr Gauci had identified the purchaser as Libyan at a time when it was clear the police suspected Palestinians or Talb as having perpetrated the bombing.

18.181 Mr Beckett was asked if the defence had been aware of an apparent tendency among the Maltese to describe all persons of Arab appearance on the island as "Libyan". Mr Beckett believed that Mr Taylor "gave this a go" in cross examination but, in Mr Beckett's view, it had not worked well and indeed had looked like it might get worse for the applicant. The focus, he said, had to be on the identification evidence and there was a danger of getting over-ambitious in trying to challenge everything. Mr Beckett was sure that the defence had discussed this possible line of cross examination and he was aware of the Maltese term "Libyano". However, in Mr Beckett's view there was more to it than that. The defence had an opinion from George Joffe, an expert in Middle Eastern affairs, who stated that the majority of Arabs in Malta were in fact Libyan. In addition the Libyan Cultural Centre was close to Mary's House, a fact that in Mr Beckett's view demonstrated that Mr Gauci would have been familiar with Libyans.

18.182 Mr Beckett accepted that the defence could have explored the matter with Mr Gauci but he doubted that it would have changed the outcome. In his view it was simply a judgment that had to be made. Mr Beckett did not think it surprising that the court had accepted this aspect of Mr Gauci's evidence and did not think that the

defence had exercised poor judgment in concentrating on the identification of the applicant as being the evidence which mattered. It had to be the applicant who was the purchaser, not just any Libyan. In these circumstances the defence had not considered the identification of the purchaser as Libyan as significant in itself.

18.183 Mr Beckett accepted that the Libyan identification had played a fairly important part in the court's judgment, but said that the question was whether one could have seen this coming. Even if it was capable of being predicted, Mr Beckett questioned whether it would have been possible on the information available to persuade the court to depart from its conclusion. In Mr Beckett's view there was material available to "shore up" the Libyan identification. Much time could have been spent on this by the defence and in the end the court might have been given a sounder basis for holding the evidence to be reliable. Mr Beckett did not see the value of general evidence that Maltese people tended to describe all Arabs on the island as Libyan, as in his view it was what Mr Gauci did that mattered.

- Alistair Duff

18.184 Mr Duff did not recall being aware of such a tendency on the part of the Maltese, nor was he familiar with Maltese term "Libyano". Asked whether the defence had any concerns regarding the reliability of Mr Gauci's identification of the purchaser as Libyan, Mr Duff replied: "We were aware of this, that he said the purchaser was Libyan, and we had in our heads the question of how he knew that, but I cannot remember anything in detail." There was also the possibility, he said, that the purchaser, though a Libyan, was not the applicant and "so it would not necessarily have affected our approach". It was suggested to Mr Duff that where, as in the present case, the identification evidence was uncertain, undermining any aspect of it might have assisted the defence. Mr Duff said that he did not disagree with this.

18.185 Mr Duff said that there must have been consideration given to challenging the Libyan identification as the defence knew it was an issue, but he could not remember now what decisions were made. He could not recall any consideration being given to obtaining expert opinion on the matter.

Consideration

18.186 It is clear from Mr Beckett's account that the questions put by Mr Taylor in cross examination were an attempt to explore with Mr Gauci his basis for identifying the purchaser as Libyan. Although there was no direct challenge to this aspect of Mr Gauci's evidence, in the Commission's view this is not surprising given the absence of any sound foundation for doing so. As Mr Beckett said at interview, the applicant's instructions, which amounted to a simple denial that he was the purchaser, were of no assistance in this connection. The only other available means of challenging the evidence lay in the apparent tendency among the Maltese to describe as "Libyan" all persons of Arab appearance in Malta. At interview only Mr Beckett recalled being aware of this phenomenon but it seems clear from what he said that the other members of the defence team were also aware of it at one time.

18.187 In the Commission's view, however, although there is evidence that some Maltese use the term "Libyano" in this way, this does not appear to be universal among them (see eg the statements obtained by the Commission from George Grech, Godfrey Scicluna, Tonio Caruana and Godwin Navarro: appendix of Commission interviews). Moreover, the terms of Mr Gauci's statement of 1 September 1989 suggest that in identifying the purchaser as a Libyan he appreciated the distinction between "Arab" and "Libyan" and between Libyans and Tunisians. Furthermore when it was put to him in cross examination that certain countries in North Africa are former colonists of the French, Mr Gauci correctly pointed out that two such countries were Algeria and Tunisia. He also said that he could distinguish between Libyans and Egyptians on the basis that they "speak different". In the Commission's view, factors such as these are not supportive of the submission that when Mr Gauci identified the purchaser's nationality he was simply using "Libyan" as a convenient term for "Arab".

18.188 In any event, if the terms of Mr Gauci's statement to the Commission are anything to go by, it does not appear that the defence would have benefited from any further exploration of this matter. At interview Mr Gauci said that he was "one hundred per cent confident" that the purchaser was a Libyan. He acknowledged that there is a habit on the part of some Maltese to describe all Arabs on the island as

"Libyan" but said that this was not something he himself did. According to Mr Gauci "to say that a person is an Arab is different from saying that a person is Libyan. Libyans are different from, for example, Moroccans and Iraqis."

18.189 It is also alleged in the submissions that the contents of some of Mr Gauci's other statements suggest a sinister or racist attitude towards Libyans. The Commission is satisfied, however, that in terms of the information available to the defence there was no proper foundation for suggesting to Mr Gauci that his identification of the purchaser's nationality was based on prejudice against Libyans (see chapter 26).

18.190 The Commission accepts that across his statements and evidence the precise means employed by Mr Gauci in seeking to distinguish Libyans from persons of other Arab nationality remains unclear (see chapter 26). However, the question raised by the submissions is whether Mr Taylor's cross examination on this issue resulted in the applicant's defence not being properly presented and in his being denied a fair trial. For the reasons given the Commission does not consider such an allegation to be well-founded.

(4) The conduct of the appeal

The applicant's submissions

18.191 The final matter raised under the heading of defective representation concerns the manner in which the defence conducted the applicant's appeal against conviction. It is alleged that at appeal none of the "obvious grounds" was argued, such as those based upon the sufficiency of evidence or the reasonableness of the verdict under section 106(3)(b) of the Act. Instead, it is alleged, arguments were made "on a peculiar and incompetent basis", namely that the trial judges had misdirected themselves.

18.192 It is submitted that the appeal, as argued, was doomed to failure because it had no proper basis in law. The appeal grounds had attacked the reasoning of the trial court on the basis, first, that it had not provided adequate reasons for the conviction

and, secondly, that it could be shown to have misdirected itself. However, according to the submissions those arguments were described by the appeal court respectively as "misconceived" and "not well founded". Indeed, according to the submissions the appeal court had concluded that "the whole appeal was irrelevant."

18.193 It is submitted that the arguments the defence sought to make at the appeal should have been presented under the heads of sufficiency and section 106(3)(b). The failure to do so, it is submitted, meant that the appeal court did not consider the fundamental issues in the case. According to the submissions it is "patent" from the terms of the appeal court's opinion that argument under those grounds would have been considered differently.

The appeal court's approach

18.194 The appeal court noted at an early stage of its opinion that the applicant was not relying upon grounds based on the sufficiency of the evidence or the reasonableness of the verdict under section 106(3)(b). Instead, the court observed, many of the grounds were concerned with the trial court's treatment of the evidence and the defence submissions. In particular it was alleged that the trial court had failed to take proper account of, or have proper regard to, or give proper weight to, certain evidence, factors or considerations.

18.195 Mr Taylor argued that although it was not a court of review, it was nevertheless open to the appeal court in the present case to review the trial court's conclusions in light of the evidence which the latter had considered material. In addition it was argued that a miscarriage of justice could be established by a failure on the part of the trial court to give adequate reasons for its conclusions on particular matters. The appeal court rejected the first of those arguments as "not well founded" and the second as "misconceived". Its views on both issues are perhaps best summed up in the following passage of the opinion:

> *"With regard to the trial court's conclusion that Mr Gauci's evidence of identification by resemblance, as far as it went, was reliable, the appellant contends that the trial court 'failed to have proper regard or give proper weight'*

to the considerations listed in the ground of appeal. As we have already indicated, this wording demonstrates a misconception as to the nature and extent of the role of the appeal court in considering an appeal against conviction, whether or not reasons for the conviction have been given. While the trial court must have regard to the evidence which was led before it, the weight which is to be given to evidence which it has decided to accept must be a matter for it to assess. Further, the trial court is not bound to set out in detail every step in its process of reasoning, nor is it required to deal with every submission made to and refer to every disputed question of fact. The fact that a particular piece of evidence is not expressly referred to in the judgment of the trial court does not mean that the trial court must be taken to have failed to take it into account. When it is alleged, not that there was in law an insufficiency of evidence, but that there had been a failure by the decision-making body to have proper regard to, or give proper weight, or take proper account of, certain evidence, all of which relate to questions of weight, then it seems to us that the only ground which could be put forward for quashing the verdict would be that the jury or trial court had returned a verdict which no reasonable jury or trial court could have returned: see section 106(3)(b) of the 1995 Act. In that connection Mr Taylor made it clear that he was not seeking to rely on section 106(3)(b)" (paragraph 288).

18.196 The appeal court made the same point throughout its opinion in respect of other grounds argued on behalf of the applicant. The opinion concludes with the following passage:

"When opening the case for the appellant before this court Mr Taylor stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly

directing itself, could have returned in the light of that evidence…" (paragraph 370).

The views of the former representatives

- William Taylor QC

18.197 Mr Taylor said that he had wanted to present an argument under section 106(3)(b) but had been persuaded by the other members of the defence team that this would be "entirely counter-productive" in that it would attract the ire of the appeal court judges. In Mr Taylor's view an argument based on that provision would have been "laughed out of court". It was, he said, a tactical decision not to include it as a ground of appeal. Mr Taylor did not accept the appeal court's view that certain of the grounds ultimately argued were misconceived.

- John Beckett QC

18.198 Mr Beckett said that Mr Taylor and the other senior counsel in the defence team, David Burns QC, had worked together on a framework for the appeal. However, as Mr Beckett understood matters, the decision not to argue unreasonable verdict at appeal had a number of aspects. Mr Beckett pointed out that in terms of section 106(3)(b) it is the court's verdict which requires to be considered unreasonable, not its findings. He added that if the appeal court's opinion is examined closely it is clear that in respect of all the crucial matters the trial court was held to have been "entitled" to find as it did. Accordingly, Mr Beckett did not read the appeal court's opinion as suggesting that a ground based on section 106(3)(b) would have succeeded. In Mr Beckett's view "not many" of the misdirection grounds fell foul of the finding that the weight to be attached to the evidence was a matter for the trial court.

18.199 Mr Beckett pointed out that in terms of *King v HMA* 1999 SCCR 330 the basis of any appeal under section 106(3)(b) was that no reasonable jury could have reached the verdict. Accordingly, if the defence had argued the appeal under section

106(3)(b) it would have been open to the Crown and the court to identify an alternative rational basis for the conviction in terms of the evidence not rejected by the trial court. Mr Beckett thereafter suggested an approach to the evidence which, according to him, would have permitted a reasonable court to convict the applicant without the need to establish the date of purchase as 7 December 1988.

18.200 According to Mr Beckett the defence was aware that it needed to "break new ground" in the appeal. In his view it would have been a tall order to argue that there was no rational basis for the verdict, and neither he nor Mr Burns thought that the defence could succeed in that argument. It was suggested to Mr Beckett that a successful argument under section 106(3)(b) would have been no taller an order than arguing grounds that were ultimately viewed as misconceived. Mr Beckett accepted that the defence had lost the appeal and were therefore not in a good position to say that they were right. Although the appeal court had found some of the grounds to be misconceived Mr Beckett did not think that the approach taken by the defence could be strongly criticised.

- Alistair Duff

18.201 Mr Duff said that although he had been involved in discussions on this matter he had left it to counsel to decide. The decision not to argue grounds based on section 106(3)(b) had proceeded upon an analysis of the law by counsel with which Mr Duff had agreed.

Consideration

18.202 In the Commission's view there is no basis in the appeal court's opinion for the submission that all of the grounds founded on alleged misdirections by the trial court were irrelevantly framed. According to the appeal court such grounds were irrelevant only to the extent to which they sought to question the weight the trial court had attached to particular pieces of evidence. Where it was established, however, that a particular inference was not open to the trial court on the evidence, the appeal court considered that this would be indicative of a misdirection and that in such circumstances it would then require to assess whether it had been material (paragraph

25). This was precisely the approach taken by the appeal court to those grounds which alleged that the trial court had misdirected itself as to the evidence of the witness Andreas Schreiner (paragraph 101), and as to the terms of joint minute number 7 (paragraph 319; see below). In light of this the Commission does not consider there to be any merit in the submission that the appeal court viewed the "whole appeal" as irrelevant.

18.203 At interview there was a clear divergence of opinion among the former representatives as to why no reliance was placed on section 106(3)(b) at appeal. Whereas Mr Beckett and Mr Duff recalled that the decision in this connection was based upon an examination of the relevant case-law, Mr Taylor believed that it was dictated by tactical considerations designed not to alienate the appeal court. Whatever may have been the basis for this decision, it is clear that the appeal court considered that many of the grounds ultimately argued were misconceived. While certain grounds were treated by the court as relevantly framed in order to do justice to the arguments made in support of them (see eg paragraph 290), it seems clear from the opinion that these were not considered in the context of section 106(3)(b).

18.204 Given its conclusions in chapter 19, the Commission does not consider that the defence can be criticised for its decision not to challenge the sufficiency of the evidence. However, as stated in chapter 21, the Commission has reached the view that the trial court's verdict is at least arguably one which no reasonable court, properly directed, could have returned. In particular the Commission does not consider there to be any reasonable basis for the trial court's conclusion that the purchase took place on 7 December 1988 and therefore for the inference it drew that the applicant was the purchaser of the items from Mary's House.

18.205 Despite that conclusion, in the Commission's view it is understandable why members of the defence team believed an argument seeking to challenge the reasonableness of the verdict would not be successful. Prior to *E v HMA* 2002 SCCR 341 (the decision in which was issued towards the end of the appeal hearing in the applicant's case) an appeal on this basis had never succeeded in Scotland. In these circumstances the Commission is satisfied that a tactical decision not to argue a ground similar to that advanced in chapter 21 was not contrary to reason. In any

event, it seems to the Commission appropriate to deal with that ground under section 106(3)(b) and the case law relating to that provision, rather than the principles listed at the beginning of this chapter.

Other matters raised with the former representatives

Background

18.206 In addition to the matters raised in the application the Commission sought the views of the former representatives on a range of other issues considered relevant to the question of defective representation. In the main these related to the approach taken by the defence to the evidence regarding the date of purchase. One particular matter concerned how the defence had approached Mr Gauci's evidence that his brother, Paul Gauci, was watching football on television on the date of purchase. However, having considered the accounts given by the representatives (as well as those given by Anthony and Paul Gauci at interview) the Commission is satisfied that this aspect of the applicant's defence was properly presented. Full details of the matters raised with the representatives in this connection are given in their respective statements.

18.207 The purpose of this final section is to consider the approach taken by the defence to two matters. The first concerns the cross examination of Mr Gauci in respect of his evidence that the purchase "must have been about a fortnight before Christmas". The second is the decision by the defence not to call Paul Gauci as a witness.

(1) *Mr Gauci's evidence of "about a fortnight before Christmas"*

Background

18.208 In order properly to assess this issue it is necessary to set out the other evidence on which the trial court relied in establishing the date of purchase:

- Mr Gauci's evidence that his brother, Paul Gauci, did not work in the shop that afternoon because he had gone home to watch a football match on television; and the terms of joint minute number 7 which agreed that particular football matches were broadcast live by the Italian television channel, Radio Televisione Italiana (RAI), on 23 November or 7 December 1988 (the trial court was held at appeal to have misconstrued the terms of this joint minute and the foregoing summary is therefore based upon the contents of the minute itself).

- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the former Chief Meteorologist at Luqa airport, Major Joseph Mifsud, to the effect that there was a 10% probability of rain in Sliema at the material time on 7 December 1988.

- Mr Gauci's evidence which, according to the trial court, was that the purchase was "about the time when the Christmas lights would be going up" in Tower Road, Sliema.

18.209 Mr Gauci's evidence that the purchase "must have been about a fortnight before Christmas" was given by him in examination in chief (31/4730). In cross examination Mr Taylor referred him to a passage in his statement of 1 September 1989 in which he described the purchase as having occurred "during the winter in 1988" (31/4876). Mr Taylor also referred him to his statement of 10 September 1990 in which he said that the purchase had taken place "at the end of November" (31/4802). The relevant passages of Mr Gauci's evidence are set out in chapters 21 and 24.

18.210 In his closing submissions Mr Taylor said that when contrasted with his more contemporaneous recollection on 10 September 1990 Mr Gauci's evidence that the purchase must have been about a fortnight before Christmas was "plainly unreliable" (82/9873).

18.211 At appeal it was argued that the trial court had failed to take into account the fact that Mr Gauci had never told the police at any of his early interviews that the purchase had taken place about a fortnight before Christmas (paragraph 334 of the appeal court's opinion). In rejecting this ground the appeal court observed that the trial court had referred to statements which Mr Gauci had made to police officers in September 1989 in none of which did he refer to the purchase as having taken place a fortnight before Christmas. The appeal court did not consider it necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage. According to the appeal court "the fact that such statements had not been made at an earlier stage must have been quite apparent to the trial court" (paragraph 336).

18.212 Although Mr Taylor referred Mr Gauci to the terms of previous statements in which he had given timescales other than "about a fortnight before Christmas", the views of the representatives were sought as to why it was not put to him that he had never given that timescale on any previous occasion.

<u>The views of the former representatives</u>

- William Taylor QC

18.213 Mr Taylor did not recall any particular importance being attached to this aspect of the evidence at trial. He pointed out that a fortnight before Christmas is 11 December and that "7 December is outwith that period and 23 November is completely outwith it." It was suggested to Mr Taylor that in terms of the trial court's judgment Mr Gauci's evidence that the purchase was about a fortnight before Christmas was crucial to the finding as to 7 December. Mr Taylor was reminded that the evidence of the football broadcasts pointed to both 23 November and 7 December, that the weather evidence pointed more to 23 November and that Mr Gauci's account that the purchase had taken place midweek (or Wednesday) pointed to both dates. Mr Taylor said he found it difficult to piece together the thinking of the defence at the time. He thought that Mr Gauci's evidence was significant in terms of the approach described to him but he did not recall its significance at the time. He did not remember thinking that Mr Gauci had "changed his evidence" on this matter. In Mr

Taylor's view it was just an approximation by the witness which the trial court had fastened upon.

18.214 Mr Taylor agreed that "except by default" it was not made clear to the court that Mr Gauci had never given that time-frame before. He pointed out, however, that Mr Gauci's testimony was different from any of his previous statements to which the court was referred. In Mr Taylor's view he was being asked to be a "counsel of perfection" in this matter. He said that once a written judgment had been issued anyone could be questioned on why they had not asked particular questions of a witness.

18.215 Mr Taylor's attention was drawn to the terms of paragraph 334 of the appeal court's opinion in which he was noted as submitting that "nowhere did the trial court acknowledge that Mr Gauci had never told the police at any of his early interviews that the sale had taken place about a fortnight before Christmas". It was suggested to Mr Taylor that a possible reason for this was that it had never been highlighted in cross examination. In reply Mr Taylor referred to the passage in paragraph 336 of the opinion quoted above. In Mr Taylor's view the terms of that passage reflected what he had said earlier in the interview, namely that the judges must have realised that Mr Gauci's evidence was the first occasion in which he had mentioned this time-frame.

- John Beckett QC

18.216 Mr Beckett said that the defence had brought up with Mr Gauci his previous accounts in which he said that the purchase had taken place in "winter" and "November". Although the defence could have gone further by referring Mr Gauci to other passages in his statements in which he said that the purchase had taken place in "November/December", in Mr Beckett's view this would have allowed the Crown to rely on the reference to December. This would in turn have left open the possibility that the purchase might have been about a fortnight before Christmas. Mr Beckett considered that it was better to make the point in closing submissions. In his view the defence had "floated" the inconsistency with the witness and had obtained useful material from him.

18.217 It was suggested to Mr Beckett that there was a distinction between, on the one hand, referring Mr Gauci to previous statements in which he had said something different and, on the other, challenging him directly that on no previous occasion had he said that the purchase took place about a fortnight before Christmas. Mr Beckett thought this matter would have been raised in defence submissions at the trial, but said that in any event the court was aware that on previous occasions the witness had said "winter" and "November 1988". In Mr Beckett's view there was a risk of pushing the witness in cross examination. The defence did not know what he would say in such circumstances. It was not difficult to envisage him saying that, now he was giving evidence on oath, he was convinced it was a fortnight before Christmas. According to Mr Beckett the defence ran the risk of Mr Gauci saying anything in his evidence and so it would have been dangerous to put this matter to him in cross examination. In Mr Beckett's view by getting from the witness that his memory of events would have been better at the time he gave his statements, and by showing that in those statements he had referred to "November" and to "winter", this contradicted the evidence that the date of purchase was in December and undermined Mr Gauci's account that it had taken place about a fortnight before Christmas. Mr Beckett accepted that it might have been possible to approach the matter in a different way but in his view this would not have been without risk given Mr Gauci's unpredictability as a witness.

18.218 Mr Beckett was asked why, if that was the approach, Mr Taylor had submitted at appeal that the trial court had failed to acknowledge that Mr Gauci had never told the police of the time-frame he had given in examination in chief. Mr Beckett replied that what Mr Gauci had said in his early interviews was explored in cross examination to the applicant's advantage. In Mr Beckett's view Mr Taylor had exercised his discretion in this matter and the point being raised was a "very minute dissection" of the defence approach. Mr Taylor, he said, had to make a judgment on the day as to the danger in pursuing this line and had to try to undermine the Crown case as safely as he could bearing in mind the unpredictable nature of the witness. Mr Beckett did not see anything wrong in Mr Taylor's approach and did not consider that this had undermined the applicant's right to a fair trial.

18.219 Mr Duff was unable to recall anything about the matter at interview.

Consideration

18.220 Prior to giving evidence Mr Gauci had never been recorded as saying that the purchase must have been about a fortnight before Christmas. The question for the Commission is whether by failing to put this to him directly the defence failed properly to present the applicant's defence and denied him a fair trial.

18.221 In the Commission's view this aspect of Mr Gauci's evidence was critical to the trial court's determination that the purchase had occurred on 7 December. Evidence of the football broadcasts pointed to both 23 November and 7 December and there was nothing in Mr Gauci's evidence that the purchase had taken place "midweek" (or on a Wednesday) which would support one of those dates over the other (both dates having occurred on a Wednesday in 1988). In terms of the passages in his statements that were put to him Mr Gauci's accounts to the police were either supportive of both dates ("November or December 1988") or pointed towards 23 November ("end of November") Likewise, evidence of the weather, while not excluding 7 December, pointed strongly to 23 November. Accordingly, in the Commission's view, it was only Mr Gauci's evidence that the purchase had taken place about a fortnight before Christmas (taken perhaps with his confused account that the Christmas lights were "going up" at the time) which allowed the court to conclude that the purchase date was 7 December.

18.222 In the Commission's view there might have been value in challenging Mr Gauci directly on the basis that he had never mentioned this particular time-frame in any of his statements. As Mr Beckett said at interview, however, there were also risks associated with such a course in that it was possible that Mr Gauci's response to further questioning would have been more certain than his account in examination in chief. In the Commission's view, given that the defence regarded Mr Gauci as an unpredictable witness, any decision by Mr Taylor not to challenge him directly on this matter amounted to a reasonable exercise of the discretion afforded to counsel in such matters.

18.223 In any event Mr Taylor put to Mr Gauci the passages in his statements in which he had described the purchase as having taken place "during the winter in 1988" and "at the end of November." Accordingly the trial court was aware that in none of the statements that were put to him in evidence had Mr Gauci mentioned that the purchase must have been about a fortnight before Christmas. Indeed, in terms of the appeal court's opinion it must have been quite apparent to the trial court that Mr Gauci had never mentioned this time-frame before in any of his previous statements.

18.224 In these circumstances the Commission does not take the view that the conduct of this aspect of Mr Gauci's cross examination resulted in the applicant's defence not being properly presented or in his being denied a fair trial.

(2) *The decision not to call Paul Gauci as a witness*

18.225 According to the volume of submissions submitted by MacKechnie and Associates concerning Anthony Gauci (see chapter 17), the fact that the defence did not call Paul Gauci was "surprising" given that in his police statement of 19 October 1989 he indicated that 23 November 1988 was "the date in question". The inference in the submissions is that the decision by the defence not to do so amounts to defective representation.

18.226 The Commission raised this matter with the former representatives and in light of their responses it is satisfied that the decision by the defence not to call Paul Gauci was justified. The submissions fail to take account of the fact that Paul Gauci was re-interviewed by the police in respect of this matter on 14 December 1989. Paul Gauci refused to provide a statement on that occasion but the details of what he told the police are contained in a statement by one of the officers who interviewed him, Henry Bell (S2632F: see appendix). According to Mr Bell's statement, on 14 December 1989 Paul Gauci was shown editions of a Maltese newspaper dated 23 November and 7 December 1988 in which the times of broadcasts of particular football matches were listed. In light of those listings Paul Gauci agreed that the "probable date was 7 December 1988."

18.227 Although Mr Bell's statement appears not to have been disclosed to the defence, he provided a similar account in his defence precognition (see appendix). At interview Mr Beckett explained that in light of Mr Bell's precognition the defence considered Paul Gauci to be a "dangerous witness" in that there was a risk that his evidence might assist the Crown in establishing the date of purchase as 7 December 1988. Similar views were expressed by Mr Taylor at interview.

18.228 In these circumstances the Commission does not consider that the decision by the defence not to call Paul Gauci was contrary to reason or that it resulted in the applicant being denied a fair trial.

Conclusion

18.229 In the Commission's view there is nothing in the submissions under this heading, or in the accounts given by the former representatives at interview, which supports the submission that the conduct of the defence was such as to deny the applicant a fair trial. Accordingly the Commission does not consider that a miscarriage of justice may have occurred in this connection.

CHAPTER 19
THE SUFFICIENCY OF THE EVIDENCE

The Grounds

19.1 The applicant raises the following grounds under this heading:

(1) At the trial and the appeal the Crown's submissions on the nature of a circumstantial case were based on an error of law; and

(2) The evidence the trial court found acceptable was insufficient to convict the applicant of murder.

The submissions in respect of ground (1)

19.2 The submissions attack the approach taken by the Crown and the appeal court to the law concerning circumstantial evidence. That attack is based on the view that the Crown and the appeal court failed to take account of the distinction between a case where circumstantial evidence is relied on to corroborate direct evidence and one like the present case which consists wholly of circumstantial evidence. It is accepted in the submissions that in the former case the circumstantial evidence need not be unequivocal but may be capable of differing interpretations, and that it is the function of the jury to determine whether or not to adopt the interpretation which supports the direct evidence. In the latter case, it is submitted that the circumstantial evidence taken as a whole must be unequivocal and point only to guilt.

19.3 The submissions refer to the cases of *Little v HM Advocate* 1983 SCCR 56; *Fox v HMA* 1998 SCCR 115; and *Mack v HM Advocate* 1999 SCCR 181, and argue that these were misunderstood by the Crown and the appeal court or that they were mistakenly applied to a case such as the present where the evidence was wholly circumstantial. Among the passages referred to in the submissions is the following passage from *Little* (in which the appellant was convicted of incitement to murder):

"The question is not whether each of the several circumstances 'points' by itself towards the instigation libelled but whether the several circumstances taken together are capable of supporting the inference, beyond reasonable doubt, that Mrs Little in fact instigated the killing of her husband by Mackenzie" (at p 61).

19.4 According to the submissions the above passage was relied upon by the Crown at appeal as support for the proposition that in a wholly circumstantial case the combined circumstances need only be *capable* of supporting the inference of guilt. It is submitted that the reference in *Little* to circumstances being "capable of supporting the inference, beyond reasonable doubt" should not mean capable in respect of being one of a number of possibilities but capable in respect of being sufficient to entitle the jury to convict.

19.5 The submissions then refer to the trial judge's charge to the jury in *Little*. There it was said that the essence of the Crown case was that the facts, considered together, demonstrated that two of the accused offered the third accused money for the killing, and paid money to him after the killing (see 1983 SCCR at p 58). The trial judge went on to quote the following well-known passage from Walker and Walker on Evidence:

"If all the circumstances in combination – the strands in the cable – lead to a full and complete assurance of the fact in issue, an assurance or moral conviction which would induce a sound mind to act without doubt on the conclusions which it naturally leads, the fact in issue may be regarded as proved. If, on the other hand, there is a single proved circumstance which is incompatible with the fact in issue, then the proof of that fact fails" (1st edition at paragraph 9).

19.6 The submissions also cite the following passage from Dickson on Evidence in support of the proposition that the whole circumstances must point only to the incrimination of the accused:

"In criminal cases the verdict ought always to be on the side of mercy unless the jury are perfectly satisfied of the prisoner's guilt. It is not enough that his guilt be a rational and probable inference, as well as the most probable of several inferences,

from the circumstances. It must be the only rational hypothesis which they will bear. The evidence must be so clear and satisfactory and conclusive as to leave no rational doubt in the minds of the jury that the prisoner is guilty" (paragraph 98).

The Commission's response to Ground (1)

19.7 Although the submissions make reference to the Crown's written and oral arguments these arguments are relevant only to the extent that they were adopted by the court at appeal. The appeal court stated at paragraph 32 of its opinion:

"Before us, the advocate depute relied on three cases in support of two… propositions which he advanced. The first proposition was that in a circumstantial case it is necessary to look at the evidence as a whole. Each piece of circumstantial evidence does not need to be incriminating in itself; what matters is the concurrence of testimony. The second was that the nature of circumstantial evidence is such that it may be open to more than one interpretation, and that it was precisely the role of the trial court to decide which interpretation to adopt."

19.8 The appeal court went on at paragraph 33 to quote the passage from *Little* above. It then quoted the following passages from *Fox* and *Mack* at paragraphs 34 and 35 respectively:

"[It] is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view – which is the one that matters – the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard" (*Fox* at p 126E-F).

"There is nothing strange in discovering that circumstantial evidence may give rise to a number of possible inferences since that is one of the characteristics of evidence of that type. When presented with such evidence, the jury have to decide whether they draw the inference that the accused is guilty of the crime" (*Mack* at p 185).

19.9 The court concluded that these passages supported the propositions advanced by the advocate depute, "with which we did not understand Mr Taylor to take issue" (at paragraph 36).

19.10 In the Commission's view, the applicant's submissions misrepresent both the Crown's submissions at appeal and the court's attitude towards them. At no point did the Crown submit that a circumstantial *case* might be open to a number of interpretations; rather its submission was simply that adminicles of circumstantial *evidence* may each be open to more than one interpretation. Both *Little* and *Mack* (on which the Crown relied and to which the court referred) make it clear that in a purely circumstantial case the combination of facts and circumstances must amount to proof beyond reasonable doubt, a standard which in the Commission's view cannot reasonably be achieved where the evidence as a whole is open to a number of interpretations.

The submissions in respect of ground (2)

19.11 On behalf of the applicant it is submitted, citing Hume on Crimes, ii, 384-386, that there are several ways in which circumstantial evidence can be insufficient to entitle a jury to convict: first, when the circumstances, even when taken together, cannot be regarded as sufficiently incriminatory but are too ambiguous; secondly, when there is insufficient "aptitude and coherence" between the pieces of evidence (ie they lack the necessary probative force); and thirdly, when the facts relied on are too remote from the *facta probanda* and the inference sought cannot reasonably be drawn.

19.12 The submissions go on to state that it cannot be a subjective matter for the trial court to decide whether it considers the entire circumstances amount to a case against the applicant. There must be an objective standard whereby one can say that

the circumstances are so ambiguous, or lacking in probative force, that no reasonable jury could have convicted.

19.13 It is submitted in the application that the circumstances relied on to convict the applicant were as follows:

(i) The purchase of the items in Malta;
(ii) The presence of those items in the primary suitcase;
(iii) The identification of the applicant as the purchaser;
(iv) The unaccompanied bag from Malta;
(v) The applicant's movements under a coded passport at material times; and
(vi) His association with Edwin Bollier and others.

Items (i), (ii) and (iii): the purchase and the identification of the purchaser

19.14 It is accepted in the submissions that the first three items, taken together, suggest involvement in the early stages of the plan which led to the murder, but it is submitted that they are insufficient to suggest involvement in the murder. It might, it is said, have been different if the purchase had been of equipment used in making the bomb, or if it had been of something nefarious necessarily pointing to knowledge of the use to which it was intended to be put, or had been so closely related in time that involvement in the final stage of the plan could reasonably be inferred. However, that was not so. It is submitted that the trial court went too far when at paragraph 88 it drew the inference from the miscellaneous nature of the purchases that the applicant must have been aware of the purpose for which they were bought. To draw such an inference, it is said, is wholly unreasonable.

19.15 It is submitted that the inference drawn in respect of the applicant can be compared with the court's reluctance to draw a similar inference in respect of the co-accused. The court observed in this connection that even if it had accepted that the co-accused obtained the luggage tags, it would be going too far to infer that he was necessarily aware that they were to be used for the purpose of blowing up an aircraft. It is argued in the submissions that the same could be said about the purchase of the clothing.

Item (iv): the unaccompanied bag from Malta

19.16 It is pointed out in the submissions that the fact that the bomb was ingested at Luqa is inferred from evidence of an unaccompanied bag on flight KM180 from Malta to Frankfurt. This, it is submitted, heightens the significance to be attached to the applicant's presence in Malta on 7 and 20 to 21 December 1988, and to Mr Gauci's evidence. However, it is argued that there is no link between the applicant and the primary suitcase or between the primary suitcase and the suggested unaccompanied bag.

19.17 Further, it is pointed out that the evidence on which the court relied to infer that there was an unaccompanied bag came from the records at Frankfurt. The records at Luqa airport, it is submitted, directly contradict that evidence. The submissions argue that the court provided no reasons for preferring the Frankfurt evidence and claim that there is no evidential basis for such a preference. Indeed, it is submitted that there was positive evidence against the ingestion of the suitcase at Malta.

Item (v): the applicant's movements under a coded passport at the material times

19.18 According to the submissions the Crown case was very different from the basis on which the court eventually convicted the applicant. In the context of the Crown case, the applicant's presence at the airport and his use of a coded passport could, it is said, "amount to something". However, it is submitted that there "just was not the evidence to support the Crown case." According to the submissions the court somehow managed to maintain that the applicant's presence at Luqa airport was incriminatory, despite its rejection of much of the Crown evidence.

19.19 The submissions argue that in these circumstances the inference drawn by the court that the applicant was at Luqa in connection with the planting of the bomb was unreasonable (which the Commission has taken to mean unsupported by sufficient evidence). The submissions claim that according to the court's judgment the drawing of that inference appears to depend upon the absence of any alternative explanation.

Such an approach, it is said, is quite wrong, and inverts the onus of proof in that it suggests that the applicant required to show his innocence to prevent the court drawing an incriminatory inference.

The Commission's response to ground (2)

19.20 In the Commission's view, before one can determine the question of sufficiency in the present case one has first to establish the evidence to be taken into account.

19.21 It is clear that when one is addressing the question of sufficiency of evidence at the no case to answer stage, the Crown case must be taken "at its highest". The test to be applied in such circumstances is whether there was evidence which if accepted would be sufficient for conviction (see *Williamson v Wither* 1981 SCCR 214 and *R v Galbraith* [1981] 1 WLR 1039 at p 1042). In other words, it does not involve an assessment of the credibility and reliability of the evidence. In the present case, given the evidence of Abdul Majid Giaka ("Majid") and Edwin Bollier, it is understandable why a submission of no case to answer was not made on behalf of either accused at the close of the Crown's case.

19.22 Similarly, in the context of an appeal based on insufficient evidence the High Court will not assess the credibility and reliability of that evidence. Appeals based solely upon challenges to the credibility and reliability of evidence are properly considered under section 106(3)(b) of the Act which concerns the reasonableness of the verdict.

19.23 In the present case, however, because, uniquely for a trial under solemn procedure, one is aware of the evidence which was accepted and rejected, the Commission has considered only that evidence which the trial court did not expressly reject. Such an approach is consistent with that which is likely to have been taken by the appeal court had grounds relating to sufficiency been argued at the applicant's appeal:

"Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment" (at paragraph 369 of the appeal court's opinion).

19.24 The Commission is conscious that the nature of circumstantial evidence is such that there is a often a fine line to be drawn between determining whether as a whole it satisfies the requirements of legal sufficiency, and determining whether the weight that can reasonably be applied to each adminicle of evidence is strong enough to justify conviction. In cases which include direct evidence, legal sufficiency is satisfied where there is evidence from at least one other source which can support the direct evidence. However, the test for a wholly circumstantial case requires something more than just the presence of two relevant circumstances. It also requires some assessment of the weight of the evidence, a factor which is also important in any determination of the reasonableness of the verdict.

19.25 Bearing in mind this potential for overlap, in determining the question of sufficiency in the applicant's case the Commission has not sought to assess the court's approach to the reliability or credibility of each adminicle. It has also not sought to assess whether in light of any difficulties with particular strands of evidence it was open to a reasonable court, properly directing itself, to apply weight to the inference that most supports the Crown's case. In other words the Commission has not assessed the *quality* of each piece of evidence. The approach adopted by the Commission is to take at its highest the evidence which the trial court did not expressly reject and apply to this as a whole the principles set out in the passages in *Little*, Walker and Walker and Dickson quoted above.

19.26 Earlier in this chapter the Commission listed the circumstances on which it was submitted that the applicant's conviction is based. The Commission accepts that with the addition of the evidence about the explosive device, its location on board PA103 and the supply of MST-13 timers, those circumstances broadly encapsulate the evidence relied upon by the trial court.

19.27 Before dealing with the principal question as to whether the evidence accepted by the court was sufficient to warrant the applicant's conviction, it is necessary to address three other points made in this part of the application. The first is the suggestion that the evidence accepted by the trial court does not establish any direct link between the applicant and the primary suitcase, or between the primary suitcase and the unaccompanied item transferred from KM180 to PA103A. In the Commission's view, it is not necessary to establish direct links between particular strands of the evidence. Rather, what one must do is to consider all the circumstances together, which may or may not allow indirect links to be drawn. In relation to the applicant and the primary suitcase there is, for example, an indirect link via the purchase of the clothing (see below).

19.28 The second point that requires to be addressed is the submission that the trial court went too far in drawing the inference from the miscellaneous nature of the items purchased from Mary's House that the applicant must have been aware of the purpose for which they were bought. What the trial court said at paragraph 88 of its judgment was:

> *"If he was the purchaser of this miscellaneous collection of garments, it is not difficult to infer that he must have been aware of the purpose for which they were being bought."*

19.29 This passage appears shortly after the court makes reference to the applicant's visit to Malta on a coded passport between 20 and 21 December 1988. In the Commission's view, what the trial court is saying here is that, assuming the applicant purchased the items, the facts that these were established to have been within the primary suitcase and that he was at the airport two weeks later when flight KM180 took off allow it to draw the inference that he must have been aware of the purpose for which the items were being bought. The Commission considers the evidence in this respect is sufficient to permit such an inference. In the Commission's view, the trial court should not be taken in the above sentence to be saying that the miscellaneous nature of the purchases is sufficient in itself to infer that the applicant must have been aware of the purpose for which the items were being bought.

19.30 The third point is the submission that, notwithstanding the trial court's rejection of much of the Crown evidence, it still somehow managed to infer that the applicant's presence at Luqa airport was incriminatory. It is submitted that according to the judgment the drawing of this inference appears to depend on the absence of any alternative explanation. Such an approach, it is said, inverts the onus of proof in that it suggests that the applicant required to show his innocence to prevent an incriminatory inference from being drawn.

19.31 The relevant passage in paragraph 88 is as follows:

> *"It is possible to infer that this visit* [to Luqa airport] *under a false name the night before the explosive device was planted at Luqa, followed by his departure for Tripoli the following morning at or about the time the device must have been planted, was a visit connected with the planting of the device. Had there been any innocent explanation for this visit, obviously this inference could not be drawn. The only explanation that appeared in the evidence was contained in his interview with Mr Salinger, when he denied visiting Malta at that time and denied using the name Abdusamad or having had a passport in that name. Again, we do not accept his denial."*

19.32 In the Commission's view, what the trial court is saying in the first two sentences of the above passage is that it is possible to draw the inference that the applicant's visit to Luqa on 20 and 21 December was in connection with the planting of the explosive device, but that it would not have been possible to do so had an innocent explanation been given for the visit *which the court found acceptable*. The court goes on to say that it does not accept the applicant's denial that he visited Malta at that time, as stated by him in the Salinger interview. In the Commission's view, the court did not conclude that the applicant was at Luqa in connection with the planting of the explosive device simply on the basis that there was no innocent explanation for his visit. It did, of course, come to that conclusion, but it did so on the basis of all the circumstances as narrated in paragraph 89 of the judgment. Accordingly, in the Commission's view, there was no inversion of the onus of proof by the court.

19.33 The main question at issue is whether the evidence not rejected by the trial court, when taken at its highest, supports the inference, beyond reasonable doubt, that the applicant was guilty of murder. A brief indication of the evidence taken into account by the Commission in assessing this issue is given above. A fuller summary is contained in chapter 2.

19.34 In the Commission's view, it was proved at trial that PA103 was destroyed by an explosive device contained in a Toshiba RT-SF16 radio cassette recorder; that a single solder-masked MST-13 timer triggered the explosion; that the explosive device was in an unaccompanied suitcase held in container AVE 4041 within the cargo hold of the aircraft; and that the suitcase contained items which matched many of those purchased from Mary's House on the occasion described by Mr Gauci.

19.35 As regards the evidence about an unaccompanied bag from Malta, there is, in the Commission's view, a clear inference from the documentary records at Frankfurt that an unidentified, unaccompanied item travelled on KM180 and was loaded on PA103A at Frankfurt. Most of the baggage unloaded from PA103A was placed in container AVE 4041 which it was established held the primary suitcase. The Commission accepts that there is an absence of any explanation of the method by which the primary suitcase might have been placed on board flight KM180. In the Commission's view, however, the absence of such an explanation can at most be seen as a failure to prove one circumstance; it ought not to be seen as a single proved circumstance which is incompatible with the fact at issue and which results in a failure to prove that fact (see Walker and Walker, quoted above).

19.36 In the Commission's view, the latter analysis would have been correct only if evidence had been led and accepted that it was not possible for an unaccompanied bag to have been put on at Luqa undetected. As the trial court noted at paragraph 38 of its judgment, however, Wilfred Borg, the Air Malta general manager for ground operations at Luqa at the time, conceded that such a scenario might not be impossible. That being the case, the Commission does not consider it appropriate to ask in isolation whether the documentary evidence from Frankfurt can be accepted in preference to the conflicting evidence from Luqa airport. In a wholly circumstantial case such conflicting pieces of evidence must be considered in light of all the other

circumstances. In that regard, the Commission considers that evidence that clothing found to have been inside the primary suitcase was purchased in Malta some time before the bombing is capable of lending support to the Frankfurt evidence.

19.37 As regards the identification of the applicant as the purchaser of the items, Mr Gauci said in evidence that the purchaser was a Libyan who resembled the applicant "a lot". A combination of two circumstances are relevant to that identification: (i) the evidence that the purchase took place on 7 December 1988; and (ii) the evidence that on that date the applicant was not only in Sliema but staying in a hotel close to Mr Gauci's shop.

19.38 In relation to circumstance (i), Mr Gauci said that the purchase must have been about a fortnight before Christmas in 1988, that it was a midweek day, that to him midweek means Wednesday and that the Christmas decorations were being put up. His brother, Paul Gauci, had gone home to watch football on television and it was agreed by joint minute number 7 that on 23 November and 7 December 1988 there was live football broadcast by Italian Radio Television. While the weather conditions on 23 November 1988 as spoken to by Major Joseph Mifsud were consistent with Mr Gauci's evidence that a light shower occurred between 6.30pm and 7.00pm on the date of purchase, Major Misfud did not rule out the possibility that there was a brief light shower on 7 December. It was argued on behalf of the applicant at appeal that, taken together, Major Mifsud's evidence that the rain which might have fallen in Sliema on the evening of 7 December would not have been sufficient to wet the ground, and Mr Gauci's statement of 10 September 1990 in which he said that the ground was damp at the time of purchase, ruled out 7 December as the purchase date. In the Commission's view, however, taking the Crown case at its highest Major Mifsud did not express himself with sufficient certainty on this point to justify the exclusion of 7 December. Because of this the Commission does not consider that his evidence amounts to a single proved circumstance which is incompatible with the fact at issue (Walker and Walker, quoted above).

19.39 In the Commission's view, leaving aside any assessment of the *quality* of the evidence relied upon by the court to establish the date of purchase, there was sufficient in the above factors for it to reach the conclusion that the purchase took

place on 7 December 1988. Although the appeal court held that the trial court had misinterpreted the terms of joint minute number 7, in the Commission's view, given that there was no evidence that football was broadcast on television in Malta on any other dates in November or December 1988, the court was entitled to reach the view that the matches Paul Gauci had watched were shown on 23 November and 7 December 1988. Viewed in the context of a choice between those dates, Mr Gauci's evidence that the purchase must have been about a fortnight before Christmas points more to 7 December than to 23 November. His evidence that the Christmas lights were being put up at the time is also not inconsistent with 7 December 1988. Although evidence as to the weather conditions points more to 23 November than to 7 December, Major Mifsud did not rule out the possibility that the conditions described by Mr Gauci were present on the latter date.

19.40 As regards circumstance (ii), there is evidence that from 7 to 9 December 1988 the applicant stayed at the Holiday Inn, Sliema, which was approximately 200-250 yards from Mary's House.

19.41 In relation to the events on 20 and 21 December 1988, there is documentary evidence that the applicant arrived at Luqa airport at about 5.30pm on 20 December using a coded passport in the name of Abdusamad and that he stayed overnight in the Holiday Inn, Sliema, using that name. He left Malta on 21 December, again using the coded passport, and was at Luqa airport at a time when the passengers and luggage for flight KM180 from Luqa to Frankfurt were being checked in. As indicated, the Commission considers that when combined with Mr Gauci's identification of the applicant as the purchaser and the adminicles in support of 7 December 1988 as the purchase date, evidence of the applicant's movements on 20-21 December 1988 using a passport in a false name is sufficient to infer that he was aware of the purpose for which the items were being bought.

19.42 Majid gave evidence that the applicant was the head of the airline security section of the JSO until January 1987 and that Ezzadin Hinshiri, Said Rashid and Nassr Ashur were the heads of the various departments at the JSO in 1985. In addition to his using his coded passport on 20 and 21 December 1988, he had done so in August 1987 when he travelled on the same flight as Nassr Ashur, who was also

travelling on a coded passport. There was evidence that between 1985 and 1986 Mr Bollier supplied 20 samples of MST-13 timers to the Libyan military, where he dealt with, among others, Mr Hinshiri, Mr Rashid and Mr Ashur. He also gave evidence that in 1988 Mr Bollier's firm, MEBO, rented an office in its premises to ABH, a firm in which the applicant was a principal. Although none of this evidence demonstrates criminal conduct on the part of the applicant, it does establish his association with the individual who produced timers of the kind which triggered the explosion on board PA103. It also establishes his association with figures in the Libyan military and intelligence services who received a quantity of such timers in the years prior to the bombing. Mr Bollier's evidence also suggested that the applicant was involved in military procurement on behalf of the Libyan government.

19.43 In summary, the applicant, a Libyan, was identified, albeit by resemblance, as the person who purchased items found to have been inside the primary suitcase. There was evidence that the purchase took place on 7 December 1988, a date on which the applicant was in Malta staying at a hotel close to Mary's House. The applicant flew into Luqa airport on the night before the bombing and the following day returned there at a time when KM180 was checking in. Based on the Frankfurt evidence and the Maltese origin of the clothing, there was sufficient evidence to conclude that the primary suitcase was placed on board that flight. The applicant flew out of Luqa airport that morning and on both flights used a passport which was in a false name and which he never used again. He had a business relationship with Mr Bollier who sold electronic equipment to Libyan military representatives, including timers of the type which was used to trigger the explosion on board PA103. There was also evidence that he was or had been a senior member of the Libyan intelligence service and that he associated with the Libyan officials who procured the timers from Mr Bollier.

19.44 In the Commission's view, the circumstances set out above (which are those set out in paragraph 89 of the trial court's judgment), when taken at their highest, are sufficient to entitle a court or jury to be satisfied beyond reasonable doubt that the applicant was the purchaser of the items in the primary suitcase, was aware of the purpose for which these were bought, and that his visit to Malta on 20 to 21 December was connected to the ingestion of the device at Luqa airport. The Commission

believes that the coincidence of the applicant's connection to each of the various strands imbued the evidence as a whole with sufficient aptitude and coherence to justify his conviction.

19.45 For these reasons the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 20
SUBMISSIONS REGARDING
THE REASONABLENESS OF THE VERDICT

Introduction

20.1 It is alleged in the submissions that the trial court's approach to the following aspects of the evidence was unreasonable:

(1) the "Libyan assumption";
(2) the provenance of the primary suitcase;
(3) Edwin Bollier;
(4) Abdul Majid Giaka ("Majid");
(5) the rejection of the defence case; and
(6) the identification of the purchaser.

20.2 The Commission's conclusions in respect of items (1) to (5) are set out below after a summary of the applicable law. Item (6) forms part of the Commission's decision to refer the applicant's case and is therefore addressed in chapter 21. Additional submissions made in respect of the court's approach to evidence of the applicant's movements on 20 to 21 December 1988 are also taken into account in that chapter.

The applicable law

20.3 The current powers of the appeal court in relation to unreasonable verdict are contained in section 106(3)(b) of the Act which provides for an appeal on the ground of a miscarriage of justice based on the jury's having returned a verdict which no reasonable jury, properly directed, could have returned. The applicant did not rely on this provision at appeal.

20.4 In *King v HMA* 1999 SCCR 330, the first case to be heard under the new provisions, it was held that the test to be applied under section 106(3)(b) was

objective in that the court must be able to say that no reasonable jury *could* have returned a guilty verdict on the evidence before them. An appellant who relies on section 106(3)(b) must therefore establish that, on the evidence led at the trial, no reasonable jury could have been satisfied beyond reasonable doubt that he was guilty (Lord Justice General (Rodger) at pp 333-334). Although in dealing with such appeals the court is required to examine the evidence which was before the jury, in terms of *King* it is not for the court simply to substitute its view of that evidence for the view which the jury took. In particular, a miscarriage of justice is not identified simply because, in any given case, the court might have entertained a reasonable doubt on the evidence (Lord Justice General (Rodger) at p 334).

20.5 Earlier legislation (see Criminal Appeal (Scotland) Act 1926 section 2(1)) contained similar provisions to section 106(3)(b). However, the Commission is conscious that the court has always been reluctant to allow an appeal on such a ground, taking the view that the assessment of evidence, and particularly of its weight, is a matter for the jury. The approach frequently taken by the court is that if evidence is capable of giving rise to two or more possible inferences, it is for the jury to decide which inference to draw, and that intervention is appropriate at appeal only where the inference was not a possible one in the sense that it was not open to the jury on the evidence. This was the approach taken by the appeal court in the applicant's case (see the opinion of the court at paragraph 25).

20.6 In *E v HMA* 2002 SCCR 341, however, the decision in which was issued during the hearing of the applicant's appeal, a somewhat different approach was taken. The appellant in *E* was charged with raping his daughter L between 1993 and 1995 and his daughter A between 1996 and 1997. The Crown relied on the *Moorov* doctrine for corroboration. There were inconsistencies in the various statements that the complainers had made and in their evidence. In particular, A had made no complaint until about six months after the alleged incident, when she was interviewed because of a complaint L had made. At that stage A denied that the appellant had penetrated her, but she was interviewed again after her mother had told the social work department that she had incriminated the appellant. At that interview A initially denied that the appellant had penetrated her, but then incriminated him. She also incriminated him in her evidence, but there were discrepancies between what she said

at interview and in evidence. There was no medical evidence of penetration, which she said had occurred when she and the appellant were lying on their sides. Evidence was led at trial that many children who have been the subject of abuse show no evidence of damage, and that a child may give different accounts on different occasions consistently with her evidence being reliable. The appellant was convicted of raping both girls. He appealed on the basis of, *inter alia*, section 106(3)(b).

20.7 In upholding the appeal on the above ground, the Lord Justice Clerk (Gill) reviewed the court's approach to appeals on the ground that a jury's verdict was unreasonable. In particular the Lord Justice Clerk was of the view that whatever may have been the law before 1997 when the current provisions were introduced, the court ought to interpret section 106(3)(b) "on the basis that it effected a change" (paragraph 28). In his opinion, the new provisions recognise that "even in a well-run system unreasonable verdicts can happen from time to time".

20.8 Although the decision in *E* does not overturn the rule that it is not for the High Court at appeal simply to substitute its view of the evidence for the view taken by the jury, the Lord Justice Clerk observed that "we cannot now regard the issue of reasonable doubt as being at all times within the exclusive preserve of the jury" (paragraph 29). The Lord Justice Clerk added that the collective experience of the appeal court in criminal jury trials, as counsel and as presiding judges, equips it to make a judgment about whether the jury's verdict was reasonable, and that the court should bring that experience to bear on that question "rather than interpret section 106(3)(b) out of existence by excessive deference to the judgment of the jury" (paragraph 35). Clearly in the applicant's case the "jury" comprised judges, but in the Commission's view the principles expressed by the Lord Justice Clerk apply equally to judges where they take the role of finders in fact. He also stated:

> *"[T]he court must certainly keep in mind that the jury heard and saw the witnesses, and the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in these respects"* (paragraph 31).

20.9 The Lord Justice Clerk sought also to distinguish the circumstances that prevailed in the case before him from those in *King* and *Donnelly v HMA* 2000 SCCR 861. In respect of *King* the jury had reached its verdict on an assessment of two irreconcilable lines of evidence, namely medical evidence establishing that the victim must have died before a certain time and eyewitness evidence that the victim had been seen alive after that. This, the Lord Justice Clerk said, was a classic jury question. He stated that *Donnelly* was to similar effect, whereby the defence evidence simply presented an alternative version of the facts. However, he described the case before him as a "case where the jury, before even looking at any competing version of the facts, had to consider the preliminary difficulties created by the evidence of the complainers themselves" (paragraph 33), adding:

> *"This case is quite unlike those under section 106(3)(b) that the court has had to consider hitherto. This was a case where, by reason of the Moorov doctrine, [A's] evidence underpinned the entire prosecution. [A's] credibility and her reliability were therefore crucial. We have to decide whether her evidence, looked at in the whole context that Lord McCluskey has described, could have provided a reasonable basis for a verdict of guilty beyond reasonable doubt"* (paragraph 37).

20.10 The court held (Lord Hamilton dissenting) that standing the contradictions in A's evidence; the contradictions between the statements at the two interviews; the contradictions between the account eventually given at the second interview and her evidence; her age; the alleged positions of the child and the appellant when the penetration was said to have occurred; and the complete absence of any signs on medical examination of any degree of penetration, no reasonable jury could hold that her evidence that she had been sexually penetrated was reliable, even if they thought she was trying to tell the truth in court (Lord Justice Clerk at paragraphs 40-44; Lord McCluskey at paragraph 37). Indeed, it was observed that there was no acceptable evidence that A was raped at all (Lord Justice Clerk at paragraph 41; Lord McCluskey at paragraph 35).

20.11 In the present case submissions are made about the trial court's treatment of the six different aspects of the evidence listed above and in each instance it is argued that the court's approach was unreasonable. Given the way the application has been

set out, the Commission has, for the purpose of clarity, addressed the submissions about the court's treatment of each part of the evidence, and it has commented on individual submissions where it has considered that to be necessary. The Commission recognises, however, that any finding under section 106(3)(b) must be based upon the evidence not rejected by the trial court taken as a whole. The issues dealt with in this chapter are those which the Commission does not consider warrant a reference under that section, even in light of its conclusions in chapter 21 below.

(1) The "Libyan Assumption"

Summary of the submissions

20.12 The applicant's submissions under this heading can be summarised as follows:

(i) There was no evidence from which the trial court might reasonably have assumed that the Libyan Government and its agencies were involved in terrorist activities generally, or that the Libyan Government or the JSO had the means and intention to destroy PA103 in particular. The court nevertheless made those assumptions, which provided a context in which it could interpret certain actions as nefarious (for example, the applicant's use of a coded passport), and it extended the assumptions it made about Libya (the state) to a Libyan national (the applicant), so that circumstances that were not "accused-specific" (for example, the supply of MST-13 timers to Libya) were taken to be evidence implying the applicant's involvement.

(ii) Mr Gauci's identification of the purchaser as a Libyan, taken in isolation, does not lead to a necessary inference that the plot was Libyan in origin. Yet the court joined that link to Libya with the evidence that the vast majority of MST-13 timers that MEBO produced were supplied to Libya, and concluded that "the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin". This was a "gigantic leap" in reasoning. The identification of the purchaser as Libyan does not incriminate the applicant, nor is it suggestive of the involvement of the Libyan

Government. Similarly, the supply of MST-13 timers to Libya does not incriminate the Libyan Government.

Consideration

20.13 In the Commission's view it is not entirely correct to say that there was no evidence from which the trial court might reasonably have inferred that the Libyan Government or its agencies were involved in terrorist activities generally. Leaving aside the evidence of Majid on this matter (which the court rejected) and the circumstances surrounding the arrest of a JSO officer, Mansour Omran El Saber, in Senegal on 20 February 1988 (which the court did not consider established a link between that individual and an MST-13 timer and explosives recovered on the same occasion) there was evidence that the PFLP-GC had "contacts to Libya" (Anton Van Treek: 71/8741).

20.14 As to whether the Libyan Government or the JSO had the means and intention to destroy PA103, there was evidence that an order for MST-13 timers, the kind used to trigger the explosion, had been received by Mr Bollier from a senior official in the JSO and that a substantial quantity of such timers were supplied to the offices of the Libyan secret service in Tripoli and to the Libyan Embassy in East Berlin during the course of 1985 and 1986 (23/3760-3761). There was also evidence that a quantity of clothing which matched items established to have been within the primary suitcase was purchased by a Libyan who closely resembled the applicant. In addition, there was evidence that the applicant was head of the airline security section of the JSO until January 1987.

20.15 The relevant part of the judgment is paragraph 82, where the court concluded that "the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin." This was based upon a number of circumstances including those described in the foregoing paragraph. The question raised by the submissions is whether the court's conclusion in this respect was one which no reasonable court could have reached upon the available evidence.

20.16 In the Commission's view taking into account the evidence about the random nature of the items purchased from Mary's House; that many of them were established to have been in the primary suitcase; that they were purchased by a Libyan; that a substantial number of MST-13 timers had been sold to Libya and that an unaccompanied item was transferred from KM180 to PA103A, it was not unreasonable to conclude, first, that the unaccompanied item was the primary suitcase and, secondly, that the plot was of "Libyan origin." This is not to say necessarily that the plot was hatched by the organs of the Libyan Government but simply that the plot originated in Libya. The Commission also does not consider this to have been an unreasonable context in which to consider the evidence implicating the applicant.

(2) The provenance of the primary suitcase

Summary of the submissions

20.17 According to the submissions the trial court gave no reasons in respect of:

(i) why it preferred the conclusion that the bomb was ingested at Luqa;

(ii) why it rejected the other possible points of ingestion suggested by the defence; and

(iii) its conclusion that the Crown had overcome the difficulty that there was no evidence as to how the primary suitcase was loaded on flight KM180 at Luqa.

Consideration

20.18 It is clear that in establishing that the primary suitcase began its journey at Luqa airport the trial court took into account the inference from the Frankfurt records that an unaccompanied, unidentified item had been transferred from flight KM180 (from Malta to Frankfurt) to PA103A (from Frankfurt to London Heathrow). In terms of paragraph 35 of the judgment, however, the court considered that this evidence required to be considered along with all the other evidence before a conclusion could be reached as to the point of ingestion. The court went on to consider the security

arrangements at Luqa airport and concluded that the absence of any explanation as to the method by which the primary suitcase might have been placed on board KM180 was a "major difficulty" for the Crown case and one which had to be considered along with the rest of the circumstantial evidence in the case.

20.19 Having considered the evidence establishing the possible involvement on the part of both accused, the trial court concluded at paragraph 82 that "from the evidence we have discussed so far, we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow." In reaching that conclusion the court appears to have relied on the following additional circumstances:

- the evidence that with one exception the clothing in the primary suitcase was purchased in Mr Gauci's shop on 7 December 1988;

- Mr Gauci's evidence that the purchaser of the clothing was Libyan; and

- evidence that the trigger for the explosion was an MST-13 timer, a substantial quantity of which had been supplied to Libya.

20.20 The trial court's approach to this aspect of the evidence was considered by the appeal court, although not specifically in the context of an argument based on section 106(3)(b). The court's conclusion was that although paragraph 82 of the judgment did not set out matters in the best order, the trial court had nevertheless disposed of the outstanding issues. The court added:

> *"What the trial court can be seen to have undertaken* [in paragraphs 16–82] *was the task of deciding what weight to attach to any particular piece of evidence or body of evidence which it accepted, which was precisely its function as a trial court. Once it had done that, it was open to it to decide that the primary suitcase began its journey at Luqa, notwithstanding the difficulty of infiltration there and the absence of any evidence about how this was achieved, because of the view it had formed about the strength of the inference which it drew from the documents*

and other evidence relating to Frankfurt, and the other circumstances which it regarded as criminative and which pointed to infiltration at Luqa" (paragraph 274).

20.21 The appeal court also addressed the argument that by assessing the question of ingestion at Luqa in the light of Mr Gauci's evidence and the evidence of the supply of MST-13 timers to Libya, the trial court had taken into account collateral issues (ie issues of no relevance to the question of whether the suitcase was ingested there). In response to that argument the Crown submitted that the JSO had a presence at Luqa airport and that several high ranking members of that organisation had placed an order for MST-13 timers, a number of which had been delivered. According to the Crown this meant that there was a link between the JSO and Luqa airport and between the JSO and the type of device used to cause the explosion.

20.22 The appeal court held that the trial court was entitled to regard evidence that the purchaser of the clothing was a Libyan and that the trigger was an MST-13 timer as part of the circumstances relevant to proving the Maltese origin of the primary suitcase. In the appeal court's view it was not necessary in a circumstantial case that every piece of material evidence should be indicative of criminal conduct, and those matters could have been regarded as collateral only if they could not on any view have been relevant to the proof of the provenance of the primary suitcase, which was clearly not so (paragraph 257).

20.23 In the Commission's view paragraph 82 of the court's judgment does not make it clear how the identification of the purchaser as Libyan and the supply of MST-13 timers to that country assist in establishing Luqa as the point of ingestion. However, as the Crown submitted at appeal, it seems likely that this was based upon evidence that the initial order for such timers was made by senior officials within the JSO and that that organisation had a presence at Luqa airport in the form of the assistant station manager of LAA.

20.24 In the Commission's view, however, a reasonable trial court, properly directed, could have concluded that Luqa airport was the point of ingestion simply on the basis of the Frankfurt records and the undisputed evidence that many of the items

established to have been within the primary suitcase were purchased in Malta. In reaching this view the Commission has taken into account Mr Borg's evidence to the effect that, though improbable, it might not have been impossible for a bag to be introduced undetected into the baggage system at Luqa. Although the Commission's finding on this issue represents a departure from the reasoning employed by the trial court, it is consistent with the objective approach to section 106(3)(b) as described by the court in *King* and in particular with the need to consider the reasonableness of the court's *verdict* as opposed to its written judgment. In light of its conclusion the Commission does not consider it necessary to assess whether the identification of the purchaser as Libyan and the supply of MST-13 timers to Libya are factors which a reasonable court could have taken into account in determining the point of ingestion.

(3) The evidence of Edwin Bollier

Summary of the submissions

20.25 The applicant's submissions under this heading can be summarised as follows:

(i) In general terms, Mr Bollier was such a fantastic witness that no reasonable jury ought to have convicted in reliance on his evidence unless this was corroborated. In certain cases a witness can be so incredible and unreliable that his evidence ought to be removed from a jury, and Mr Bollier was such a witness. The trial court was wrong to conclude that the absence of any challenge to certain aspects of Mr Bollier's evidence implied an acceptance of these by the defence. In addition, while the court indicated that it was prepared to accept Mr Bollier's evidence when *inter alia* it was supported by other sources, in some cases the court did not adhere to this approach.

(ii) The applicant's association with Mr Bollier was very weak and did not justify an inference that he was in any way connected to the supply of items used in the destruction of PA103.

(iii) Although there is evidence that MEBO supplied timers to the Libyan Government, there was no evidence that the applicant was involved in the purchase of timers. For this reason the court's reliance on the applicant's association with Mr Bollier and members of the JSO or Libyan military who purchased MST-13 timers was unwarranted.

Consideration

20.26 The trial court explained at paragraph 49 of its judgment that, despite finding Mr Bollier at times an untruthful and at other times an unreliable witness, it accepted certain parts of his evidence when this "has not been challenged and appears to have been accepted, or where it is supported from some other acceptable source." The evidence accepted by the court can be summarised as follows:

(a) Mr Bollier had had military business dealings in relation to the Libyan Government with Ezzadin Hinshiri ("Hinshiri") since the early 1980s and in about July 1985, on a visit to Tripoli, he received a request for electronic timers from Said Rashid ("Rashid") or Hinshiri;

(b) in the summer of 1985, Mr Bollier delivered two prototype MST-13 timers to the Stasi in East Berlin;

(c) in 1985 and 1986 Mr Bollier supplied 20 sample MST-13 timers to Libya in three separate batches and may have been correct when he said in evidence that this order consisted of circuit boards which were solder-masked on one side and on both;

(d) in 1986 or 1987 Mr Bollier attended tests carried out by the Libyan military involving MST-13 timers which were brought by Nassr Ashur;

(e) MEBO rented an office to ABH, a company of which the applicant and Badri Hassan ("Hassan") were principals, and the applicant and Hassan explained to Mr Bollier that they might be interested in taking a share in or having business dealings with MEBO; and

(f) Mr Bollier visited Tripoli between 18 and 20 December 1988 in order to sell a quantity of Olympus timers to the Libyan army.

20.27 It is acknowledged in the submissions that there is no authority for the proposition that a witness can be so incredible and unreliable that his evidence ought to be removed from a jury. Indeed, such a submission may run counter to the principle that a fact-finder is entitled to reject parts of a witness's evidence and accept other parts. Further, although a decision by the Crown or defence not to challenge a witness on a particular matter at trial is not necessarily to be taken as an acceptance of that matter (*King* at p 342), it may nevertheless affect the weight and value which the fact-finder places on the evidence of such a witness (see *McPherson v Copeland* 1961 JC 74; *Young v Guild* 1985 JC 27).

20.28 In relation to the court's acceptance that MEBO had business dealings with the Libyan Government since the 1980s and received a request for electronic timers from Rashid or Hinshiri in about July 1985, the Commission notes that both Mr Bollier and Mr Meister spoke to this in evidence. When Mr Meister was shown photographs of Rashid and Hinshiri (CP 313 image 11, photograph 14; and image 19, photograph 20), he identified the photographs as looking like the two men. Evidence that MEBO received an order for electronic timers in July 1985 is supported by the orders for circuit boards which MEBO placed with Thuring AG in August and October 1985. In evidence Astrid Thuring spoke to the order card relating to an order that MEBO placed with Thuring on 13 August 1985 for 20 MST-13 circuit boards (CP 402, photograph 2-575). She stated that, according to a delivery note (CP 319, image 1), Thuring supplied 24 such circuit boards on 16 August 1985. In addition, she spoke to the order card relating to an order that MEBO placed with Thuring on 8 October 1985 for 35 MST-13 circuit boards (CP 402, image 208). According to a further delivery note (CP 400, image 1), Thuring supplied 34 such circuit boards on 5 November 1985.

20.29 The Commission notes that no documentary evidence was led at trial that directly vouched Mr Bollier's evidence about the supply of MST-13 timers to Libya (although Mr Meister understood that Mr Bollier had personally delivered these in

1985: 22/3741). Accordingly, it seems that the court was prepared to accept Mr Bollier's evidence on this issue on the basis that it had not been challenged and appeared to have been accepted by the defence. Although the Commission recognises that any assessment of the reasonableness of the verdict must proceed purely on the evidence before the trial court (*King*; *Campbell v HMA* 1998 SCCR 214), the account given to the defence by Hinshiri is of assistance in understanding why no such challenge was made. In his defence precognition (see appendix) Hinshiri confirmed that he had ordered a quantity of MST-13 timers and that these had subsequently been delivered to him. A similar account was given by him when questioned by the Scottish police in Libya on 30 October 1999 (see appendix).

20.30 As to Mr Bollier's evidence that he delivered two prototype MST-13 timers to the Stasi in East Berlin in the summer of 1985, the Commission does not consider that the court's acceptance of this can assist in any argument under section 106(3)(b). His evidence on this issue potentially undermined the Crown case and was used by the defence in seeking to establish an alternative to Libya as the source of MST-13 timers (80/9575).

20.31 Mr Bollier's evidence as to the tests involving MST-13 timers carried out by the Libyan military was that these took place at a military camp in Sabha, and that several high ranking military personnel, including Nassr Ashur, were also present. Mr Bollier said that he was there for two days and that he thought it was in 1987. He saw about four MST-13 timers at that time, which he believed had been taken there by Nassr Ashur. When he was shown a photograph of Nassr Ashur (CP 413, image 1) he identified this as looking like him.

20.32 The court's basis for accepting this aspect of Mr Bollier's account was "the way he gave evidence" about the matter. This amounted to a departure from the criteria the court had applied in respect of other aspects of Mr Bollier's evidence which had been accepted where they had not been challenged or where they were supported by some other acceptable source. It is not clear from the judgment precisely what it was about the way in which Mr Bollier gave evidence on this issue that impressed the trial court, but in the Commission's view his account is detailed and precise and therefore unlikely to have been fabricated. In light of this the

Commission does not consider that Mr Bollier's evidence regarding the testing was such that no reasonable trial court could have accepted it.

20.33 The court also accepted Mr Bollier's evidence that MEBO rented an office to ABH, a company in which the applicant and Hassan were principals, and that the applicant and Hassan expressed an interest in taking a share in MEBO. It was not disputed by the defence that the applicant, along with Hassan, was a principal of ABH. Moreover, the fact that ABH rented premises from MEBO is vouched by the existence of an unsigned lease between the firms dated 3 June 1987 (DP 35, images 1 and 2); a receipt for rent received by MEBO from Hassan dated 3 March 1988 (CP 378); and a rental cheque from Hassan to MEBO dated 20 February 1989 (CP 376, item 1). That there was an intention that the two firms would do business together is vouched by an unsigned contract dated 31 June 1987 which envisaged that ABH would act as distributor for MEBO's products in Libya (CP 328).

20.34 There was also other documentary evidence vouching the association between the applicant and MEBO. Mr Meister spoke to a telex he sent to the applicant dated 2 April 1988, in which he complained about several occasions when the Libyans had failed to make payments and about difficulties he had had contacting the applicant (DP 16, document 21). He spoke also to a telex that he sent to the applicant dated 16 October 1987, which related to invoices for payments owed by ABH and by Hinshiri (DP 16, document 30). In addition, Mr Meister accepted in evidence the terms of a statement from MEBO to Hassan dated 5 August 1989 which detailed the costs of renting the office from MEBO and the use of the telex facility there (DP 16, document 12).

20.35 In relation to the court's acceptance that Mr Bollier travelled to Tripoli on 18-20 December 1988 in order to sell 40 Olympus timers to the Libyan army, the initial purchase of these timers by Mr Bollier was vouched by invoices. In particular he spoke to the invoice for 16 timers dated 5 December 1988 (CP 321, image 1) and a further invoice dated 15 December 1988 in respect of the remaining 24 timers which he had purchased separately (CP 321, image 2). Mr Bollier's visit to Tripoli was vouched by his airline ticket, which was issued on 16 December for travel on 18 December (CP 317, image 2). His account that Hassan had placed the order for 40

MST-13 timers at the end of November or start of December 1988 was vouched by Mr Meister who spoke to Mr Bollier taking the timers to Tripoli, from where he contacted Mr Meister and asked him to get in touch with Hassan. Although there was no evidence to vouch Mr Bollier's account of events when he was in Tripoli the court declined to draw the adverse inference suggested by the Crown in this connection (paragraph 46).

20.36 In summary, as much of the evidence given by Mr Bollier which the trial court deemed acceptable was supported by documentary and other evidence the Commission does not consider that the court's approach to it can be criticised. In the Commission's view the court was also entitled to accept those aspects of his evidence noted above for which there was no such support.

20.37 A further question concerns the inferences that the trial court drew from those aspects of Mr Bollier's evidence it accepted (see points (ii) and (iii), above). These were as follows:

> *"He* [the applicant] *also appears to have been involved in military procurement. He was involved with Mr Bollier, albeit not specifically in connection with MST timers, and had along with Badri Hassan formed a company which leased premises from MEBO and intended to do business with MEBO*" (paragraph 88).

20.38 As noted above, in listing what it considered to be the criminative circumstances against the applicant, the court included his "association with Mr Bollier and with members of the JSO or Libyan military who purchased MST-13 timers" (paragraph 89).

20.39 In the Commission's view, given the evidence the court accepted, those inferences cannot be said to be unreasonable. It is true that there is no evidence of any direct connection between the applicant and the supply or purchase of timers and that his associations with Mr Bollier and members of the Libyan military are not in themselves indicative of his involvement in the crime. In the Commission's view, however, they were relevant background circumstances on which the trial court was entitled to rely.

(4) The evidence of Majid

Summary of the submissions

20.40 The Commission understands the applicant's submissions under this heading to be as follows:

(i) The trial court rejected Majid's evidence in all respects except his description of the organisational structure of the JSO and its personnel, but given his utter lack of credibility and reliability, the court's acceptance of his evidence, even to that limited extent, was unreasonable. In order to accept this part of Majid's evidence the court would require to have had some distinct rationale for doing so, which it did not have.

(ii) The court, in accepting Majid's evidence to the extent that it did, overlooked the limited terms of that evidence.

Consideration

20.41 The aspects of Majid's evidence which the court was prepared to accept are as follows:

(a) In 1984, Majid joined the JSO where he was initially employed in its vehicle maintenance department.

(b) In December 1985, he was appointed as assistant to the station manager of LAA at Luqa airport. In that year, the director of the central security section of the JSO was Hinshiri, the head of the operations section was Rashid, the head of special operations in the operations department was Nassr Ashur and the head of the airline security section was the applicant until January 1987 when he moved to the strategic studies institute.

(c) The co-accused was the station manager for LAA at Luqa from 1985 until about October 1988.

20.42 It is acknowledged in the submissions that a fact-finder is entitled to accept certain parts of a witness's evidence and reject others. In principle, then, the court's approach cannot be criticised. However, the issue is whether the court's decision to accept Majid's evidence in the limited terms that it did was reasonable. Relevant to this issue is whether the court had some distinct rationale for doing so.

20.43 No challenge was made at trial to Majid's evidence that he was at one time the assistant station manager of LAA at Luqa, a position normally occupied by a member of the JSO. In the Commission's view, that evidence itself provides a reasonable basis for the court's acceptance of his evidence about the organisational structure of the JSO and its personnel. Furthermore, Majid was not cross examined about the applicant's membership of the JSO nor was any challenge made at appeal to the court's acceptance of that evidence. At least part of the reason for this was that the defence was in possession of information supportive of this aspect of Majid's evidence (see chapters 18 and 27 for an account of what the applicant told his representatives at precognition).

20.44 In light of the above, the Commission considers that a reasonable court would have been entitled to accept Majid's evidence in the limited terms that the trial court did.

20.45 In relation to point (ii) above, the Commission considers that the trial court drew two inferences from Majid's evidence either alone or in combination with other evidence it accepted. The first was that the applicant would be aware, at least in general terms, of the nature of security precautions at Luqa airport. In the Commission's view, despite the distinctions that might be drawn between airline and airport security, it is difficult to view that inference as one which no reasonable trial court could have drawn. Indeed, one would be justified in supposing a degree of overlap between the two fields, given the possibility that a breach of airport security might give rise to a threat to airline security. The second inference was that the applicant, along with Hinshiri, Rashid and Nassr Ashur, was a senior official in the

JSO and was therefore linked with the individuals who Mr Bollier said had ordered a quantity of MST-13 timers or who had attended military tests involving the use of such timers. Again, the Commission does not consider that this inference can be said to be unreasonable. Although the applicant's associations with those individuals are not in themselves indicative of his involvement in the crime, they are nevertheless relevant background circumstances on which the trial court was entitled to rely.

(5) The rejection of the incrimination defence

Summary of the submissions

20.46 The applicant's submissions on this issue can be summarised as follows:

(i) The trial court considered each of the groups named in the schedule to the notice of incrimination, Parvez Taheri and the evidence about the Goben memorandum as separate issues or defences, and therefore failed to make the necessary links between the respective groups and individuals.

(ii) The court imposed a burden of proof on the defence, which is illustrated by its treatment of the evidence about Abo Talb ("Talb"). By acknowledging that the PFLP-GC had the means and intention to destroy civilian aircraft but concluding that there was no evidence linking that group to MST-13 timers, the court further inverted the onus of proof.

(iii) The court's approach to the evidence about the PFLP-GC cell in West Germany was flawed, in that it failed to give real effect to its acknowledgement that the cell had the means and intention to destroy a civil aircraft. The court failed to take into account that the cell was targeting US airlines and that it produced improvised explosive devices in the same brand of radio cassette recorder (Toshiba) as was used in the bombing of PA103. It also failed to recognise that the particular make of radio cassette recorder was a hallmark of the PFLP-GC. Instead the court relied upon particular differences between the models of radio cassette recorder. There was, however, clear evidence that Marwan Khreesat could and did introduce

bombs into a variety of electronic devices. In his defence precognition, he even speaks of having seen a twin speaker model in the boot of Dalkamoni's car. The court also relied heavily upon the make of timer used in the bombing of PA103, thereby ignoring the evidence that the supply of MST-13 timers was not confined to Libya. The court also relied on the absence of a barometric device in the bombing of PA103, whereas the evidence suggested only that such a device was not found, not that one was not used. The court thereby ignored the obvious suggestion in support of the defence case, namely that a group was involved in a plot to bomb airlines (the only possible need for a barometric device).

20.47 The submissions also refer in this context to the following comments by Professor Alan Dershowitz about the trial court's approach to the evidence:

"The court erred – as a matter of basic science, logic and common sense – in the manner in which it 'combined' or 'added up' each of the unreliable, unconvincing, problematic and equivocal items of evidence to come up with a 'sum' of proof beyond reasonable doubt."

Consideration

20.48 In relation to point (i), the court acknowledged that there was evidence that some of those in Talb's circle in Sweden associated with members of the PFLP-GC cell in West Germany. For example, the court noted that in 1988 Mohamed Al Mougrabi, Talb's brother-in-law, visited Hashem Abassi in Neuss and met Haj Hafez Kassem Dalkamoni ("Dalkamoni"), the apparent leader of the PFLP-GC cell there, at a time when Marwan Khreesat ("Khreesat") was manufacturing bombs there. In addition, Ahmed Abassi, who also lived in Uppsala, Sweden, and who knew both Talb and Mohamed Al Mougrabi, was staying with his brother Hashem in Neuss at the time of the Autumn Leaves raids. Ahmed Abassi was with Dalkamoni and Khreesat on an expedition to buy electrical components on 26 October 1988 when they were arrested by the BKA. The court also referred to evidence that at the material time the PPSF – an organisation for which Talb had worked in what he

described as military operations – and the PFLP-GC shared the same political objective (at paragraph 77).

20.49 In relation to the incriminee Parvez Taheri, the Commission notes that Mr Taylor, in his closing submissions, made clear that he was not suggesting that Mr Taheri may have been responsible for the crime charged (paragraph 72). Like the trial court, the Commission considers that this concession was correct in light of Mr Taheri's evidence. With regard to the submissions concerning the Goben memorandum, there was no evidence at trial about this and it is therefore outside the scope of this ground of review.

20.50 In relation to point (ii), the court made it clear that the notice of incrimination in no way affected the burden of proof:

> *"As with all special defences, this Notice does not in any way affect the burden of proof. That remains on the Crown throughout the trial and it is therefore for the Crown to prove beyond reasonable doubt that the accused committed the crime charged. There is therefore no onus on the Defence to prove that any of the persons referred to in the Schedule to the Notice were the perpetrators"* (paragraph 71).

20.51 It is alleged that the court inverted the onus of proof by concluding that there was no evidence linking the PFLP-GC with MST-13 timers. In the Commission's view, however, what the court was saying in this part of its judgment was simply that, having considered the circumstantial evidence against the applicant, the evidence about the incriminees did not give rise to a reasonable doubt as to his guilt.

20.52 The Commission accepts that the items found at Talb's home on 18 May 1989, including the barometer with the barometric device removed, are capable of suggesting an intention to attack civil aircraft at some point. In light of this, the Commission is doubtful as to the trial court's conclusion "that there is a great deal of suspicion as to the actings of Abo Talb and his circle, but there is no evidence to indicate that they had either the means or intention to destroy a civil aircraft in December 1988" (paragraph 81). However, against Talb's involvement in the

bombing was the fact that there was no evidence of his presence in Malta after 26 October 1988, and therefore nothing to indicate that Mr Gauci's partial identification of him as the purchaser of the clothing was correct. There was also no evidence of his presence in Malta on the date of the explosion and nothing at all to link him to MST-13 timers. Accordingly, while it is true that there was no evidence that the applicant had possession of the materials necessary to manufacture the device used to bomb PA103, nevertheless unlike the position in the cases of Talb and the other incriminees there was evidence which, if accepted, connected him to the clothing in the primary suitcase and to the men involved in the sale and purchase of MST-13 timers.

20.53 In relation to point (iii), the court acknowledged that explosives, detonators, timers, barometric devices, arms, airline timetables and seven unused Lufthansa luggage tags were recovered in the Autumn Leaves raids (paragraph 73). There was also evidence that traces of the chemicals PETN and RDX – both used in the manufacture of Semtex – were found on two sections of the luggage container in which the bomb was situated, and that Semtex was recovered during the Autumn Leaves operation. The court was also aware that in October 1988 the BKA recovered two Toshiba 453 BomBeat radio cassette players. One of these had been modified to form an explosive device and was found in the boot of Hashem Abassi's car; the other was found at residential premises in Neuss occupied by, among others, Hashem Abassi. Although the latter device had not been adapted to form an explosive device, it had certain modifications from which one could infer that it was intended to be constructed into such a device.

20.54 The court was also clearly aware that the device used to bomb PA103 was housed in a Toshiba RT-SF16 BomBeat radio cassette player. However, while Toshiba radio cassette players were recovered in the Autumn Leaves operation, it is not necessarily the case that they were a hallmark of the PFLP-GC, as is suggested in the submissions. Khreesat, in his FBI statement of November 1989 (CP 1851), which was led in evidence, stated only that he had made five devices in 1985, all housed in Toshiba 453s. However, he had then deactivated them and in October 1988 had used one to build a single device. This device was found in the boot of Hashem Abassi's car and one of the other models was the device found in Neuss. In addition, however,

the BKA also recovered a Sanyo monitor and two radio tuners all of which had been constructed into improvised explosive devices.

20.55 In any event, the device recovered during the Autumn Leaves operation was different from a Toshiba RT-SF16 BomBeat radio cassette player, in that it had one speaker, not two. In that regard, Khreesat said that he never used radio cassette players with twin speakers to convert into explosive devices (see paragraph 74 of the judgment). Khreesat's FBI statement includes the following passage:

> *"Khreesat is sure that the fifth device was also a Toshiba radio cassette recorder. When shown a catalogue of Toshiba products, Khreesat said the fifth device looked exactly like a model RT-F423 radio cassette recorder* [a single-speaker model]. *It was bronze in colour just like the model in the catalogue."*

20.56 In other words, Khreesat identified the fifth device on which he worked as being a particular single-speaker radio cassette recorder. Unlike his defence precognition (see appendix to chapter 18) his FBI statement contains no mention of there having been a twin-speaker stereo in the boot of Dalkamoni's car.

20.57 The court did not rule out potential access to MST-13 timers by parties other than Libya and the Stasi, but it noted that there was no evidence linking the PFLP-GC cell in West Germany to such timers. Indeed, there was no evidence that such timers were in any other hands than Libya or the Stasi, except for the two Togo timers, which were obtained from the US and French authorities and produced at trial, and the Senegal timer, which the court wrongly stated was handed over to the Scottish police in 1999 (see chapter 8 above).

20.58 In relation to the submission that the evidence suggested only that a barometric device was not found, rather than that one had not been used, the court's conclusion was as follows:

> *"On the evidence which we heard we are satisfied that the explosive device which destroyed PA103 was triggered by an MST-13 timer alone and that neither an ice-cube timer nor any barometric device played any part in it"* (paragraph 74).

20.59 That conclusion was based on the evidence of Allen Feraday of RARDE, and of John Orkin, a CIA officer whose job it was to analyse technical devices used by terrorist organisations. Mr Feraday spoke to section 10.2 of the RARDE report:

> *"The improvised mechanism of the explosive device included a proprietary long delay electronic timer type 'MST-13' manufactured by the MEBO company of Switzerland. Such a versatile long delay timer would not require any further actuation devices, such as a pressure operated switch* [ie a barometric device]*, in order to construct a viable improvised explosive device capable of repeated flights before detonation after a preset time. The 'MST-13' timer has previously been used in improvised explosive devices"* (21/3269).

20.60 However, when Mr Keen questioned Mr Feraday about the device recovered in the Autumn Leaves operation, the following exchange took place:

> *Q. If you wanted a longer time delay, or if you wanted to be able to set the time delay in the Toshiba bomb once it was constructed, the simple way of doing that would be to remove the relatively simple timing device you saw and substitute for it a more sophisticated timing device, such as a MEBO MST-13; is that correct, Mr. Feraday?*
>
> *A. Yes, sir…* (21/3347-3348).

20.61 Mr Orkin stated in evidence that an MST-13 timer would provide up to almost 10,000 hours' delay, as compared with less than an hour for an ice cube timer. He also said that an MST-13 would be far more accurate than an ice-cube timer, because it was crystal-controlled. An MST-13 timer would also be more stable than an ice-cube timer. According to Mr Orkin the inherent unpredictability of ice-cube timers made them very difficult to use. Mr Orkin's only knowledge of occasions when an ice-cube timer had been used in conjunction with another device, such as a barometer, was the device recovered in the Autumn Leaves operation. He explained that the purpose of using an ice-cube timer in conjunction with a barometric device was to guarantee that the target, an aeroplane, was airborne before the timer was

started. When he was asked why an ice-cube timer on its own would not be suitable for that purpose, he said that because of the time delay on an ice-cube timer, there probably would be insufficient time for the aircraft to become airborne before the timer triggered the explosion (71/8804-8825).

20.62 Therefore, according to Mr Feraday, while an MST-13 timer could be used in conjunction with a barometric device it did not require to be so used. Likewise, in terms of Mr Orkin's evidence, a barometric device was not required. Clearly a barometer would have guaranteed that the bomb exploded when the plane was airborne, but there was no evidence that one was used, and it was not an essential component of the device that destroyed PA103. In light of this evidence as a whole, the Commission does not consider that the trial court's conclusion that an MST-13 timer alone triggered the explosion was one which no reasonable trial court could have drawn.

20.63 In conclusion, the Commission considers that the relevance to PA103 of the evidence arising from the Autumn Leaves operation is undeniable. This was particularly so given Khreesat's account that the cell was in possession of a Pan Am timetable, that it used Toshiba radio cassette recorders to create improved explosive devices and that the cell was based partly in Frankfurt, from where PA103A departed. In addition the evidence relating to the movements of some of the incriminees in Malta during October and December 1988 are particularly suspicious (see joint minute number 11). In these circumstances, the Commission has some doubt as to the trial court's conclusion that: "While no doubt organisations such as the PFLP-GC and PPSF were also engaged in terrorist activities during the same period, we are satisfied that there was no evidence from which we could infer that they were involved in this particular act of terrorism" (paragraph 82). In the Commission's view, there was *some* evidence that *could* support an inference of involvement by one or both of those groups.

20.64 However, the question for the trial court was whether the evidence about the incriminees, by itself or in conjunction with other evidence, gave rise to a reasonable doubt as to the guilt of the applicant. In the Commission's view, the evidence concerning the incriminees goes some way to providing an alternative explanation as

to the person or persons who perpetrated the crime (as in *Donnelly*). However, such evidence, even taken at its highest, does not undermine the body of evidence against the applicant. In particular, it has no effect upon Mr Gauci's evidence that the applicant resembled the purchaser of the clothing; or evidence of his presence at Luqa airport on 21 December 1988 on a coded passport at a time when the explosive device would have been placed on board KM180; or evidence of his association with the seller and purchasers of MST-13 timers. In these circumstances the Commission does not consider that the trial court's rejection of the incrimination evidence renders the verdict one that no reasonable court could have returned.

Conclusion

20.65 In the Commission's view, none of the matters raised on behalf of the applicant under grounds (1) to (5) above is such as to cast doubt upon the reasonableness of the verdict in terms of section 106(3)(b). The Commission's conclusions in respect of ground (6), which concerns the trial court's approach to Mr Gauci's identification evidence and the date of purchase, are set out in the next chapter.

CHAPTER 21
"UNREASONABLE VERDICT"

Introduction

21.1 In a substantial portion of his submissions the applicant seeks to demonstrate under section 106(3)(b) of the Act that the verdict in his case was one which no reasonable trial court, properly directed, could have returned. Many of the submissions made under this heading have been addressed in chapter 20. In this chapter the Commission sets out its conclusions in respect of grounds concerning the approach taken by the trial court to Mr Gauci's identification of the applicant as the purchaser and to its finding as to the date of purchase.

21.2 The principles which the Commission has applied in assessing this ground are set out in chapter 20 and are derived from the decisions in *King v HMA* 1999 SCCR 330 and *E v HMA* 2002 SCCR 341. For present purposes they can be summarised as follows:

- The test under section 106(3)(b) is objective and an appellant who relies upon it must establish that, on the evidence led at trial, no reasonable jury *could* have been satisfied beyond reasonable doubt that he was guilty (*King* at p 333);

- A miscarriage of justice is not identified simply because, in any given case, the court might have entertained a reasonable doubt on the evidence (*King* at p 334);

- In light of section 106(3)(b) the issue of reasonable doubt is not at all times within the "exclusive preserve" of the jury and the court has to assess the reasonableness of the verdict with the benefit of its collective knowledge and experience (*E* at p 351);

- In making that assessment the court must keep in mind that the jury saw and heard the witnesses, and that the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in these respects (*E* at p 352).

The applicant's submissions

21.3 The following is a broad summary of the applicant's submissions:

(i) Mr Gauci's police statements, when viewed with his evidence at the trial, demonstrate the poor quality of his identifications of the applicant as the purchaser which, in any event, were not positive identifications;

(ii) Mr Gauci's identification of the applicant was further undermined because he identified others as the purchaser;

(iii) the manner in which the identification parade was conducted was unfair;

(iv) Mr Gauci's dock identification of the applicant was unfair and incompatible with the applicant's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention");

(v) the reliability of the "Libyan identification" was questionable;

(vi) the trial court failed to direct itself properly on matters relating to identification evidence; and

(vii) the inference the trial court drew about the date of purchase was unreasonable.

21.4 Standing those matters it is submitted that the inference drawn by the trial court that the applicant was the purchaser of the items was unreasonable.

21.5 The approach taken in this chapter is to consider each of the applicant's submissions in turn, highlight those aspects which the Commission considers to be significant and in the concluding part of the chapter assess how these might affect the reasonableness of the verdict, applying the principles set out above.

(i) The quality of Mr Gauci's identification of the applicant

21.6 According to the submissions Mr Gauci's prior statements demonstrate the poor quality of his identification evidence. Reference is made in particular to Mr Gauci's initial description of the purchaser's height and age which it is said is inconsistent with the applicant's height and age at the material time.

21.7 Mr Gauci was referred in evidence to various police statements in which he had given descriptions of the purchaser. It is worth setting out the relevant passages of his evidence in full.

Examination in chief

Q. What sort of build did [the purchaser] *have?*

A. I'm not an expert on these things. I think he was below six feet. I'm not an expert on these things. I can't say.

Q. What age would you say he was?

A. I said before, below six – under 60. I don't have experience – I don't have experience on height or age (31/4752).

Q. Does the statement then read as follows, that it was taken on the 14th of September 1989, at the police headquarters, and it states: That at about 7.25 p.m., on Thursday, 14 September 1989, I went to police headquarters, Floriana, along with two police officers, Detective Chief Inspector Bell and Inspector Scicluna. It had been explained to me that the officers wished me to look at photographs to see if I could pick out anyone in the photographs as the man I sold

the clothing to in November or December 1988 and had given a description of to the police. I agreed to attend and look at the photographs. When I arrived at the police office, I was taken to a room. There was [sic] *four officers present in the room, and they are named. I was then shown two cards of photographs which had a total of 19 photographs thereon. I identified a photograph of a man in one of the cards* [a Mohammed Salem, born 1956]. *This photograph is similar to the man who bought the clothing. The man in the photograph I identified is too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who bought the clothing.*

I wonder if we could have on the screen at this point Production 426. Do we see in the bottom right-hand corner of the screen your signature?

A. Yes.

Q. And do we see the date, 14/9/89?

A. Yes.

Q. We can see that on that particular sheet there are five photographs along the top and four below. And do we see that you have signed the second photograph from the left in the top row? Do we see that?

A. Yes. Yes.

Q. And is that the photograph of the man that you've been referring to in this statement, of a man that is similar to the man who bought the clothing, but you said that he was too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who had bought the clothing. Is that right?

A. Yes, something like that. Yes. I thought he was a little bit young from the photo. He didn't look as young as that, the chap who bought the stuff from me (31/4757-4758).

Q. *The statement* [of 15 February 1991, which relates to Mr Gauci being shown a card containing photographs of several individuals including one of the applicant] *goes on to say: I looked at every photograph on the card, and I counted a total of 12 photographs on the card. The first impression I had was that all the photographs were of men younger than the man who bought the clothing. I told Mr Bell this. I was asked to look at all the photographs carefully and to try and allow for any age difference. I then pointed out one of the photographs, and I later counted the photographs from the left as number 1 to the photograph at number 8* [the applicant].

Number 8 is similar to the man who bought the clothing. The hair is perhaps a bit long. The eyebrows are the same. The nose is the same. And his chin and shape of face are the same. The man in the photograph number 8 is in my opinion in his 30 years. He would perhaps have to look about 10 years or more older and he would look like the man who bought the clothes. It's been a long time now, and I can only say that this photograph 8 resembles the man who bought the clothing, but it is younger. I was asked to sign my name across the top left side of the photograph to indicate that this was the photograph I had identified to the police. I signed the photograph. I also signed a label for the card containing the photographs…

… The photograph at the right-hand end has your signature in the corner. Do you see that?

A. *Yes. Yes.*

Q. *Is that the photograph to which you had been referring?*

A. *Yes…*

Q. *The statement goes on to say: Mr Bell wrote down the statement for me. I can only say that of all the photographs I have been shown, this photograph number 8 is the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me.*

And what you said about this photograph in this statement at the time, was that the truth?

A. Yes, I have signed it, too. Yes, number 8.

Q. And when you said that this was the only one really similar to the man who bought the clothing, if he was a bit older, other than the one my brother showed me, is that also the truth?

A. Of course. He didn't have such long hair, either. His hair wasn't so large (31/4773–4774).

Cross examination

Q. ... But let's look at the description [in Mr Gauci's statement of 1 September 1989]. *He was about six foot or more in height. Yes?*

A. I always said six foot, not more than six feet (31/4789).

Q. All right. Now, you, in the course of that statement [of 13 September 1989], *tell us some further information about the man. What you say is, and listen carefully if you would to me, please: I think the man I described would be about size 16 and a half or 17-inch collar. I am reading line 25. I think the man I described would be about size 16 and a half or 17-inch collar?*

A. Because that was the size of the shirts he took, he bought.

Q. I understand. Carrying on with the information that you are giving the police, you say this: He was about 50 years of age, and I think the age of the man in the photofit is between 45 and 50, which would be – which is just about right. Do you see that? So, in terms of the description, you've given a description as best you can and being as honest you can on the 1st of September of 1989, you were able to add two further details on the 13th of September, these details being the

man's collar size and his age. And his age you describe as about 50 years of age (31/4796-4797).

Q. I think you were seen again by Detective Chief Inspector Bell on the 14th of September 1989 in the evening… Now, you identified a photograph of a man [Mohammed Salem] *in one of the cards you were shown, and you indicated that the photograph was similar to the man who bought the clothing, at the foot of page 1. But you qualified it at the top of page 2: The man in the photograph I identified is too young to be the man who bought the clothing. If the man in the photograph was older by about 20 years, he would look like the man who bought the clothing. Is that right?*

A. Maybe (31/4801).

Q. All right. Now, I want to look at the middle of page 3 [of Mr Gauci's statement of 10 September 1990]. *Well, let's start at the top of page 3, just for completeness. You are asked there about the description: I've been asked to go over the description of the man, and the description is exactly the same. I would say he was about 50 years old and I am positive he was a Libyan…* (31/4802).

Consideration

21.8 The Commission notes that at the identification parade the applicant's height was measured at 5 feet, 8 inches, and that in December 1988 he was 36 years old. Mr Gauci's descriptions of the purchaser's age in his police statements ("about 50" and "between 45 and 50") and of his height ("about 6 foot or more") are therefore markedly different from the applicant's age at the time of purchase and his height. This was acknowledged by the trial court which described these inconsistencies as "a substantial discrepancy" (at paragraph 68 of the judgment). The Commission shares that view and considers the inconsistencies to be significant in any assessment of the reliability of Mr Gauci's identification of the applicant as the purchaser. The Commission returns to this issue in the concluding part of this chapter.

21.9 In the Commission's view the terms of Mr Gauci's statements of 15 February 1991 and 14 September 1989 quoted above are of little assistance in assessing his evidence about the age of the purchaser. In the former statement he said that the applicant, as pictured in the photograph shown to him, was "in his 30 years" and that he "would perhaps have to look about 10 years or more older" to look like the purchaser. However, while it is known that the same photograph appears in a passport issued to the applicant in 1986 (and indeed in an application for an entry visa to Czechoslovakia in connection with a planned visit there in June 1985) there was no evidence at trial as to when that photograph was taken (see paragraph 294 of the appeal court's opinion). The same applies to Mohammed Salem's photograph which was shown to Mr Gauci by police on 14 September 1989 and about which Mr Gauci said that he would look like the purchaser if he was older by about 20 years. Although it is known that Mr Salem was born in 1956 there was no evidence led as to his age at the time the photograph was taken.

21.10 A further submission under this heading is that Mr Gauci's identification of the applicant is tantamount to his saying that the applicant, though he looks like the purchaser, is not the purchaser. Reference is made in this connection to *Macdonald v HMA* 1997 SCCR 116. The accounts given by Mr Gauci in his statements and in evidence are detailed above. In the Commission's view it is difficult to maintain that Mr Gauci was attempting to convey in these that the applicant, while looking like the purchaser, was not him. Rather it seems that the qualifications expressed by Mr Gauci are simply an indication of the uncertainty in his identification of the applicant.

(ii) Mr Gauci's identification of others

21.11 The passages in Mr Gauci's evidence relating to his identification of Mohammed Salem as similar to the purchaser are noted above. Mr Gauci also identified the incriminee Abo Talb ("Talb") on a number of occasions. The following are the relevant passages of his evidence:

Examination in chief

Q. Do you remember there being an article in the newspaper [an edition of *The Sunday Times* which Mr Gauci saw at the end of 1989 or the beginning of 1990] *about the Lockerbie disaster?*

A. Yes. Yes. But they were two people, not one person alone, I remember.

Q. And did you tell the police about looking at that newspaper?

A. Yes.

Q. I wonder if you could look please at Production 1833 [the newspaper article in question]*... Now we can see a photograph which has the word "bomber" across it, and we can see a photograph of wreckage below… When the article is opened up, you can see that in the top right-hand corner there is a photograph of a second man with the word "bomber" across it. Do you see these?*

A. Yes. Yes.

Q. And as you said a moment or two ago, there were indeed two photographs of men in this article?

A. Yes. Yes.

Q. When you saw the photographs of men in this article, what did you think about them? ...

A. I thought it was the one on this side, I thought. That was the man who bought articles from me.

Q. Now, when you say "on this side", we can see two photographs, one on the right-hand side of the screen and one on the left-hand side of the screen. Which one are you referring to?

A. To the right. The one on this side. On the right [Talb].

Q. What was it about that man's photograph that made you think he looked similar to the man who bought the clothes?

Q. [Following an objection by counsel for the applicant] *Mr Gauci, what was it about the photograph that made you think that was the man who bought the articles from you?*

A. He resembled – he resembled him, didn't he?

Q. In what way?

A. His face and his hair was the way it appeared to me (31/4767–4769).

Q. Turn to page 7, please. And if I remind you that this was a statement taken on the 10th of September 1990, on page 7, at line 11 of the page, the police have noted you as saying: I have been shown many photographs over the last year, but I have never seen a photograph of the man who bought the clothing.

And when you said that in September of 1990, was that the truth?

A. Yes, at that time, that was what I thought it was. I saw that in photos and ... (31/4770).

21.12 The advocate depute also referred Mr Gauci to his statement of 15 February 1991, in which he said that the photograph of the applicant was the only photograph he had seen which was really similar to the purchaser, other than the one his brother showed him. The photograph shown to Mr Gauci by his brother was that contained in *The Sunday Times* article referred to above.

Cross examination

> *Q. Do you recollect looking at this production* [1833: the article in *The Sunday Times* which contained a photograph of Talb] *earlier today in your evidence?*
>
> *A. Yes. Yes, I do.*
>
> *Q. And these are the photographs that were shown to you by your brother, are they not?*
>
> *A. Yes.*
>
> *Q. And you identified the photograph on the right of the two photographs in respect of the man who came into the shop. Do you recollect that?*
>
> *A. Yes. He was* [sic] *resembles him a lot. He resembles him a lot* (31/4829).

The appeal court's approach

21.13 At appeal it was argued by counsel that Mr Gauci's identifications of Talb and Salem from photographs undermined his identification of the applicant by photograph. In rejecting this argument the appeal court said the following:

> *"In any event, the fact that the witness had stated that two other men, in addition to the appellant, resembled the purchaser does not, in our opinion, detract from the evidence relating to the appellant. The evidence that the appellant resembled the purchaser was simply one of the circumstances founded on by the Crown as forming part of the circumstantial case against the appellant and, of course, all the other circumstances had to be taken into account as well"* (paragraph 292).

Consideration

21.14 In the Commission's view the fact that Mr Gauci identified other individuals as resembling the purchaser does not in itself render the court's acceptance of his

partial identification of the applicant as unreasonable in terms of section 106(3)(b). It might have been different if Mr Gauci's identifications of the applicant and others had all been positive as clearly this would reflect upon his reliability given that there was only one purchaser. However, it seems to the Commission that it is of the nature of resemblance identifications that they can be made in respect of more than one person.

(iii) The identification parade

21.15 The applicant's submissions on this issue are to the effect that because of the length of time between the purchase and the parade; the fact that in late 1998 or early 1999 Mr Gauci was shown a photograph of the applicant published in *Focus* magazine; the prejudicial pre-trial publicity; and the composition of the parade itself (it did not include any other Libyans and only two of the stand-ins were of a similar age to the applicant), Mr Gauci's identification of the applicant at the parade is unreliable.

Consideration

21.16 The identification parade took place on 13 April 1999 and was conducted by Inspector Brian Wilson who spoke in evidence to the contents of the parade report (32/4898-4900). Before Mr Gauci viewed the parade, Inspector Wilson read to him the following instructions:

> *"The man whom you referred to in your statement to police entered your shop premises, Mary's House, 63 Tower Road, Sliema, Malta, midweek prior to 10 December 1988 and purchased clothing and an umbrella, may or may not be here, but, if you see him, tell me his number."*

21.17 Mr Gauci's response, which was given by him in English, was noted in the following terms:

> *"Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5."*

21.18 Number 5 was the position adopted by the applicant. Inspector Wilson noted in the parade report that the applicant was 47 years old, 5 feet 8 inches tall, of stocky build, with dark curly hair. Prior to the commencement of the parade the applicant's solicitor Mr Duff took issue with the inclusion of four stand-ins by reason of age. He also made the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten years ago. In these circumstances, a witness acting in good faith and genuinely trying to recall the event is likely to be guessing rather than making a true and reliable identification;*

- *"In November 1991, when Mr Megrahi was named as an accused in this case, his photograph was released to the press either by the police or the prosecution along with details of the alleged evidence in the case. Since November 1991, the photograph of Mr Megrahi has appeared thousands of times in the printed and electronic media with the acquiescence or connivance of the Lord Advocate, who has failed to take any action under the Contempt of Court Act when it was applicable and, despite requests to do so, has failed to make any effort to restrain the media. Publication of the photograph has continued right up to the day the accused left Libya for the Netherlands. It is inconceivable that the witness will not have seen the photograph on many occasions. To ask the witness to make an identification now, or even at the trial, is grossly unfair and liable to lead to a miscarriage of justice;*

- *"Finally, in my view, the stand-ins available in the original pool of 11 were not sufficiently similar to the accused, particularly in terms of age and ethnic background. There is a difference in appearance between someone of Libyan background and someone from Algeria, let alone Holland or Italy"* (32/4899-4900).

21.19 In evidence Inspector Wilson stated that the four stand-ins to whom Mr Duff had objected were removed, but that he had taken no action in respect of the remaining objections other than noting them on the appropriate forms.

21.20 In relation to the period of time between the purchase and the parade, Scots law has always recognised the importance of identification soon after the event in question (see Alison: *Practice of the Criminal Law in Scotland* at p 627; Dickson on Evidence (2nd ed) Vol II, paragraph 263; the Thomson Committee *Criminal Procedure in Scotland* Cmnd 6218 (1975) at paragraph 46.10).

21.21 In the present case the length of time between the purchase and the parade was, from the Crown's perspective, unavoidable and the parade took place as soon as was practicable following the applicant's arrest. That said, the period involved was extraordinary and in the Commission's view raises doubts as to the reliability of Mr Gauci's identification of the applicant during those proceedings.

21.22 As noted above, in late 1998 or early 1999 Mr Gauci was shown a photograph of the applicant published in *Focus* magazine. In evidence Mr Gauci said that he had taken this photograph to a Maltese police officer, Mr Scicluna, and had told him something like "This chap looks like the man who bought the articles from me." Mr Gauci added that the purchaser's hair was much shorter than the hair of the man shown in the photograph and that he was not wearing glasses.

21.23 The appeal court made the following observations in respect of this matter:

> *"Mr Taylor submitted that Mr Gauci might have been influenced in his identification by having seen the appellant's photograph in the magazine not long before the identification parade was held. However, the defence must have been aware that Mr Gauci had seen the magazine containing the appellant's photograph. If it was going to be suggested that Mr Gauci's identification at the identification parade and in court had been influenced by seeing the photograph of the appellant in the magazine, then that should have been put to Mr Gauci in cross-examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci in cross-examination, but it does not*

appear that the defence sought directly to challenge his evidence that the appellant resembled the purchaser of the clothes" (paragraph 302).

21.24 At the time of the applicant's trial the conduct of identification parades was regulated by guidelines issued by the Scottish Home and Health Department ("SHHD"), paragraph 31 of which is in the following terms:

"Care should be taken that any witness who has identified a suspected person by his photograph and who is subsequently called upon to identify that person on his apprehension is not again shown the photograph before identification proceedings" (a similar provision is contained in the current guidelines: *Lord Advocate's Guidelines to Chief Constables on the Conduct of Identification Procedures* (2007) at p 6).

21.25 Clearly the purpose of this provision is to avoid the situation in which a witness, on attending the parade, identifies the person he recalls from the photograph, rather than the person involved in the incident in question.

21.26 Paragraph 23 of the SHHD guidelines is as follows:

"It is essential that the witnesses who are to view the parade do not at any time have an opportunity of seeing the suspect or accused or the other parade members" (an identical provision is contained at p 20 of the current guidelines).

21.27 While this provision relates solely to the conduct of an identification parade, in the Commission's view the risk it seeks to avoid applies equally to situations in which a witness has been exposed to images of the accused in the media.

21.28 In the Commission's view, evidence that Mr Gauci was shown the photograph of the applicant in *Focus* magazine in relatively close proximity to the parade, however innocently – and notwithstanding that the defence did not challenge Mr Gauci on that point – raises a strong possibility that it influenced his identification at those proceedings.

21.29 As to the question of prejudicial publicity in general, as the appeal court observed, even if photographs of the applicant had been published in the media across the world, there was no evidence that Mr Gauci had seen any of them other than that contained in *Focus* magazine. The extent of any other prejudicial pre-trial publicity is therefore not a matter which can be considered in any assessment of the reasonableness of the verdict (*King*; *E*; *Campbell v HMA* 1998 SCCR 214).

21.30 As to the composition of the parade the SHHD guidelines contain the following provision:

> *"The suspect or accused should be placed beside a person of similar age, height, dress and general appearance. It is more important that the stand-ins should resemble the suspect or accused than that they should be like any description given by witnesses"* (at paragraph 10; again, a similar provision is contained in the current guidelines at p 18).

21.31 As noted earlier the evidence before the court was that Mr Duff had made specific objections to the inclusion of four stand-ins by reason of the differences in age between them and the applicant. Those stand-ins were consequently removed from the pool. There was also evidence of a further objection to the effect that none of the available stand-ins was sufficiently similar to the applicant in terms of age and ethnic background. However, there was no evidence as to the similarity or otherwise of the remaining stand-ins to the applicant and no evidence that only two were of similar age to him. Accordingly the Commission does not consider that this aspect of the parade can form part of its assessment of the verdict under section 106(3)(b).

21.32 In summary, the Commission considers that the extraordinary length of time between the date of purchase and the parade and the evidence of Mr Gauci's exposure to the photograph of the applicant in *Focus* magazine in relatively close proximity to the parade (indeed, closer than the trial court appears to have believed: see chapter 22 below) raises doubts as to the reliability of Mr Gauci's identification of the applicant at that time. The Commission returns to these issues in the concluding part of this chapter.

(iv) The dock identification

21.33 It is alleged in the submissions that dock identification evidence is, in itself, objectionable as unfair and is so unreliable that no reasonable jury could rely upon it for conviction. No authority is cited for this proposition but reference is made to several cases which were awaiting judgment by the High Court at the time the submissions were made. One of those cases, *Holland v HMA* 2005 SCCR 417, has since been heard by the Privy Council. The submissions highlight that the period between the purchase and the trial was extreme. It is also alleged that the advocate depute "led" Mr Gauci to his dock identification in that before being asked to identify the applicant in court Mr Gauci was first shown the photographs of the applicant which he had previously identified including the one published in *Focus* magazine. It is submitted that such an approach rendered the dock identification both inadmissible and meaningless in terms of its quality and reliability.

Consideration

21.34 It is worth setting out the trial court's conclusions in respect of Mr Gauci's parade and dock identifications:

> *"From his general demeanour and his approach to the difficult problem of identification, we formed the view that when he picked out the first accused at the identification parade and in Court, he was doing so not just because it was comparatively easy to do so but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser, and we did regard him as a careful witness who would not commit himself to an absolutely positive identification when a substantial period had elapsed… We are nevertheless satisfied that his identification so far as it went of the first accused as the purchaser was reliable and should be treated as a highly important element in this case"* (at paragraph 69).

21.35 In *Holland* the Privy Council held that the evidence of a witness who identifies an accused in the dock is not by its nature so unfair as to be incompatible in

all cases with the accused's right to a fair trial under article 6 of the Convention. It was also held that "except perhaps in an extreme case" there was no basis, either in domestic law or in the Convention, for regarding evidence of such an identification as inadmissible per se. In *Holland* the Privy Council was primarily addressing the question of whether the dock identification in that particular case was compatible with the appellant's article 6 rights. It was not dealing with a case, like the present one, in which it is alleged that the trial court's acceptance of such evidence resulted in a verdict which no reasonable trial court, properly directed, could have returned. The Privy Council also made clear in *Holland* that it was concerned only with cases in which identification is a live issue at the trial and where the Crown witnesses who identify the accused in court have previously failed to pick him out at an identification parade. As explained above, however, the latter consideration does not apply in the present case. Not only did Mr Gauci pick out the applicant at the identification parade, he also selected his photograph from a total of twelve shown to him by the police on 15 February 1991. While none of these identifications was positive, neither was his dock identification. In these circumstances although the decision in *Holland* is of assistance in highlighting the risks associated with dock identification evidence, its facts are perhaps distinguishable from those of the present case.

21.36 Nevertheless, for the same reasons as it doubts the reliability of Mr Gauci's identification of the applicant at the parade, the Commission also has significant doubts as to the reliability of his later identification of the applicant in court. In the Commission's view that identification is further undermined by the highly suggestive context in which it took place and by the manner in which Mr Gauci's evidence on the matter was taken by the Crown. In particular, given the risk that Mr Gauci's identification of the applicant might be affected by his exposure to the photograph in *Focus* magazine it is difficult to understand why the advocate depute considered it appropriate to show him the same photograph prior to asking him whether he could see the purchaser in court (see chapter 18 for the Commission's conclusions on the absence of any objection to this by the defence). It might be said that in the circumstances of this case the dock identification was simply a formality and that the important factor was Mr Gauci's identification of the applicant from a photograph on 15 February 1991. However, it is clear from the passage in the judgment quoted above that the trial court relied not only upon the photographic identification but also

those made at the parade and in court. It is also clear that the Crown went to some lengths in obtaining the dock identification (see Mr Gauci's evidence at 31/4777-4778).

21.37 In conclusion, given the extraordinary period of time between the purchase and the trial, Mr Gauci's exposure to the photograph in *Focus* magazine, the inherent risks associated with dock identifications and the manner in which this aspect of Mr Gauci's evidence was led by the Crown, the Commission has significant doubts as to the reliability of Mr Gauci's identification of the applicant in court. The Commission returns to this issue in the concluding part of this chapter.

(v) The "Libyan" identification

21.38 It is submitted that Mr Gauci's identification of the purchaser as Libyan is "questionable". In particular it is alleged that although it was not raised in evidence "all persons of Arab extraction are commonly referred to by the Maltese as 'Libyans'" and that this is a generic term. In addition it is said that the basis for this aspect of Mr Gauci's evidence was not fully examined at trial. For example it was established by counsel for the co-accused that Mr Gauci did not remember the languages in which he and the purchaser had spoken, but in terms of his statement of 1 September 1989 Mr Gauci's only means of identifying the purchaser as Libyan was the language used by him. It is submitted that these factors cast serious doubt upon Mr Gauci's identification of the purchaser's nationality. The submissions also appear to criticise the advocate depute who throughout his questioning of Mr Gauci continually referred to the purchaser as "the Libyan".

21.39 In order to consider these matters it is necessary to set out the relevant passages in Mr Gauci's evidence and the trial court's conclusions in this connection.

Examination in chief

Q. Did you recognise [the purchaser's] *nationality?*

A. Yes.

Q. What nationality was it?

A. To me he was a Libyan.

Q. Are you familiar, from the experience in your shop and in Malta, with Libyans?

A. Many come, and I recognise them (31/4731).

Cross examination by Mr Taylor

Q. ... In this statement [Mr Gauci's statement of 1 September 1989] *you told Mr. Bell… He was speaking Libyan to me. He was clearly from Libya. He had an Arab appearance, and I would say he was in fact a Libyan. I can tell the difference between Libyans and Tunisians when I speak to them for a while. Tunisians often start speaking French if you talk to them for a while…* (31/4789-4790).

21.40 The above passage was not put to Mr Gauci for comment.

Q. ... Now, I want to look at the middle of page 3 [of Mr Gauci's statement of 10 September 1990]. *Well, let's start at the top of page 3, just for completeness. You are asked there about the description: I've been asked to go over the description of the man, and the description is exactly the same. I would say he was about 50 years old and I am positive he was a Libyan* (31/4802).

21.41 Again, the above passage was not put to Mr Gauci for comment.

Q. ... There are Arabs in North Africa who are former colonists of the French and who therefore tend to speak French as a second language rather than English; isn't that right?

A. Algiers and Tunisia, yes. Italians – Libyans sometimes talk English in the same way as we do – Maltese, I mean.

Q. And Egyptians? …

Q. Would you mind saying that again?

A. That we recognise Egyptians. Obviously, they speak different from Libyans. My own experience, I can distinguish between Libyans and Egyptians.

Q. But you are not an expert? In Maltese.

A. I am not an expert, obviously.

Q. As a matter of interest, do you speak Arabic yourself?

A. I can manage.

Q. And on the day of the clothing purchase, was the conversation in English, or in Arabic?

A. In both languages (31/4823).

Cross examination by Mr Keen

Q. The man who came into your shop to buy the clothes that you have been talking about spoke to you in Arabic, or in English, or in Maltese?

A. I believe we spoke Maltese and Arabic that day. That's 11 years ago. That's the way I recollect we spoke.

Q. And yet just a moment ago, you recollected that you spoke in Arabic and English, Mr Gauci. Would it be fair to say that you in fact have no recollection of the conversation or the language which was employed?

A. Well, exactly. Exactly. All these years – I mean, you can't remember everything precisely, but that's – most of the time that's the way we speak with them, in our language and their language, and we understand each other quite well. We even have the same sort of character. We get on well together.

Q. So if the man who came into the shop to buy the clothes was an Arab, you believe you would have spoken to him in a mixture of Arabic and Maltese; is that the position, Mr Gauci?

A. That's the way we speak to them most of the time. That's the way I – that's what I do, at least. I – I look – I try and see what they prefer…

Q. So you might have spoken to this customer in Arabic, or in Maltese, or in English, or in a mixture of these languages; is that fair, Mr Gauci?

A. Yes, it could be. Yes (31/4824-4826).

The trial court's approach

"We are satisfied that on two matters [Mr Gauci] *was entirely reliable, namely the list of clothing that he sold and the fact the purchaser was a Libyan"* (paragraph 67).

Consideration

21.42 In the Commission's view no criticism can be attached to the advocate depute for his use of the term "the Libyan" in his questioning of Mr Gauci. He did so only after Mr Gauci had himself referred to the purchaser as being Libyan and his approach simply reflected the contents of Mr Gauci's Crown precognition (see appendix to chapter 24) in which the term appears throughout.

21.43 According to the prior statements put to him in evidence it appears that Mr Gauci's basis for identifying the purchaser as Libyan was that he was of Arab

appearance and spoke "Libyan". Strictly speaking, however, there is no such language and it is therefore doubtful that this is a sound basis in itself for accepting his evidence on the point. It is also notable that in terms of his statement of 1 September 1989, to which he was referred in evidence, Mr Gauci's apparent ability to distinguish Tunisians from Libyans was based not upon the latter speaking "Libyan" but rather that Tunisians often start speaking French "if you talk to them for a while." In any event the fact that in cross examination Mr Gauci was unable to recall the languages in which he and the purchaser had spoken tends to undermine any suggestion that his identification of Libyan nationality was based on the purchaser's language. Although in cross examination Mr Gauci commented that Egyptians "[o]bviously speak different from Libyans", again it is not clear from Mr Gauci's evidence precisely how they do so.

21.44 Despite these concerns the Commission does not consider that the trial court's acceptance of the Libyan identification can be said to have been unreasonable, although it perhaps went too far in finding Mr Gauci's evidence on the point "entirely reliable". From the court's perspective Mr Gauci was firm in his recollection of the purchaser's nationality not only in examination in chief, but also in the prior statements to which he was referred in cross examination. He also appeared from his evidence to have some experience of dealing with Libyans. Furthermore, although the matter was explored to some extent in cross examination by Mr Taylor and Mr Keen there does not appear to have been any serious attempt to undermine Mr Gauci's evidence in this connection.

21.45 Further consideration of issues arising from the Libyan identification is contained in chapter 26.

(vi) The trial court's alleged failure to direct itself on identification evidence

21.46 Although this ground is not presented under section 106(3)(b) it is appropriate to consider it under this heading.

21.47 It is submitted that the court had no apparent regard to the extraordinary period of time which had elapsed since the purchase of the clothing or to the fact that

the purchaser was a stranger to Mr Gauci and from a different ethnic group. It is alleged that the court also had no apparent regard to Mr Gauci's exposure to the applicant's photograph in the media. In support of these submissions reference is made to a practice note issued by the Lord Justice General (Emslie) dated 18 February 1977, *McAvoy v HMA* 1982 SLT 46 and Lord Cullen's directions to the jury in *Farmer v HMA* 1991 SCCR 986.

Consideration

21.48 The Lord Justice General in his practice note reminded judges of the need to give appropriate and adequate guidance to juries on their approach to the assessment of identification evidence where its quality was in any way in doubt. In *McAvoy* the court held that in cases in which identification is in issue, trial judges may feel it desirable to remind the jury to treat the issue with some care given that mistakes can occur. In particular, a trial judge may remind the jury that the witness was not familiar with the person he identified and that they may wish to ask themselves how long the witness had the person in view, whether the person was clearly visible, how positive the identification was and whether the person concerned was nondescript or had distinctive features. In *Farmer* it was held that similar directions given by Lord Cullen to the jury in that case minimised the risk of injustice. These included directions that the jury should consider any reasons given by a witness for identifying an accused as well as the possibility that the witness was confusing the accused with someone who the witness had seen at some time other than the occasion of the crime.

21.49 In the Commission's view, although the trial court did not make explicit in its judgment that it had directed itself on the matters outlined above, it does not necessarily follow that the court did not have due regard to them. The court was aware of the passage of time which had elapsed between the purchase and Mr Gauci's identifications at the parade and in court, and of the fact that Mr Gauci had seen a photograph of the applicant in *Focus* magazine. The court noted at paragraph 55 of its judgment that Mr Gauci's identifications at the parade and in court had been criticised on the ground that photographs of the applicant had featured in the media and that purported identifications more than ten years after the event were of little if

any value. Before assessing the quality and value of these identifications the court considered it important to look at the "history" which included Mr Gauci's identification of the applicant by photograph in 1991 (when the applicant's photograph had not yet appeared in the media) as well as his identification of other individuals such as Talb.

21.50 The court also acknowledged, presumably as a result of the issues which had been raised by the defence, that there were "undoubtedly problems" with Mr Gauci's identification of the applicant and that there was a "substantial discrepancy" between Mr Gauci's initial description of the purchaser's height and age and the applicant's characteristics at the material time. Nevertheless, the court considered that taken together with evidence as to the date of purchase it was possible to infer that the applicant was the purchaser. In the Commission's view, whatever conclusions one might draw as to the reliability of the evidence on which that inference is based, it appears that the court had regard to all the factors on which a jury would be directed in a similar case.

(vii) The date of purchase

Introduction

21.51 According to the submissions the defence clearly had an interest in establishing the date of purchase as being one on which the applicant was not in Malta, thus excluding his involvement. The Crown, on the other hand, sought to establish that the date of purchase was 7 December 1988, a date which corresponded with the applicant's presence in Malta. It is submitted that in doing so the Crown sought to turn a consistency into positive support for the identification itself.

21.52 The submissions go on to summarise the evidence relied upon by the court in this connection. This consisted of Mr Gauci's evidence that on the date of purchase his brother, Paul Gauci, was absent from the shop watching football on television. According to the submissions "Paul Gauci stated which teams he tended to watch and from TV schedules suggested in a police statement dates which included 23rd November or 7th December… The matter was agreed by joint minute." The

submissions also refer to Mr Gauci's account that the purchase had taken place "about a fortnight before Christmas", a time frame which it is said was given by him for the first time in evidence and which was inconsistent with his prior statements. In addition, Mr Gauci suggested in his statements and in evidence that when the purchaser first left his shop it was "raining or drizzling, not raining heavily." The defence thereafter led evidence to the effect that there was a 90% chance that it was not raining in Sliema on 7 December 1988. It is submitted that, despite this evidence, the trial and appeal courts "insisted that the likely date of purchase was 7 December 1988 and that this supported the identification evidence."

21.53 In order properly to assess this issue it is important to set out in detail the relevant passages in the evidence and the approaches taken by the trial and appeal courts. Before doing so, however, it is helpful to consider the significance of the trial court's finding that the purchase took place on 7 December 1988.

21.54 The trial court accepted that Mr Gauci's identification of the applicant was not unequivocal, but stated that it was possible to infer from his evidence that the applicant was the purchaser of the clothing (at paragraph 88). The court went on to refer to its conclusion that the date of purchase was 7 December 1988, a date when the applicant was in Malta staying at a hotel close to Mary's House. In other words, the court's finding that the purchase took place on 7 December was used in conjunction with Mr Gauci's evidence that the applicant resembled the purchaser to draw the inference that the applicant was the purchaser. The appeal court acknowledged this approach in the following passage of its opinion:

> *"It is clear, and the trial court recognises, that Mr Gauci did not make a positive identification of the appellant. However, the trial court refers, in the next sentence of para 88, to the fact that it has already accepted that the date of purchase was 7 December 1988 when the appellant was shown to have been in Malta. The evidence of the date of the purchase was based primarily on Mr Gauci's evidence. In the circumstances it seems to us that the trial court was simply saying that Mr Gauci's evidence of identification by resemblance taken along with evidence as to the date of the purchase, when the appellant was proved to have been staying in*

Sliema, enabled the inference to be drawn that he was the purchaser" (paragraph 293).

21.55 As well as potentially providing support for Mr Gauci's identification of the applicant, any finding that the purchase had occurred on a particular date was significant because, on the evidence, 7 December 1988 was the only date on which the applicant would have had the opportunity to purchase the items. Accordingly if the court had found that the purchase had taken place on some other date in November or December, in terms of the evidence this would effectively have excluded the applicant as the purchaser.

21.56 The trial court referred to the following factors in connection with its finding as to the date of purchase (see paragraphs 64 and 67 of the judgment):

(a) Mr Gauci's evidence that his brother Paul Gauci did not work in the shop on the afternoon of the purchase because he had gone home to watch football on television; and the terms of joint minute number 7 which, according to the trial court, agreed that whichever football match or matches Paul Gauci had watched would have been broadcast by Italian Radio Television ("RAI") either on 23 November or 7 December 1988;

(b) Mr Gauci's evidence that the purchase "must have been about a fortnight before Christmas";

(c) Mr Gauci's evidence that the sale took place on a "midweek" day, and that he thought Wednesday is midweek. (It is not clear what weight, if any, the trial court attached to this evidence. Although it is mentioned in paragraphs 12 and 64 of the judgment, it does not feature in paragraph 67 in which the court narrates the evidence establishing the date of purchase as 7 December. The Commission has nevertheless included this factor in its assessment of the evidence);

- Mr Gauci's evidence to the effect that the purchase was about the time when the Christmas lights in Tower Road would be "going up"; and

- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the Chief Meteorologist at Luqa airport, Major Joseph Mifsud, that there was a 10% probability of rain in Sliema at the material time on 7 December 1988.

21.57 Each of these factors is examined in turn below.

(a) Evidence of the football matches

Mr Gauci's evidence in chief

Q. I wonder if I could ask you about one other thing, Mr Gauci. Earlier on we talked about the occasion when the Libyan gentleman came into the shop and bought the clothing. Apart from yourself working in the shop, was there anybody else working in the shop that day?

A. Not at that moment, but when [the purchaser] *went to get the taxi, my brother came in, and I told my brother to keep an eye on the shop till I took the stuff to the taxi.*

Q. Where had your brother been that afternoon?

A. He must have been watching football, and when he comes late, that is what usually happens, so I think that was what happened that day (31/4779).

Cross examination

Q. ... Now, turning to page 9 [of Mr Gauci's statement of 1 September 1989] f*or my purposes at the top of the page what you said to Mr Bell on the 1st of September was this: I cannot remember the day or date that I met this man. I would think it was a weekday as I was alone in the shop. My brother Paul did not work in the shop that afternoon as he had gone home to watch a football match on*

television. He may be able to recall the game and this could identify the day and date that I dealt with the man in the shop. Do you see that?

A. Yes. Yes (31/4793).

21.58 As noted above it was agreed by joint minute number 7 that certain live football matches involving Italian clubs were broadcast by RAI at particular times on 23 November and 7 December 1988. The joint minute also agreed that Maltese and Italian local times are the same.

The trial court's approach

"[Mr Gauci] *could not say what day of the week it was. He was alone in the shop because his brother was at home watching football on television"* (paragraph 56).

"In cross examination, Mr Gauci was referred to a statement which he had given to DCI Bell on 14 September 1989 [in fact the date of the statement is 1 September 1989]. *In that statement he said that the purchase of the clothing was made on a week day when he was alone in the shop. His brother Paul Gauci did not work in the shop on that particular afternoon because he had gone home to watch a football match on television. It was agreed by joint minute that whichever football match or matches Paul Gauci had watched would have been broadcast by Radio Televisione Italiana either on 23 November 1988 or 7 December 1988"* (paragraph 64).

"We are satisfied with Mr Gauci's recollection, which he has maintained throughout, that his brother was watching football on the material date, and that narrows the field to 23 November or 7 December… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December" (paragraph 67).

The appeal court's approach

21.59 At appeal it was argued on behalf of the applicant that the trial court had misconstrued the terms of joint minute number 7 in respect that it agreed only that football matches were broadcast by RAI at certain times on 23 November and 7 December 1988. It was submitted that there was no basis in the evidence for inferring that these were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988. There was also no evidence from which it could be inferred that Paul Gauci had watched football on television only on one or other of those dates. It was submitted that accordingly there was no basis for inferring that the football matches listed in the joint minute were the only matches broadcast on television in Malta between the relevant dates of 18 November and 20 December 1988. Indeed, there might have been football on television on other days. The most it was said the trial court would have been entitled to draw from the joint minute was that both dates were consistent with Mr Gauci's evidence that his brother might have been watching football on television. However, other dates had not been ruled out. The defence position, it was argued, was that there was no reliable evidence that the purchase had taken place on 7 December 1988, the only date on which the purchaser could have been the applicant. The defence had not treated 23 November as the only alternative but, as there was a body of evidence supporting that date, this had been pointed out to the trial court.

21.60 In reply the advocate depute submitted that the competition which had developed between 23 November and 7 December 1988 emerged because the applicant had introduced the former date as an alternative. Indeed, the whole tenor of the defence submission was to place before the trial court a choice between those two dates. Although at first sight it might appear that the trial court had misinterpreted the joint minute there had been no misdirection, or if there had been it was of no materiality. According to the advocate depute Mr Gauci had not been challenged in cross examination as to whether his brother had been watching football on television on the date of purchase. Indeed, by referring to one of Mr Gauci's prior statements on this issue, counsel for the applicant had sought to bolster his evidence to this effect.

21.61 In the appeal court's view, the trial court had misinterpreted the joint minute. The joint minute had simply related to football broadcasts on 23 November and 7 December and did not contain any agreement that whichever football match or

matches Paul Gauci had watched would have been broadcast on either of those dates. However, the appeal court did not consider this matter to be of any real materiality. The Crown case was that the date of purchase was 7 December which was the only date when the purchaser could have been the applicant. The applicant had clearly put in issue 23 November as a competing date and had led evidence as to the weather conditions on both dates. The defence had gone on to submit that this evidence, taken together with Mr Gauci's evidence as to the weather conditions on the date of purchase, favoured 23 November. It did not appear to the appeal court that there was any evidence directed to showing that the purchase had occurred on Wednesday 30 November or Wednesday 14 November. The critical issue was whether the trial court was satisfied that the date of purchase was 7 December. If it had not been so satisfied then in the appeal court's view one of the important circumstances relied upon by the Crown would not have been established. However, having regard to the way in which the case was presented to the trial court it seemed to the appeal court that, in effect, the only real competing date was 23 November. Accordingly, the trial court had not erred in approaching the case on that basis.

Consideration

21.62 In terms of paragraph 64 of its judgment, the trial court appears to have accepted the passage in Mr Gauci's statement of 1 September 1989 as evidence that on the afternoon of the purchase Paul Gauci had gone home to watch football on television. In the Commission's view the court was entitled to do so. The statement in question represents Mr Gauci's earliest recollection of his brother's movements that day and, as Mr Gauci said himself on several occasions in his evidence, his memory of the sale was better at that time. Moreover, the relevant passage in the statement was put to Mr Gauci by the defence which did not seek to challenge his evidence of what his brother was doing that day.

21.63 Similarly, although the trial court misconstrued joint minute number 7, the Commission does not consider that it was unreasonable in terms of section 106(3)(b) for the court to narrow the possible dates to 23 November and 7 December, even in the absence of evidence from Paul Gauci.

(b) Mr Gauci's evidence as to when the purchase occurred

Examination in chief

Q. The police came to see you at the beginning of September 1989. Were you able to remember when this particular sale had taken place?

A. No. Exactly, I couldn't remember the date, but I remember all the clothes I had sold.

Q. Were you able to tell them that it was towards the end of 1988?

A. Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas, but I can't remember the date (31/4730).

21.64 Later in examination in chief Mr Gauci was referred to the following passage in his statement of 14 September 1989:

"[A]*bout 7.25pm, on Thursday, 14 September 1989, I went to police headquarters, Floriana, along with two police officers, Detective Chief Inspector Bell and Inspector Scicluna. It had been explained to me that the officers wished me to look at photographs to see if I could pick out anyone in the photographs as the man I sold the clothing to in November or December 1988"* (31/4757).

21.65 Mr Gauci agreed that his signature was at the foot of that statement.

Cross examination

Q. Now, at the foot of the third page of the witness statement [Mr Gauci's statement of 1 September 1989]*, you indicate that you remembered – I'll put it as it's written: I then remembered that one day during the winter in 1988 I had been working alone in the shop. It was around 6.30, just before closing time at 7.00*

p.m. A man had entered the shop and he started – My copy is cut off. But he was starting to look at some clothing; is that right?

A. Yes (31/4786).

Q. … And then about the middle of the page [of Mr Gauci's statement of 10 September 1990]*, Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November…*(31/4802).

Q. Let's go to Production 466 [Mr Gauci's statement of 21 February 1990] *please … I have been thinking about the day ... the man bought the clothes, November, December 1988* (31/4815).

The trial court's approach

21.66 At no time prior to giving evidence had Mr Gauci been noted as saying that the purchase "must have been about a fortnight before Christmas". However, as noted above, when the advocate depute asked him whether he was able to tell the police in September 1989 when it was that the purchase had taken place, Mr Gauci replied: "Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas, but I can't remember the date." In terms of paragraph 12 of its judgment it seems that the trial court interpreted Mr Gauci's response to be that he had told the police of this time frame:

"Mr Gauci's evidence was that he was visited by police officers in September 1989. He was able to tell them that he recalled a particular sale about a fortnight before Christmas 1988, although he could not remember the exact date."

The appeal court's approach

21.67 At appeal it was argued on behalf of the applicant that in narrating Mr Gauci's evidence in paragraph 12 of the judgment the trial court had failed to take account of the fact that Mr Gauci had never told the police at any of his early interviews that the purchase had taken place about a fortnight before Christmas. It was submitted that while the trial court was prepared to pray in aid Mr Gauci's prior statements when they demonstrated a consistency in his approach, in paragraph 67 of its judgment the court simply ignored those aspects of his prior statements which were inconsistent with the crucial areas of his evidence in court.

21.68 In reply the advocate depute pointed out that in paragraph 12 the trial court was simply giving a brief introductory account of Mr Gauci's evidence, and had indicated that it would return to deal with his evidence in more detail with reference to the date of the transaction and the issue of identification. Mr Gauci gave evidence that the police came to see him at the beginning of September 1989. He could not remember the date of the sale but, on being asked if he was able to tell the police that it was towards the end of 1988, said that it "must have been about a fortnight before Christmas". In the advocate depute's submission it therefore appeared to be Mr Gauci's recollection that he had told the police that the purchase had taken place about a fortnight before Christmas. According to the advocate depute the question as to whether he had in fact said that to the police was not specifically brought out in evidence on made the subject of submission.

21.69 In rejecting this ground the appeal court said the following:

> *"In our opinion there is no substance in this ground of appeal. The trial court referred to statements which Mr Gauci had made to police officers in September 1989 in none of which was there stated to be any reference to the purchase having taken place a fortnight before Christmas or to the fact that the Christmas lights were just being put up. In the circumstances we do not consider that it was necessary for the trial court in its judgment to draw attention expressly to the fact that these statements had not been made at an earlier stage. The fact that such*

statements had not been made at an earlier stage must have been quite apparent to the trial court" (paragraph 336).

Consideration

21.70 According to the appeal court, then, the trial court must have been aware that Mr Gauci had not given this time frame in any of the previous statements put to him in evidence. To some extent this conclusion sits uneasily with the terms of paragraph 12 of the judgment quoted above, in which the trial court states that Mr Gauci "was able to tell [police officers] that he recalled a particular sale about a fortnight before Christmas 1988". In the Commission's view the appeal court's conclusion in this respect is supported by the terms of Mr Gauci's evidence which do not reflect the finding made by the trial court in paragraph 12 of the judgment quoted above. In the Commission's view, however, taken as a whole there is nothing in Mr Gauci's evidence to support the view that he told the police of this time frame. Although in examination in chief the advocate depute effectively asked Mr Gauci what he had said to the police in this connection, a careful reading of his response indicates that all he was attempting to convey was simply his own recollection as to when the purchase had occurred.

21.71 As the Crown highlighted at the appeal, Mr Gauci was not cross examined as to whether he had told the police that the purchase must have taken place about a fortnight before Christmas. At the very least, however, the trial court was aware that in his first statement to the police dated 1 September 1989 Mr Gauci had been able to say only that the purchase had occurred "during the winter in 1988". Although this is not necessarily inconsistent with his evidence in chief, it suggests that at the time that statement was given Mr Gauci was unable to be any more specific than that the purchase took place in a particular season. The court was also aware that at interview with the police on 10 September 1990 Mr Gauci believed that the purchase had taken place at the end of November 1988. More generally, the court was aware that in none of the passages in the statements put to Mr Gauci in evidence was there any mention of the time frame given by him in examination in chief.

21.72 The Commission returns to this issue in the final part of this chapter.

(c) Mr Gauci's evidence as to the day of the purchase

Examination in chief

Q. Are you able to say which day of the week it was?

A. No, I have no idea. I can't say. I have no idea. If I said that, I wouldn't be – I would have no – nothing to count on (31/4779).

Cross examination

Q. ... Now, turning to page 9 [of Mr Gauci's statement of 1 September 1989] *for my purposes at the top of the page, what you said to Mr Bell on the 1st of September was this: I cannot remember the day or date that I met this man. I would think it was a weekday, as I was alone in the shop. My brother Paul did not work in the shop that afternoon, as he had gone home to watch a football match on television. He may be able to recall the game, and this could identify the day and date that I dealt with the man in the shop. Do you see that?*

A. Yes. Yes (31/4792-4793).

Q. ... And then about the middle of the page [page 3 of Mr Gauci's statement of 10 September 1990]*, Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November.*

Now, I am going to come back to that, in view of what you said in your evidence in chief, Mr Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr Bell, in September of 1990, that it was a weekday?

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date (31/4802-4803).

Q. Now, without going into it again, the first paragraph [of Mr Gauci's statement of 19 September 1989] *deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.*

A. Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that (31/4809-4810).

Q. So can I take it, then, that by "midweek", you mean not a Monday and not a Saturday?

A. No, certainly not Saturday. I believe. But I've already told you, I have nothing, no dates. I don't want to say anything about it, because if I don't know, I don't know. It's simply that. I don't want to mention a date. Why should I say or do so when I do not know? Do you understand?

Q. I do understand. Under our procedure, Mr Gauci, I ask the questions and you answer them.

A. Yes. Yes. But I'm trying to help.

Q. Indeed.

A. That's what I mean, I don't want to give you a date or say it's Friday. I don't want to tell lies. You understand? (31/4811).

Q. What I am interested in is what you said to Detective Constable Crawford in the last sentence [of Mr Gauci's statement of 19 September 1989]*: I am sure it was midweek when he called. What I want to do is see if we can investigate that word "midweek" together. We've already done a bit of this exercise. Your shop was open from Monday through till Saturday?*

A. Exactly.

Q. When you use the word "midweek", what day of the week do you have in mind, or what days? Would it be –

A. Wednesday, I think. That's how I see it.

Q. Wednesday?

A. But I stress the point, I don't know dates. I don't know the dates.

Q. I can assure you…

A. I don't want to cause confusion. I don't know dates.

Q. I understand. You had just –

A. I just open the shop…

Q. … with you. You chose the word "midweek", and you've told me that by "midweek", you probably mean Wednesday. If I popped down to see you in Malta, and we were close friends, and we arranged to meet midweek in two weeks' time, you would be thinking that I would turn up on a Wednesday?

A. That's how I think, sir. This is how I think it. That's how I think. In Malta – in Malta we use this phrase quite often. We say we go out midweek. It's a common phrase in Maltese, in the Maltese language.

Q. Indeed. And because I am not Maltese, I want to understand what it is you mean by it, you see. Would another way of approaching it be this: that midweek entails being separate from the weekend; in other words, the shop would be open the day before and the day after? And that would give me a clue to what you mean.

A. That's it. Exactly. Tuesday and Thursday.

Q. It would include Tuesday and Thursday. So we narrow it down to Tuesday, Wednesday or Thursday.

A. I think that Wednesday is midweek (31/4819-4821).

Consideration

21.73 As indicated above, it is not clear what weight, if any, the trial court attached to this aspect of Mr Gauci's evidence. In the Commission's view the inference that might be drawn from it is that the purchase had taken place on a Wednesday. However, in order to accept that inference the court would require to have ignored those passages in Mr Gauci's evidence (and the terms of his statement of 10 September 1990) in which he made it clear that he was unable to remember the day or date of the purchase. In any event, evidence that the purchase took place on a Wednesday points both to 23 November and 7 December (both fell on that day in 1988) and therefore does not, in itself, assist in determining on which of those dates the purchase might have taken place.

(d) Mr Gauci's evidence as to the Christmas lights

Examination in chief

Q. I wonder if we can try and approach [the date purchase] *then from a slightly different angle. Did the Tower Road in Sliema put up Christmas lights?*

A. Yes. Yes.

Q. How long before Christmas, generally, was that?

A. I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I can't say exactly.

Q. I would like you to think carefully about that, Mr Gauci, if you can, whether at the time when you sold to the Libyan the Christmas lights were on or not.

A. Yes, they were putting them up. Yes.

Q. Do you remember being asked about that by the police when they came to see you?

A. Yes, they had said. And I had said the lights were there when they came to buy.

Q. Am I right in thinking that you, from the time when the police came first to see you, at the beginning of September, were seen by the police on quite a large number of occasions?

A. Yes, they came a lot of times. They used to come quite often, didn't they.

Q. And that would be in the months after they came first to see you, was it?

A. Yes. Not months after. They used to come after. I don't know exactly when they used to come, but I did not take notes when they used to come. But they used to come quite often to see me. They used to come and ask questions, and they used to take me to the depot and things like that.

Q. And when you were interviewed by the police on these occasions, was your memory of the sale to the Libyan better than it is now?

A. Yes, of course. That is 12 years – 11 years after. I mean, 11 years are a long time for me, but in those days I told them everything exactly, didn't I?

Q. And if you told them, in one of these interviews, that the sale was made before the Christmas decorations went up, might that be correct?

A. I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights, though, in those times.

Q. But in any event, you explained that you thought it was about a fortnight before Christmas?

A. Something like that, yes, because I don't remember all these things, do I, when they put the lights on and when they turned them on. I'm not really interested so much because I don't even put decorations, Christmas decorations myself in my shop (31/4739-4741).

Cross examination

Q. [referring to Mr Gauci's statement of 10 September 1990]… *And then about the middle of the page, Mr. Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November*...(31/4802).

A. ... I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies.

Q. But if a policeman was coming to get you, that would be during the period you were being interviewed.

A. Yes, of course, to tell them about these description.

Q. Yes. And no doubt there were Christmas lights at such occasions, but we are looking at Christmas lights in the context --

A. I remember that there were Christmas lights.

Q. Well, so you say. But we'll examine together in detail what it was you said to the police on the subject of Christmas lights at the time, 10 and 11 years ago.

Now, I want you to look at another statement, please. This is Production 454 [Mr Gauci's statement of 19 September 1989]...

Q. Now, without going into it again, the first paragraph deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before

Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.

A. Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that.

Q. Undoubtedly. Now, let's deal with two aspects of that last paragraph. One is we can see that the statement was given by you to Mr. John Crawford, Detective Constable John Crawford, about ten to 1.00 on the 19th of September 1989. Is that right? Do you see that?

A. Yes, yes.

Q. And what you say is that the Christmas decorations were not up when the man bought the clothes. So would I be right in thinking that on the 19th of September of 1989, you believed that there were no Christmas decorations up when the man bought the clothes, and you told that to DC Crawford?

A. Maybe (31/4803-4810).

The trial court's approach

"In his evidence in chief, Mr Gauci said that the date of the purchase must have been about a fortnight before Christmas. He was asked if he could be more specific under reference to the street Christmas decorations. Initially, he said 'I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I can't say exactly.' In a later answer when it had been put to him that he had earlier said that the sale was before the Christmas decorations went up, he said 'I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights though in those times'" (paragraph 56).

"The position about the Christmas decorations was unclear, but it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of the purchase was Wednesday 7 December" (paragraph 67).

Consideration

21.74 It appears therefore that, despite being aware of his recollections in 1989 and 1990 to the effect that the Christmas lights were not up at the time of the purchase, and despite the substantial degree of confusion in his evidence on this point, the trial court was prepared to accept Mr Gauci's account that the Christmas lights were "going up" at the time. Although the appeal court took the view that the trial court did not attach a great deal of weight to this evidence (see its opinion at paragraph 332), it was nevertheless sufficiently material to feature in the judgment and was a factor on which the court relied to some degree in determining the date of purchase. The Commission returns to this issue in the final part of this chapter.

(e) Evidence of the weather conditions

Mr Gauci's evidence in chief

Q. Do you remember what the weather was like when the man came to the shop?

A. When he came by the first time, it wasn't raining but then it started dripping. Not very – it was not raining heavily. It was simply – it was simply dripping, but as a matter of fact he did take an umbrella, didn't he? He bought an umbrella (31/4741).

Cross examination

Q. And what he [Mr Bell] *has noted you as saying* [in Mr Gauci's statement of 1 September 1989] *is that the man said he had other shops to visit, and he picked up the umbrella and he said he would come back shortly. He paid me in the* [sic] *cash, which I think was 56 Maltese pounds. He then walked out the shop with the umbrella, which he opened up, as it was raining.*

A. The amount was different. The amount was 77 pounds. I always said that…(31/4788).

Q. … What I want to draw your attention to there is on page 5 in this very first interview [of 1 September 1989]. *You indicated to Mr. Bell, and the other police officers, that the man walked out of the shop with the umbrella, which he opened up because it was raining…* (31/4789).

Q. Then on the subject of weather, foot of page 4 and then on to page 5 [of Mr Gauci's statement of 1 September 1989]: *I even showed him a black-coloured umbrella, and he bought it. It then deals with other clothing. Then, in the middle of the page, which we've looked at: The man said he had other shops to visit, and he picked up the umbrella, and he said he would come back shortly… He then walked out of the shop with the umbrella which he opened up as it was raining.*

Do you see that? I take it, then, that on the 13th of September – the 1st of September of 1989 – your memory was that the man purchased the umbrella, he didn't leave it for you to bundle up with the other things he had bought in the shop, but he left with the umbrella and put it up outside the door of the shop because it was raining?

A. Exactly (31/4814-4815).

Q. Let's go to Production 466 please [Mr Gauci's statement of 21 February 1990]: *…I have been thinking about the day the man bought the clothes, November, December 1988. He left the shop after having made the purchases and*

turned right down Tower Road. At that time, he had the umbrella raised and opened. When he returned to the shop, he came from the same direction, but the umbrella was down because it had almost stopped raining, and it was just drops coming down.

So again on this question of weather, on the 21st of February of 1990, when this statement was made by you, your recollection was that when the man left the shop, he turned right down the Tower Road; is that right? And he took the umbrella with him, as you indicated to the police a lot earlier, he put it up, as he was leaving, and then when he came back, the umbrella was down and it had almost stopped raining. And just a few drops were still coming down. Yes?

A. I – precisely, I saw him going down, not going – he went down to get the taxi. He didn't go uphill. He went downhill. I said this – I went uphill to put the things in his taxi.

Q. Yes, I understand that. Can we look together, then, at –

A. It wasn't raining. It wasn't raining. It was just drizzling" (31/4815-4816).

Q. This [statement] *is dated the 10th of September of 1990, and it bears to be taken by Detective Chief Inspector Bell. Now, I invite your attention to page 2 of the statement, at the paragraph near the top of the page: I have been asked about the weather conditions that night the man made the purchase of the clothing. Just before the man left the shop, there was a light shower of rain just beginning. The umbrellas were hanging from the mirrors in the shop, and the man actually looked at them, and that is how I came to sell him one. He opened it up as he left the shop, and he turned right and walked downhill. There was very little rain on the ground, no running water, just damp...* (31/4817-4818).

Major Joseph Mifsud's evidence in chief

21.75 Major Mifsud, the Chief Meteorologist at the Meteorological Office at Luqa airport between 1979 and 1988, was called on behalf of the applicant to give evidence

about the weather conditions at Luqa airport and Sliema on 23 November and 7 December 1988. He was referred to defence production number 7 which consisted of an extract from the meteorological records maintained by his former department for 22 and 23 November and 6 and 7 December 1988. He was also shown a supplementary defence production which consisted of a continuation of those records into Thursday 8 December 1988. The records contained observations about wind, air pressure, temperature, rainfall and clouds at Luqa. Rainfall was observed and recorded every three hours. Recordings were made in GMT, Maltese local time being one hour ahead of this.

21.76 Based on those records Major Mifsud said that at 21.00 and midnight on 6 December 1988 and 06.00 on 7 December no rainfall was recorded at Luqa. At 09.00 on 7 December trace rainfall (ie less than 0.5 of a millimetre) was recorded at Luqa and a further entry in the records indicated that there was a light shower of rain between 08.44 and 08.45. Major Mifsud believed that this shower accounted for the trace of rain recorded at 09.00 that day. A further five entries for 7 December – 11.00, 12.00, 18.00, 20.55 and 23.45 and 23.55 – all recorded that there had been "nil rainfall" at Luqa. Aside from the trace of rain measured at 09.00 on 7 December no rain was recorded as having fallen at Luqa up until midnight. In particular, there was no rain recorded at Luqa at 18.00 (19.00 local time).

21.77 In respect of 8 December, an entry for 04.15 showed that a light shower of rain was recorded at Luqa at that time. Thereafter light intermittent rain was recorded at 04.45 and 05.45. Between 06.00 and 09.00 1 millimetre of rain was recorded as having fallen and between 09.00 and 11.00 6 millimetres of rain were recorded. Between 11.00 and 12.00, 7.2 millimetres of rain were recorded. In general, the records for 8 December showed that between 04.15 and noon there was continuous rain at Luqa.

21.78 According to Major Mifsud the distance between Luqa airport and Sliema was about 5km as the crow flies. He was asked whether in these circumstances he could assess whether on 7 December it would have rained in Sliema between 18.00 and 19.00 local time, to which he replied:

A. As the – we had no rain, all right, between 6.00 and 7.00 in the evening of the 7th at Luqa, so I do not either exclude the possibility that there could have been a drop of rain here and there. I do not exclude that possibility… Since we have no direct observation for that locality [ie Sliema]*, I would assume that the general conditions were as represented by the Luqa observation.*

Q. With what result, then, does –

A. Well, if you ask for a percentage, if – if I have to talk about a percentage, probability, I would say that 90 per cent there was no rain. And there was always that possibility that there could be some drops of rain, about ten per cent probability in other places.

Q. So are you saying that your view is that there is a – is your view then that you have a 90 per cent probability that there was no rain –

A. Yeah

Q. – at Sliema?

A. That's my opinion

Q. Between 6.00 and 7.00 –

A. Because I do not have any observations for that locality. This is basically… (76/9202-9203).

21.79 Major Mifsud was then asked about the air pressure measurements in the records. He confirmed that between 15.00 and 18.00 (16.00 and 19.00 local time) on 7 December the air pressure was rising, which restricted the possibility of cloud formation and decreased the possibility of rainfall at Luqa and Sliema. However, the possibility of rain could not be excluded as "there was cloud around, you know, a type of cloud". Major Mifsud could not be exact in saying how long such rain might have lasted but it would only have been for a "very short interval… a few drops". He did

not think that any rain that might have fallen would have made the ground damp because for that to happen the rain has to last "for quite some time". It was possible to have a shower within a very short period "but the cloud does not indicate that there was… that type of precipitation around."

21.80 Major Mifsud was then referred to the weather records relating to Luqa for 23 November 1988. These showed that there was light intermittent rain observed at noon on that date, and that a trace of rain was recorded. According to the records these conditions persisted until 18.00 (19.00 local time) at which time a rainfall measurement of 0.6 of a millimetre was taken. According to Major Mifsud this measurement covered the period between 12.00 and 18.00 (13.00 and 19.00 local time). Asked for his views on what the conditions might have been like in Sliema between 18.00 and 19.00 local time, Major Mifsud replied that he thought that the same conditions would have prevailed in that area. There was "8/8ths" cloud cover recorded at Luqa at that time which, because Malta was small, meant that cloud was covering the whole island. The clouds in question would have been rain-bearing clouds, although the intensity of the rainfall would depend on the thickness of the cloud. As only 0.6 of a millimetre of rain was recorded, the cloud was unlikely to have been that thick "but it did give some rain".

Cross examination

21.81 Major Mifsud accepted that the rainfall measurements to which he had referred in his evidence in chief related purely to Luqa airport. He also accepted that the weather in Malta varied from place to place. He was aware that other records relating to rainfall were kept at police stations throughout Malta. These records were passed by the police to the Meteorological Office at Luqa airport at noon of each day. Major Mifsud was referred to Crown production number 443 which showed the total amount of rain that had fallen at each police station in Malta during the 24-hour period ending at 12 noon on 8 December 1988. The amount of rain recorded varied from place to place; for example, 7.3 millimetres of rain was recorded as having fallen at Luqa airport but only 3.3 millimetres was recorded as having fallen at Sliema police station. According to Major Mifsud, it was not possible to say from the records when

that quantity of rain fell within the 24 hour period. The following exchange then took place:

Q. And since the weather does vary from place to place in Malta, if you have no observation for a particular locality, then it's difficult to express a clear view about the weather conditions in that locality isn't it?

A. It is yeah. Difficult, the question of probability comes in then. Give you a general idea but you can't be 100 per cent sure, so this is the thing.

Q. I understand that. So the absence of information about another locality does not increase the probability that the conditions will be the same as they are in Luqa, for instance?

A. Uh-huh. Yes (76/9217-9218).

21.82 Major Mifsud accepted that there were certain entries in defence production number 7 which suggested that at 17.45 local time on 7 December cloud was forming and that over the previous six hours the cloud cover had been over at least half of the sky. He accepted that the observations on which those entries were based were made from a vantage point at the airport which enabled one to look around the rest of the island. Other entries for the same date showed that there was stratocumulus cloud at a height of about 5000 feet covering half of the sky. Major Mifsud accepted that stratocumulus cloud can give rain depending upon its thickness and the freezing level. He accepted that at 17.45 local time on 7 December there was cloud cover over Malta that could produce light rain, but he reiterated that it was not raining at Luqa at that time.

21.83 Major Mifsud was referred to the entries for 17.15 (18.15 local time) on 7 December which indicated that the cloud cover remained unchanged from the conditions noted at 16.45 (17.45 local time). The situation remained until 18.15 (19.15 local time) when the clouds changed from stratocumulus at 5000 feet to altocumulus at 9000 feet base. According to Major Mifsud, altocumulus could cause rain under special conditions depending upon its thickness.

Re-examination

21.84 Major Mifsud agreed that the figures contained in the Meteorological Office records were taken at that office rather than at a police station. Asked whether police officers were always assiduous in their duties in respect of meteorological matters, he replied "95, 98 per cent, yes."

21.85 Major Mifsud agreed that so far as the Luqa records were concerned, rain began falling as a shower at 04.15 on 8 December and continued until noon that day. He also agreed that aside from trace rain at Luqa airport between 08.44 and 08.45 on 7 December no rain was recorded as having fallen there on that date. Given that the Sliema police station records showed that there had been 3 millimetres of rain between noon on 7 December and noon on 8 December, Major Mifsud was asked for his opinion as to when that rain was likely to have fallen, taking into account the Luqa records for that date. His opinion was that most of the rain recorded at Sliema police station on 8 December had fallen on the morning of that day. Although there was still a possibility that some of that rain might have fallen on the evening of 7 December, he thought that most of it had fallen on 8 December.

21.86 Major Mifsud was then asked about the records for 7 December which gave details of the cloud cover between 17.45 and 19.15 local time. He did not accept that those records showed that there was "half cloud cover in the sky" during that period. Rather the records showed that there was half cloud cover of stratocumulus at 5000 feet. Major Mifsud expected that those cloud conditions would have covered the whole of Malta. He agreed, however, that at no time had those conditions produced any rain at Luqa. The clouds were moving from the north west to the south east. Sliema, he said, is situated north west of Luqa airport.

The trial court's approach

"There is no doubt that the weather on 23 November would be wholly consistent with a light shower between 6.30pm and 7.00pm. The possibility that there was a brief light shower on 7 December was not however ruled out by the evidence of

Major Mifsud. It is perhaps unfortunate that Mr Gauci was never asked if he had any recollection of the weather at any other time of the day, as evidence that this was the first rain of the day would have tended to favour 7 December over 23 November. While Major Mifsud's evidence was clear about the position at Luqa, he did not rule out the possibility of a light shower at Sliema. Mr Gauci's recollection of the weather was that "it started dripping – not raining heavily" or that there was a "drizzle" and it only appeared to last for the time that the purchaser was away from the shop to get a taxi, and the taxi rank was not far away… Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of purchase was Wednesday 7 December" (paragraph 67).

Consideration

21.87 In the Commission's view although the evidence of the weather does not necessarily exclude 7 December as the purchase date, as the trial court appeared to acknowledge, it provides little support for it. Indeed, on any view it provides much greater support for 23 November.

Conclusion

21.88 The Commission considers that in the present case, to paraphrase the words of the Lord Justice Clerk in *E v HMA*, the trial court, before even looking at any competing versions of the facts, had to consider the difficulties created by Mr Gauci's evidence which ultimately underpinned the Crown case. In line with the approach taken in *E* the Commission has therefore considered whether Mr Gauci's evidence implicating the applicant as the purchaser, when viewed together with the other criminative circumstances, can provide a reasonable basis for a verdict of guilty beyond reasonable doubt.

21.89 The Commission considers that the extraordinary length of time between the purchase and the identification parade, and the evidence of Mr Gauci's exposure to the photograph in *Focus* magazine in relatively close proximity to the parade, cast doubt upon the reliability of that identification, even though it was one of resemblance

only. Likewise, the even longer period between the purchase and the trial, Mr Gauci's exposure to the photograph in *Focus* magazine, the dangers inherent in dock identifications and the way in which this aspect of Mr Gauci's evidence was led by the Crown, cast significant doubt upon the reliability of Mr Gauci's identification of the applicant in court.

21.90 In the Commission's view, however, neither of these identifications is easily separated from Mr Gauci's identification of the applicant from a photo-spread shown to him on 15 February 1991. That identification was made at a time when Mr Gauci was not at any risk of exposure to the applicant's photograph in the media and at a point significantly closer to the purchase than his identifications at the parade and in court. However, like those other identifications, the identification by photograph in 1991 was one of resemblance only and was qualified and equivocal. It was also made over two years after the event and was undermined by Mr Gauci's initial descriptions of the purchaser, particularly of his height and age.

21.91 Accordingly, as the trial court acknowledged, there were "undoubtedly problems" in respect of Mr Gauci's identification of the applicant (paragraph 67). The approach which appears to have been taken by the court in drawing the inference that the applicant was the purchaser was to combine Mr Gauci's identification evidence with its finding that the purchase had taken place on 7 December 1988, a date on which it was established that the applicant was in Malta staying at a hotel close to Mary's House. As well as potentially providing support for the identification, the finding that the purchase took place on that date was important because a finding of any other date would, on the evidence before the court, effectively have excluded the applicant as the purchaser. As noted earlier in this chapter there was no evidence that the applicant was in Malta in November 1988 and, although it was established that he was there on several occasions in December 1988, in terms of the evidence 7 December was the only date on which he would have had the opportunity to purchase the items. To that extent the Commission considers that the finding that the purchase took place on 7 December was crucial to the applicant's conviction.

21.92 The Commission accepts that there was evidence before the trial court from which it could reasonably conclude that Paul Gauci had gone home to watch football

on the date of purchase. Although the court misconstrued the terms of joint minute number 7 there was clear evidence that live football was broadcast by RAI on 23 November and 7 December 1988. In the Commission's view, based on those pieces of evidence, the court was entitled to view the purchase as having occurred on one or other of those dates.

21.93 In establishing the date of purchase the court also relied upon Mr Gauci's evidence that it "must have been about a fortnight before Christmas". Although Mr Gauci was not directly challenged on this aspect of his evidence, the trial court was aware that he had never mentioned such a time frame in those statements that were put to him. The court knew, for example, that in his first police statement Mr Gauci was able to say only that the purchase had occurred "during the winter in 1988". The court was also aware that in his statement of 10 September 1990 he told the police that it had taken place "at the end of November." While in other statements put to him Mr Gauci indicated that the purchase had occurred "in November or December 1988" or "November/December 1988", the fact that these left open the possibility that it had occurred in November makes it even more difficult to understand why the court was prepared to accept as reliable an account which, on any reasonable interpretation, tends to exclude that month.

21.94 The trial court also accepted Mr Gauci's evidence to the effect that the Christmas lights were "going up" at the time of the purchase. However, the court was aware that in two of his previous statements (dated 19 September 1989 and 10 September 1990) Mr Gauci's recollection was that they were "not up" at the time. The court was also aware of Mr Gauci's confusion in cross examination as to whether he was being asked about the Christmas lights at the time of the purchase or at the time when the police came to collect him. Although the court might not have attached a great deal of weight to this aspect of the evidence, it was nevertheless viewed by the court as being "consistent with [Mr Gauci's] recollection that it was about two weeks before Christmas". It therefore played at least some part in the court's determination of the date of purchase.

21.95 As noted above it is not clear to the Commission to what extent the trial court relied upon Mr Gauci's evidence that the purchase had taken place "midweek", a term

which he understood to mean "Wednesday". However, in order to have done so the court would require to have ignored the many passages in Mr Gauci's evidence (and the terms of his statement of 10 September 1990) in which he made it clear that he was unable to remember the day or date of the purchase. In any event, evidence that the purchase took place midweek or on a Wednesday would not have supported 7 December any more than it would 23 November (both dates having fallen on a Wednesday in 1988).

21.96 Although the weather evidence did not necessarily exclude 7 December as the date of purchase, in any choice between that date and 23 November it strongly favoured the latter.

21.97 Having considered all the evidence before the court in this connection the Commission has reached the view that there is no reasonable basis for the conclusion that the purchase took place on 7 December 1988. The only evidence which favours that date over 23 November is Mr Gauci's account that the purchase must have been about a fortnight before Christmas and his confused description of the Christmas lights going up at the time. In light of the difficulties with those two pieces of evidence the Commission does not consider that a reasonable court, properly directed, could have placed greater weight upon them than upon evidence of the weather conditions and of Mr Gauci's statements (in which he said that the purchase had taken place in "November, December 1988", "November or December 1988" and "at the end of November"). In the Commission's view, those factors, taken together, point, if anything, to a purchase date of 23 November.

21.98 In the absence of a reasonable foundation for the date of purchase accepted by the trial court, and bearing in mind the problems with Mr Gauci's identification of the applicant, the Commission is of the view that no reasonable trial court could have drawn the inference that the applicant was the purchaser.

21.99 As well as being significant in itself such a finding might be capable of undermining the weight of other evidence against the applicant such as that relating to his presence at Luqa airport on the morning of 21 December 1988. It is clear that this piece of evidence gains its significance largely from the finding that the primary

suitcase was somehow placed on board KM180. However, it arguably takes on further significance when seen in the context of the court's conclusion that the applicant was the purchaser of the items established to have been within that suitcase.

21.100 The Commission has considered whether, leaving aside the evidence as to the date of purchase, there exists an alternative means by which a verdict of guilty could reasonably have been returned, based on the evidence not rejected by the court. Such an approach is consistent with that taken by the court in *King* in which it was held that the test to be applied under section 106(3)(b) is whether no reasonable jury *could* have returned a verdict of guilty on the evidence before them. However, given the importance of the date of purchase to the identification of the applicant as the purchaser, and the importance of that identification to his conviction, it seems to the Commission that this is a matter more appropriately determined by the High Court in the event that it arises at appeal. It is sufficient to say that in the Commission's view any finding that a reasonable court could not have inferred that the applicant was the purchaser would render the remaining evidence against him insufficient to convict.

21.101 Based on these conclusions the Commission is of the view that the verdict in the case is at least arguably one which no reasonable court, properly directed, could have returned. In these circumstances the Commission considers that a miscarriage of justice may have occurred in the applicant's case.

CHAPTER 22
UNDISCLOSED EVIDENCE CONCERNING *FOCUS* MAGAZINE

Introduction

22.1 In the Commission's view further doubts as to Mr Gauci's identification of the applicant as the purchaser of the items emerge from evidence which was not disclosed to the defence. This concerns Mr Gauci's exposure to images of the applicant in the media and, in particular, to photographs contained in the December 1998 edition of *Focus* magazine and in the Maltese language newspaper, *It Torca*. A copy of the *Focus* article was lodged by the Crown as a production at trial (CP 451, see appendix) and was spoken to by Mr Gauci in evidence. There was no evidence at trial concerning the *It Torca* articles (see appendix for copies of the articles).

22.2 Before setting out the content of the undisclosed material it is important, by way of context, to narrate the evidence concerning pre-trial publicity which was led at trial, together with the approaches taken to this on behalf of the applicant in closing submissions, and by the trial and appeal courts in their respective judgments.

The evidence at trial

Anthony Gauci

22.3 Mr Gauci's evidence regarding pre-trial publicity related only to his exposure to the *Focus* article. The relevant passage of his evidence is as follows.

> *Q. ... Do you remember, Mr Gauci, perhaps towards the end of 1998, or the beginning of 1999, another shopkeeper in the street showing you a magazine?*
>
> *A. Yes*
>
> *Q. Do you remember the name of the magazine?*

A. No, I don't remember. I remember seeing the magazine, but I don't remember the name.

Q. And do you remember taking the magazine and showing it to Mr Scicluna, the police officer?

A. Yes. Yes. I do

Q. Could we have on screen, please, production 451. And if we have image 67, please. Was that the article in the magazine which a fellow shopkeeper showed to you?

A. Yes.

Q. And did the magazine contain an article about the Lockerbie disaster?

A. Yes. Yes.

Q. Towards the bottom of the page in the article, is there a photograph in the centre, of a man wearing glasses?

A. Yes.

Q. Did you recognise that photograph?

A. That day, I thought he looked like the man who bought from me, but his hair was much shorter, and he didn't wear glasses.

Q. And did you show that photograph to Mr Scicluna?

A. Yes.

Q. Do you remember what you said to Mr Scicluna when you showed it to him?

A. Well, now, I told him, 'This chap looks like the man who bought the articles from me.' Something like that I told him.

Q. If Mr Scicluna says that you said 'that's him', would that be correct?

A. I don't remember now. I remember I told him, 'This man looks like the man who bought the articles from me.' This is what I said – I don't know exactly what I said. But I said he might have said that, but his hair and his glasses were not like that, the day he bought from me. And it was much shorter than that and he was without glasses (31/4473-4475).

22.4 Mr Gauci was not cross examined on the matter.

Inspector Brian Wilson

22.5 Inspector Wilson was responsible, along with Constable Calum Watson, for the conduct of the identification parade which took place at Kamp van Zeist on 13 April 1999. In evidence Inspector Wilson spoke to the contents of the parade report which had been prepared by him (CP 1324).

22.6 The applicant was the only accused to take part in the identification parade and Mr Gauci was the sole witness in attendance. Prior to its commencement the applicant's solicitor Mr Duff took issue with the inclusion of four stand-ins by reason of age. He also made the following, more fundamental, objections as to the circumstances in which the parade was to be held:

- *"The incident to which the witness's evidence relates happened more than ten years ago. In these circumstances, a witness acting in good faith and genuinely trying to recall the event is likely to be guessing rather than making a true and reliable identification;*

- *"In November 1991, when Mr Megrahi was named as an accused in this case, his photograph was released to the press either by the police or the*

prosecution along with details of the alleged evidence in the case. Since November 1991, the photograph of Mr Megrahi has appeared thousands of times in the printed and electronic media with the acquiescence or connivance of the Lord Advocate, who has failed to take any action under the Contempt of Court Act when it was applicable and, despite requests to do so, has failed to make any effort to restrain the media. Publication of the photograph has continued right up to the day the accused left Libya for the Netherlands. It is inconceivable that the witness will not have seen the photograph on many occasions. To ask the witness to make an identification now, or even at the trial, is grossly unfair and liable to lead to a miscarriage of justice;

- *"Finally, in my view, the stand-ins available in the original pool of 11 were not sufficiently similar to the accused, particularly in terms of age and ethnic background. There is a difference in appearance between someone of Libyan background and someone from Algeria, let alone Holland or Italy"* (32/4899-4900).

22.7 In response to the objections taken to the inclusion of four of the stand-ins, Inspector Wilson informed the applicant and Mr Duff that these had been discarded from the original pool. With regard to those objections concerning the potential effects of pre-trial publicity; the lengthy period that had elapsed since the purchase; and the general objection to the age and ethnic background of the original pool of stand-ins, Inspector Wilson informed the applicant and Mr Duff that he was acting on the instructions of the Crown and intended to take no action other than to note the objections on the appropriate forms.

22.8 Prior to his viewing the parade Mr Gauci was read the following instructions by Inspector Wilson:

"The man whom you referred to in your statement to police entered your shop premises, Mary's House, 63 Tower Road, Sliema, Malta, midweek prior to 10 December 1988 and purchased clothing and an umbrella, may or may not be here, but, if you see him, tell me his number."

22.9 Mr Gauci's response, which was spoken by him in English, was noted by Inspector Wilson as follows:

> *"Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who look a little bit like exactly is the number 5."*

22.10 The applicant adopted position number 5 in the parade.

22.11 In cross examination Inspector Wilson was asked to narrate the description of the applicant contained within the parade report. This indicated that at the time of the parade the applicant was 47 years of age, five feet, eight inches tall and of stocky build with dark curly hair.

Submissions to the trial court

22.12 No submissions were made by the Crown in respect of the *Focus* article or on pre-trial publicity in general.

22.13 On behalf of the applicant (82/9916-9922) counsel highlighted the threat to the course of justice posed by media coverage and, in particular, by the publication of photographs of accused persons in newspapers. It was submitted that in the present case the court could not have failed to notice the photographs of both accused which had been shown on television and in newspapers across the world since 1991. If evidence were needed to vouch this it was provided by the *Focus* magazine which Mr Gauci had seen "at the end of 1998 or early in 1999".

22.14 In the normal case, counsel submitted, the publication of an accused person's photograph is a contempt of court, which implies a substantial risk of serious prejudice to the course of justice. Reference was thereafter made by counsel to a number of decisions by the High Court in which newspaper representatives had faced contempt of court charges in connection with the publication of photographs of accused persons and suspects.

22.15 Counsel then went on to narrate Mr Gauci's evidence concerning his partial identification of the incriminee Abo Talb ("Talb") in 1990 which came about following Mr Gauci's exposure to a newspaper article about the case in *The Sunday Times* in which Talb had been pictured beneath the caption "Bomber". Counsel submitted that Mr Gauci's identification of the applicant by resemblance was undermined by the fact that in evidence Mr Gauci described the newspaper photograph of Talb as resembling the purchaser "a lot".

The trial court's judgment

22.16 In respect of the identification parade (which the trial court mistakenly indicates took place on 13 August 1999 – in fact, as stated above, it was held on 13 April of that year) the trial court narrated the comment made by Mr Gauci in picking out the applicant, as recorded in the parade report and in the evidence of Inspector Wilson. The court then went on to quote Mr Gauci's evidence when identifying the applicant in court: "He is the man on this side. He resembles him a lot". Both identifications, the court observed, were criticised on the ground, *inter alia,* that photographs of the applicant had featured in the media many times over the years, and that accordingly purported identifications taking place more than 10 years after the event were of little if any value. Before assessing the quality and value of the identifications the court considered it important to look at the history of the matter, which entailed an examination of Mr Gauci's evidence and the terms of his previous statements that were put to him. As part of this exercise the court made reference to Mr Gauci's identification by resemblance of a photograph of the applicant shown to him by police officers on 15 February 1991.

22.17 The court went on to say the following about Mr Gauci's exposure to the *Focus* article:

> *"Finally, so far as police interviews were concerned, Mr Gauci was asked about a visit he made to Inspector Scicluna towards the end of 1998 or the beginning of 1999 after another shopkeeper showed him a magazine containing an article about the Lockerbie disaster. Towards the bottom of the page in the article there was a photograph in the centre of a man wearing glasses. Mr Gauci thought that*

that man looked like the man who had bought the clothes from him but his hair was much shorter and he didn't wear glasses. He showed the photograph in the article to Inspector Scicluna and, as Mr Gauci recalled it, he said "Well now I said, 'This chap looks like the man who bought articles from me.' Something like that I told him." He added that the hair of the man who bought from him was much shorter than that shown in the photograph and he was without glasses. The photograph was a photograph of the first accused" (paragraph 63).

22.18 Having examined the evidence in some detail the court then set out its conclusions regarding Mr Gauci's identification of the applicant. In its view Mr Gauci had applied his mind carefully to the problem of identification whenever he was shown photographs and did not just pick someone out at random. Unlike many witnesses who express confidence in their identification when there is little justification for it, Mr Gauci was always careful to express any reservations he had and gave reasons why he thought there was a resemblance. The court observed that there are situations where a careful witness who will not commit himself beyond saying that there is a close resemblance can be regarded as more reliable and convincing in his identification than a witness who maintains that his identification is 100 per cent certain. The court formed the view from Mr Gauci's general demeanour and his approach to the difficult problem of identification that when he picked out the applicant at the identification parade and in court he was not doing so just because it was comparatively easy, but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser. While he had never made what could be described as an "absolutely positive identification", in the court's view, given the lapse of time, it would have been surprising if he had been able to do so. In these circumstances the court considered that Mr Gauci's identification of the applicant "so far as it went" was reliable and should be treated as a highly important element of the case.

The appeal court's opinion

22.19 Counsel for the applicant criticised the trial court's conclusions on the basis that while it had noted the defence submissions as to the prejudicial effect of pre-trial publicity it had failed to deal with these and, in particular, had failed to indicate

whether such publicity affected the value to be attached to Mr Gauci's identifications at the parade and in court. Counsel referred to the defence submissions at trial regarding the extent to which the applicant's photograph had been shown in the world media since 1991 and to Mr Gauci's exposure to the article in *Focus* magazine, which counsel informed the appeal court had occurred "not very long before the date of the identification parade". The issue of identification was clearly crucial and Mr Gauci, it was submitted, might have been influenced in his identification of the applicant by having seen his photograph in a magazine a short time before the identification parade was held. While the trial court had set out the defence submissions on the matter, it had not come to any express judgment as to whether Mr Gauci's evidence had been affected. Its failure to do so, it was submitted, amounted to a misdirection (paragraph 300).

22.20 On behalf of the Crown it was argued that there had been no evidence that any photographs of the applicant, other than that which appeared in *Focus* magazine, had been published or, if they were, that Mr Gauci had seen any of them. Mr Gauci had not been challenged in cross examination about his identification of the applicant at the parade or in court, and in particular it had not been suggested to him that his identification had been in any way affected by his having seen the photograph in *Focus* magazine or any other published photograph. The question whether the identification made by a witness had been affected by pre-trial publicity had to be examined in light of the evidence in each case. The trial court had considered all the evidence and the submissions by counsel and had come to a conclusion about the history of Mr Gauci's examination of photographs. In the advocate depute's submission there had been no misdirection (paragraph 301).

22.21 In the appeal court's view the submissions made on behalf of the Crown were well founded. The court observed that counsel's argument was based on the fact that Mr Gauci had seen the article in *Focus* magazine not long before the identification parade in April 1999. In narrating the history of Mr Gauci's accounts the trial court noted that he had picked out a photograph of the applicant in February 1991 and had concluded that his identification by resemblance was reliable. In the appeal court's view the defence must have been aware that Mr Gauci had seen the magazine containing the applicant's photograph. If it was going to be suggested that Mr

Gauci's identification of the applicant at the parade or in court had been influenced by seeing that photograph, then this should have been put to Mr Gauci in cross examination so that consideration could have been given to his response. Not only was that matter not put to Mr Gauci, but the defence did not seek to challenge directly his evidence that the applicant resembled the purchaser of the clothing. In the appeal court's view the trial court had dealt with the issue of pre-trial publicity as far as was required, standing the fact that it was never suggested to Mr Gauci in cross examination that his evidence had been influenced by any pre-trial publicity. While counsel for the applicant alleged that photographs of the applicant had previously been published in the media across the world, even if this had happened there was no evidence that Mr Gauci had seen any of them other than the photograph contained in *Focus* magazine (paragraph 302).

22.22 In the circumstances the court considered there to be no substance in this ground of appeal.

The evidence not heard by the trial court

(i) Further evidence regarding the Focus magazine

22.23 As noted earlier the only indication at trial as to when Mr Gauci saw the *Focus* article came in the form of a question by the advocate depute in which he asked Mr Gauci if he could recall "perhaps towards the end of 1998, or the beginning of 1999" another shopkeeper in the street showing him a magazine. As can be seen from the accounts given above this rather vague timescale formed the basis of submissions on behalf of the applicant to both the trial and appeal courts.

22.24 However, further details as to the circumstances of Mr Gauci's exposure to the article are contained in an undated police statement by a Maltese officer, Sergeant Mario Busuttil (S5725, see appendix). The statement, which was noted by Mr Bell, was extracted from the HOLMES database of police statements supplied to the Commission by Crown Office. Its contents are reproduced, in precognition form, in chapter 11 of the Crown precognition volume (see appendix). The statement is in the following terms:

"On the morning of 1 April 1999 I accompanied Superintendent Scicluna to the shop premises at 63 Tower Road Malta occupied by the witnesses Anthony and Paul Gauci.

On this date Anthony Gauci informed Mr Scicluna that in December 1998 a local shop keeper, whom he did not wish to identify, had shown him a magazine which referred to the Lockerbie Air Disaster and also contained photographs of two Libyans. Anthony Gauci stated that one of the photographs was of the man who had bought the clothing in question.

Mr Scicluna asked Gauci to hand over the magazine and Gauci stated that he had it at home and that he would look for it. Mr Scicluna also stated to Gauci that under the circumstances it was the intention to hand the magazine to officers from the Lockerbie enquiry.

On 9 April 1999, I had occasion to call at the shop premises. I was alone at this time when witness Anthony Gauci handed over to me a Focus magazine dated December 1998 (DC1626). I examined the magazine and noted that there was an article referring to the Lockerbie Air Disaster.

Anthony Gauci pointed out to me a photograph on page 67 of a male who had the name shown as Abdelbasset Al Megrahi. The witness stated to me "Dan Hu" which translates in English as "That's him".

I retained this magazine as a production and on 12 April 1999 I travelled with the witnesses Anthony and Paul Gauci to Holland. On this date, I handed over to the witness, Detective Chief Superintendent Bell the magazine in question which he retained. I have signed the label prepared in respect of this magazine.

The reason I had accompanied the witness Anthony Gauci to Holland was to enable him to view an identification parade, act as interpreter and keep him calm. I was present with the witness during the identification parade when the witness Anthony Gauci identified a male person at position No 5. The police officer

conducting the identification parade asked the person at position No 5 to give his name but he did not answer.

I can now identify the person whom the witness Anthony Gauci identified at the identification parade."

22.25 In correspondence dated 5 February 2007 Crown Office confirmed to the Commission that Sergeant Busuttil's statement was not disclosed to the defence. According to Crown Office this was because it was not considered disclosable in terms of the principles laid down by the High Court in *McLeod v HMA* 1998 SCCR 77. Furthermore, Crown Office believed that the defence had full access to Sergeant Busuttil for the purposes of precognition and that the Maltese police had made his statement available to the defence during preparations for trial. According to Crown Office if the defence had experienced any problem in precognoscing Sergeant Busuttil the Crown would have endeavoured to assist them. However, there was no record of any such difficulty or request for assistance.

22.26 Contrary to the suggestion made by Crown Office it does not appear that the defence knew of Sergeant Busuttil's potential evidence as a result of its own enquiries. Although not called, Sergeant Busuttil featured on the Crown's list of witnesses (no. 662) and was precognosced by the defence prior to the trial (see appendix). While Sergeant Busuttil confirms in this precognition that on 12 April 1999 he travelled with Anthony and Paul Gauci to Kamp van Zeist in connection with the identification parade, he makes no reference to the *Focus* magazine. He does, however, make the following comment on the subject of pre-trial publicity:

"However, by 1999 most people had seen photographs of Megrahi. I could pick out Megrahi although I had never seen him personally myself. The others at the ID parade did not look enough like Megrahi to be confused with him."

22.27 There also appears to be no basis for the Crown's belief that a copy of Sergeant Busuttil's statement was supplied to the defence by the Maltese police during preparations for trial. One of the conditions imposed by the Maltese authorities in return for allowing the Scottish police to conduct enquiries there in 1989

was that the Maltese police be provided with copies of all statements obtained from Maltese witnesses. In 1999 the Maltese Attorney General passed copies of these statements to the defence following a request to do so by the co-accused's representatives. During preparations for the appeal in 2001 a list purportedly of all such statements was compiled by the Maltese Police Commissioner (see appendix). Sergeant Busuttil's statement does not appear on that list. The Commission also obtained from the McGrigors electronic files an index of statements they had obtained from the Maltese police (see appendix). This index includes a number of statements not mentioned in the list compiled by the Maltese Police Commissioner, including a number of statements taken in 1999. However, again there is no mention of Sergeant Busuttil's statement (although it does list a statement taken from him in April 1999 regarding a separate matter (S5725A, see appendix)).

22.28 Sergeant Busuttil's senior officer, Mr Scicluna, was also listed by the Crown as a witness (no. 661) but again was not called. In his Crown precognition (see appendix) he makes reference to the *Focus* magazine though not to the date, or even the month or year, in which it was handed over by Mr Gauci. Despite his having been seen on two occasions by the defence, there is no reference to the *Focus* magazine in either of Mr Scicluna's defence precognitions.

22.29 Although Mr Bell in his defence precognition makes reference to obtaining the *Focus* magazine while at Kamp van Zeist for the identification parade, his precognition contains no details as to the length of time the magazine was in Mr Gauci's possession or the proximity of this to the parade. Nor is there any reference to such matters in Mr Bell's police statement on the subject (S2632CO). Copies of this statement and his defence precognition are included in the appendix.

22.30 At interview with the Commission's enquiry team (see appendix of Commission interviews) none of the applicant's trial representatives could recall being aware of the information contained in Sergeant Busuttil's statement.

(ii) Evidence as to Mr Gauci's exposure to articles in It Torca newspaper

22.31 As explained in chapter 4, during the course of its review the Commission obtained from D&G a number of "protectively marked" (or classified) documents. One such item is a confidential report dated 20 March 1999, entitled "Threat Assessment – Gauci Brothers", certain passages of which the Commission has been given consent to disclose (see appendix of protectively marked materials). As its title suggests, this report appears to a have been intended as a basis for discussing witness safety issues in the lead-up to the trial and the various ways in which perceived risks might be addressed. It contains the following passage in relation to the difficulties posed by increasing press attention in the case:

> *"On 28 February 1999 the Malta local language newspaper It Torca (The Torch) published a two page spread on pages 16 and 17 in which a photograph of the two accused appeared along with other photo montages of the various scenes at Lockerbie. Just after this appeared a local (thought to be a shopkeeper) (unidentified at present) came into Marys* [sic] *House shop and showed Tony Gauci the article. The following week a further two page spread in the same newspaper was published which concluded the article begun the previous week, this was similar to the first with photographs supporting the main article. Needless to say the publication of this article had a profound effect on both of the brothers, it is more likely that Paul would be more worried than Tony as he can probably grasp the potential threat to his and his brothers* [sic] *safety."*

22.32 By letter dated 8 March 2007 Crown Office confirmed to the Commission that this report was not disclosed to the defence. It was explained in the letter that Crown Office has no record of the document in its files but that Mr Brisbane, now Deputy Crown Agent, was confident that as a member of the joint police and prosecution investigation team in Malta in early 1999 he would have been made aware of the information it contained.

Further enquiries

(i) Sergeant Mario Busuttil

22.33 Members of the Commission's enquiry team met with Sergeant Busuttil in Malta on 1 August 2006. A copy of his statement is contained in the appendix of Commission interviews.

22.34 Sergeant Busuttil explained that his first involvement in the case was from about 1991/2 until 1993/4 and that he was involved again from 1999 until the end of the trial. He had assisted generally in obtaining statements from witnesses as well as maintaining security arrangements for Anthony and Paul Gauci particularly in respect of their shop, Mary's House.

22.35 On being shown a copy of the HOLMES version of his statement Sergeant Busuttil confirmed that its contents accorded with his understanding of events. While he had not seen the original manuscript version of the statement, he said he would be content with the HOLMES version provided it was the same as the manuscript version. The Commission subsequently obtained the manuscript version of Sergeant Busuttil's statement which, as explained above, was noted by Mr Bell – it is in precisely the same terms as the HOLMES version (see appendix).

22.36 Sergeant Busuttil was generally unable to expand on the terms of the statement. He did not dispute that he had visited Mr Gauci on 1 April 1999 but could not recall clearly the purpose of the visit other than that during that time he would visit Mary's House quite often in connection with the Gaucis' protection and security. He specifically recalled Mr Gauci uttering the words "dan hu" when referring to the applicant's photograph within the article. Sergeant Busuttil took this to mean that Mr Gauci believed the man pictured in the photograph was the same as the man who purchased the items of clothing from his shop in "December 1988". Although it was possible that he had discussed the matter further with Mr Gauci that day he could not remember what else was said. He could not recall reading out the contents of the article to Mr Gauci but it was possible that he had done so.

22.37 Sergeant Busuttil confirmed that he had taken the magazine to Kamp van Zeist where he had travelled with Mr Gauci so that the latter could view the identification parade. There, Sergeant Busuttil had handed the magazine to Mr Bell. Sergeant Busuttil explained that as his stay in the Netherlands on this occasion was brief he would not have placed baggage in the hold of the aircraft and would have taken the magazine in his hand luggage. He could not recall discussing the article with, or showing it to, Mr Gauci while on the plane, but he explained that normally he would not talk about such matters on planes.

22.38 Prior to Sergeant Busuttil's interview a member of the Commission's enquiry team obtained archive copies of *It Torca* newspaper dated 28 February and 7 March 1999 from its publisher in Malta (see appendix). As detailed in the report dated 20 March 1999, both editions were found to contain articles about the case featuring photographs of the applicant and the co-accused. The photographs of the two accused in each article are different.

22.39 At interview Sergeant Busuttil was referred both to the relevant passage in the report of 10 March 1999 and to the *It Torca* articles themselves. He could not recall Mr Gauci discussing either article with him and indeed did not believe that Mr Gauci read newspapers. In Sergeant Busuttil's view it was more likely that Paul Gauci read newspaper articles and that Paul Gauci would have shown articles about the case to Anthony Gauci.

22.40 Asked if Mr Gauci had ever indicated to him an awareness that the man whose photograph appeared in the *Focus* article would be present in the line-up at the identification parade, Sergeant Busuttil answered: "Yes, because Tony knew he was going to the identification parade and had seen photographs of the suspects on the news etc."

(ii) Anthony Gauci

22.41 As explained in chapter 4 Mr Gauci has not approved the terms of his statement (see appendix of Commission interviews), although the Commission is confident that it reflects what was said at interview.

22.42 During the interview Mr Gauci was referred to a copy of the *Focus* article and was asked if he recalled discussing this with Mr Scicluna and Sergeant Busuttil following a visit they made to his shop in 1999. Mr Gauci explained that Mr Scicluna and Sergeant Busuttil used to come to his shop often so it was difficult to remember a particular visit in that year. He had seen many magazines, and customers would bring newspapers to his shop. The people who used to come into the shop to discuss the case used to annoy and stress his father. When people came into his shop and told him that his name was in the newspaper he would ask them to read the articles out to him. He recalled an occasion when the man from the next door shop, Mr Pollicini, had shown him a magazine or a book. According to Mr Gauci the photograph of the applicant contained in the *Focus* article shown to him by the Commission's enquiry team was the same as that which appeared in the magazine shown to him by Mr Pollicini. However, he could not recall the actual magazine.

22.43 Mr Gauci was read the relevant passages from Sergeant Busuttil's statement and was asked when in December 1998 he had received the magazine. He could not recall the exact date he had received it, other than that it was at the beginning of December 1998. He was also unable to recall whether he had the article in his possession from December 1998 to April 1999 or indeed how long he had it at all. He remembered going to the identification parade but could not recall discussing the article with anyone during the course of the journey to the Netherlands. Asked if he could recall discussing the article with anyone at any time, he replied that people would come into his shop every day to discuss the case. He would ask Mr Pollicini to read out articles to him or to give him the gist of what was in them. He recalled discussing the article with Mr Bell who "used to ask [him] if [he] recognised the man and [he] used to say that it was the man." Although Mr Gauci was not sure whether it was the *Focus* magazine, he recalled the photograph. He could not remember discussing the article with Mr Bell when he arrived in the Netherlands for the identification parade.

22.44 Asked whether he could recall seeing any newspaper reports or magazine articles about the case, other than the *Focus* article, before giving evidence, Mr Gauci explained that friends would sometimes give him newspaper cuttings. He did not

recall how many times this had actually happened. It did not happen lots of times but friends would tell him when there was a news story about him and they would give him the cutting. Sometimes Mr Gauci saw and heard about the case in news programmes on Maltese television. Asked whether this occurred frequently, he replied that it depended on the time he came home. If there was a news item on television then he would watch it. The local news programmes did not report on the case every day but he would watch what was reported both before and after the trial. Sometimes the applicant's photograph would appear in the television reports, along with pictures of the plane and the scene of the disaster. As he does not read English, Mr Gauci would not read the newspaper stories.

22.45 Mr Gauci was referred to the relevant passage in the confidential report dated 20 March 1999 and to the editions of *It Torca*, and was asked whether he recalled the incident in question. Mr Gauci explained that he did not buy *It Torca* usually, but that the articles could have been passed to him as cuttings. Although he could not recall seeing the articles he remembered seeing the photographs contained in them. Asked specifically whether he recalled seeing the photographs of the applicant and the co-accused which feature in the edition of *It Torca* dated 28 February 1999, Mr Gauci replied that he had seen hundreds of photographs at the police depot and had told the police that "it must have been him but he was much younger". The men shown in the photographs within the article looked younger to Mr Gauci than they did at trial. Contrary to his initial position at interview (that he had seen the photographs contained in both articles) Mr Gauci then said that he did not recall seeing at the time the photographs of the suspects which feature in the edition of *It Torca* of 7 March 1999. Asked whether he considered the contents of the report of 20 March 1999 wrong in its suggestion that he did see this article, Mr Gauci responded that when he spoke to the officer who produced the report "he was not speaking about these articles in particular". He reiterated that he did not recall seeing either of the articles and (again contrary to his initial position) said that he had not seen the photographs which featured in the edition of 7 March 1999. He did, however, recall seeing the photographs which featured in the edition dated 28 February 1999, but was unable to say whether this occurred prior to the trial. People came into his shop "every day" with newspaper cuttings. When it was put to him that the report of 20 March 1999 indicated that he had seen the article prior to the trial, Mr Gauci replied that he did not

dispute the terms of the report. It was just that he was not sure and he had seen many newspaper cuttings.

22.46 Mr Gauci could not recall ever seeing a televised interview with the applicant carried out by representatives of a US news channel.

22.47 Asked whether he considered his exposure to photographs of the applicant in the media before the trial might have affected his ability to identify the purchaser of the clothing, Mr Gauci replied that he did not believe this at all. He explained that before he had seen any photographs of the applicant he had required to assist in preparing the identi-kit of the purchaser. Asked if there was a risk that when he attended the identification parade he was simply identifying someone whose photograph he had seen in the media on a number of occasions, Mr Gauci repeated that he did not believe this.

(iii) Paul Gauci

22.48 In his statement to the Commission (see appendix of Commission interviews) Paul Gauci could not recall the visit made to his shop by Mr Scicluna and Sergeant Busuttil in connection with the *Focus* magazine and said that he was not present when it took place. He was shown a copy of the *Focus* article but could not recall having seen it before. He collected articles about the case as they were published and kept many press cuttings at home from before the trial. However, he could not recall this particular magazine and, despite the fact that they lived together in the same house (both then and now), could not recall Anthony Gauci keeping it at home. Paul Gauci also could not recall Sergeant Busuttil having the magazine in his possession when they both accompanied Anthony Gauci to the identification parade, nor could he recall any mention being made of the article while in the Netherlands on this occasion.

22.49 Paul Gauci confirmed that, generally, when articles about the case came to his attention he would give Anthony Gauci a summary of their contents. Asked how frequently he saw and read newspaper articles about the case, Paul Gauci replied that "[t]here was practically an article every week" as well as programmes about the case broadcast on the BBC and coverage in the Maltese press.

22.50 Paul Gauci was asked whether, leaving aside the *Focus* article, there were other occasions when he saw the applicant's photograph in the media. He replied that there were certainly pictures of the applicant in the British press and also in the television coverage. Asked whether he knew that the applicant would be in the line-up at the identification parade, he replied "[m]ost probably I knew this because it was reported that Gadaffi had consented to send the accused for trial." In his supplementary statement (see appendix of Commission interviews) Paul Gauci confirmed that he knew this and expected that Anthony Gauci would also have been aware.

22.51 On being read the relevant passage from the confidential report dated 20 March 1999 and shown the related newspaper articles, Paul Gauci explained that they did not buy *It Torca* and that someone must have shown Anthony Gauci the newspaper. Paul Gauci did not recall the newspapers, but one of Anthony Gauci's friends might have brought the article to him. He was not present when the articles were shown to Anthony Gauci.

Consideration

(i) The Crown's duty of disclosure

22.52 Clearly the regime whereby the Crown routinely discloses police witness statements to the defence, as required following the decision of the Privy Council in *Sinclair v HMA* 2005 SCCR 446, was not in place at the time of the applicant's trial. Similarly, although prior to that decision the Crown had introduced a system in which the defence in High Court cases were, subject to limited exceptions, provided with copies of all such statements in its possession, this did not take effect until some years after the conclusion of proceedings in the applicant's case.

22.53 At the time of the applicant's trial the Crown's obligations in respect of disclosure were as set out in *McLeod v HMA* 1998 SCCR 77. There the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown has a duty to disclose to

the defence information in its possession that would tend to exculpate the accused, or is likely to be of material assistance to the proper preparation or presentation of the accused's defence (Lord Justice General (Rodger) at p 97), as well as information in its possession and knowledge which is significant to any indicated line of defence, or which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt upon it (Lord Hamilton at p 100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the European Convention of Human Rights (Lord Rodger at paragraph 65). In terms of *McLeod* the Crown's obligations of disclosure subsist "at any time" (Lord Justice General (Rodger) at p 97).

22.54 In the Commission's view it is clear from these decisions that the Crown's duty of disclosure extends only to information within its possession and/or knowledge. Although in *Holland* Lord Rodger (at paragraph 74) suggested that the Crown was in certain circumstances obliged to search for information not readily in its possession, this was in the context of identifying outstanding charges faced by Crown witnesses, or in respect of specific requests by the defence. In the Commission's view it was not intended to impose a general duty upon the Crown to search materials held exclusively by the police or other agencies with a view to establishing whether they contain disclosable evidence.

(ii) The test to be applied in assessing undisclosed evidence

22.55 Generally, evidence not heard at trial can only be led at appeal where the appellant satisfies the requirements of sections 106(3)(a) and (3A) of the Act. These provide that such evidence may found an appeal only if there is a "reasonable explanation" as to why it was not led at the original proceedings. The test applied by the court in assessing the significance of evidence led under these provisions has been set out in a number of decisions, notably *Al Megrahi v HMA* 2002 SCCR 509. The most significant features of the test are that the court must be satisfied that the additional evidence is capable of being regarded as credible and reliable by a reasonable jury, was likely to have had a material bearing on its determination of a critical issue at trial and is of such significance that it is reasonable to conclude that a

verdict reached in ignorance of its existence must be regarded as a miscarriage of justice (paragraph 219).

22.56 That, however, is not the test applied in cases where the reason for the absence of the evidence at trial is the Crown's failure to disclose it. In *Holland*, for example, the Privy Council's assessment of the undisclosed evidence was based upon the approach taken by the High Court in *Hogg v Clark* 1959 JC 7, a decision concerning the improper exclusion at trial of a relevant line of cross examination by the defence. Lord Rodger said the following at paragraph 82:

> *"Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge (2). At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross examination would have been. But applying the test suggested by Lord Justice General Clyde in* Hogg v Clark*...I cannot say that the fact that counsel was unable to cross examine in this way might not possibly have affected the jury's (majority) verdict on charge (2) – and hence their verdict on charge (3)"* (a similar test is applied by the Court of Appeal in England: *R v Hadley* [2006] EWCA Crim 2544; *R v Smith* [2004] EWCA 2212 and *R v Ward* (1993) 96 Cr App R 1).

22.57 The same approach was taken by the Privy Council in *Sinclair*. There, it was held that the undisclosed evidence was plainly likely to be of material assistance to the defence and that it was "impossible therefore to say that the appellant's defence was not prejudiced by what happened in this case" (Lord Hope at paragraph 35).

22.58 Similarly, in *Gair v HMA* 2006 SCCR 419 the High Court held that statements and other evidence relating to an important Crown witness should have been disclosed to the defence. In allowing the appeal the court accepted that even with the benefit of the undisclosed evidence the jury might still have convicted the appellant. However, while one could not tell what the effect of the additional information would have been, "the possibility that the jury might have reached a different verdict if the police statements and other information about [the witness] had been disclosed is in our view real and certainly cannot be excluded" (at paragraph 39).

22.59 In *Kelly v HMA* 2006 SCCR 9 it was argued on behalf of the appellant that it was "impossible to assert" that an undisclosed police statement by the complainer would not have made a difference to the outcome of the case. In particular it was submitted that the approach adopted by the court to non-disclosure has been to "refuse to indulge in speculation as to how the failure might have impacted on the jury". In rejecting the appeal the court held that in determining whether the appellant's article 6 rights had been breached "the critical issues include the materiality of the statement in question and the nature and extent of any prejudice suffered by the appellant as a result of non-disclosure." In the court's view had the statement been disclosed its terms would not have assisted the defence in undermining the complainer's credibility or reliability.

22.60 In all of the above cases the undisclosed material which formed the basis of the appeals was in the possession of the Crown. In *Johnston v HMA* 2006 SCCR 236, however, the court was faced with a situation in which several material witness statements obtained by the police were not passed to the procurator fiscal and therefore were not made known to the Crown. While the appellants' grounds of appeal were based partly upon an alleged failure by the Crown to disclose the statements, in the event the court heard the evidence of the witnesses under section 106(3)(a) of the Act (the Crown having conceded at an earlier stage that there was a reasonable explanation in terms of subsection (3A) as to why their evidence was not heard at trial). Accordingly, in assessing the significance of the evidence the court applied the test set out in *Al Megrahi*, and not the *Hogg v Clark* test as adopted by the Privy Council in *Holland* and *Sinclair*. The court concluded that the evidence of the witnesses would have had a vital bearing on a critical issue at trial and that the jury's verdict returned in ignorance of it amounted to a miscarriage of justice (at paragraph 111).

22.61 On one reading *Johnston* might be considered as authority for the proposition that in assessing the significance of undisclosed evidence known only to the police, the court will be inclined to apply the *Al Megrahi* test as opposed to that adopted by the Privy Council in *Holland* and *Sinclair*. In the Commission's view, however, it is doubtful that this is the correct interpretation of that decision. In *Johnston* the court

approached the appeal on the basis of the evidence it heard from the witnesses, and not on the terms of the undisclosed statements themselves. In that sense, the decision can be distinguished from *Holland*, *Sinclair* and *Gair* which were argued and decided purely upon the basis of the material which the Crown had failed to disclose. Moreover, if *Johnston* is truly authority for the application of the *Al Megrahi* test in such circumstances, it would mean that there are effectively two tests for assessing undisclosed evidence: one where the evidence was in possession of the Crown and the other where it was known only to the police. In the Commission's view, given that from an appellant's perspective the identity of the party responsible for the non-disclosure of material evidence is irrelevant, it would seem unusual if the test for assessing the significance of such evidence was determined by this factor.

22.62 In conclusion, the Commission considers that the test it should adopt in assessing the materiality of undisclosed evidence, whether it is in the possession of the Crown, the police or both, is that applied by the Privy Council in *Holland* and *Sinclair*, and by the High Court in *Gair*.

(iii) Potential significance

Sergeant Busuttil's statement

22.63 As narrated above, the evidence at trial indicated that on a date towards the end of 1998 or the beginning of 1999 a shopkeeper showed to Mr Gauci the *Focus* magazine which contained an article about the Lockerbie case along with a photograph of the applicant, that Mr Gauci remembered taking the magazine and showing it to Mr Scicluna and that Mr Gauci told Mr Scicluna that the photograph of the applicant "looked like" the man who purchased the clothing from his shop.

22.64 In the Commission's view the contents of Sergeant Busuttil's police statement significantly expand on the circumstances surrounding Mr Gauci's exposure to the applicant's photograph in the magazine. In particular, whereas the evidence at trial perhaps gives the impression that the magazine was in Mr Gauci's possession only fleetingly, in terms of Sergeant Busuttil's statement the period seems to have been of the order of four months. During that time Mr Gauci appears to have kept the

magazine at his home where he would have been free to view the contents of the article, including the applicant's photograph, as and when he wished. Critically, Mr Gauci's possession of the magazine, and therefore his potential exposure to the applicant's photograph, came to an end, not months before the identification parade as the evidence at trial perhaps tends to convey, but on 9 April 1999, a matter of only four days. It was on that date, according to Sergeant Busuttil's statement, that Mr Gauci last saw the applicant's photograph in the article before travelling to the Netherlands on 12 April to view the parade the following day.

22.65 While Mr Gauci does not read English it is clear from his evidence that he was in no doubt as to the subject matter of the *Focus* article. Entitled "The Whole Truth About Lockerbie", it extends to four pages, two of which are occupied by a photograph of the nose-section of PA103, which appears alongside smaller images of officials from the US Department of Justice. There are also a large photograph of Colonel Gadaffi and, beneath the sub-heading, "Pan Am 103 Who planted the bomb?", photographs of the applicant and the co-accused, both of whom are named.

22.66 Given the contents of the article, and the fact that at interview Mr Gauci indicated that he had seen other photographs of the applicant in the media, it is unlikely that Mr Gauci would not have been aware that the applicant was an accused in the case. According to what Mr Gauci said at interview the photographs of the applicant contained in the *Focus* and *It Torca* articles are merely examples of those to which he was exposed throughout the years. Not only did Mr Gauci see such articles, but it appears that Paul Gauci kept a collection of press cuttings at their home.

22.67 In the circumstances it is difficult to avoid the conclusion that Mr Gauci would also have been aware that the applicant was to be present on the identification parade. If that is true, then no matter what attempts were made to select stand-ins of similar appearance there was a substantial risk that the applicant would be instantly recognisable to Mr Gauci, not from any genuine memory of the purchaser, but rather as a result of his exposure to photographs of the applicant in the media and, in particular, to the one he saw only four days previously.

22.68 The dangers posed by witnesses seeing suspects prior to viewing them in parades are obvious and are fully acknowledged in the Lord Advocate's guidelines to Chief Constables on the conduct of identification procedures issued in 2007:

> *"It is essential that the witnesses who are to view the parade do not, at any time, have an opportunity of seeing the suspect or accused, or the other parade members" (*p20; an identical passage is contained in an amendment made in 1991 to the Guidelines on the Conduct of Identification Parades issued by the Scottish Office in 1982: see chapter 21).

22.69 In the Commission's view while this provision relates solely to the conduct of identification procedures such as parades, the risk it seeks to avoid applies equally to situations in which a witness has been exposed to images of the accused in the media.

22.70 Indeed, there are indications that Mr Gauci may in the past have been influenced by his exposure to photographs of suspects in the media. In his statement of 5 March 1990 (CP 467) Mr Gauci is noted as having told police that he thought that a photograph of the incriminee Talb, which featured in an article about the Lockerbie case in *The Sunday Times* of 5 November 1989 (CP1833), "may have been" and "looks the same as" the man who bought the clothing. As noted above the photograph in question was one of two which appeared under the caption "Bomber". In an earlier, undated statement relating to an interview which took place on 2 October 1989 (CP 463), Mr Gauci was shown an image of Talb which the police had obtained by using the freeze frame facility of a video recorder. Although Mr Gauci was unable to say that the image was definitely the same as the purchaser he believed it to be similar. In evidence Mr Gauci was not referred specifically to his statement of 5 March 1990 but was shown the relevant pages of the newspaper (31/4766-4770). Referring to the photograph of Talb in the article, Mr Gauci commented: "I thought it was the man on this side, I thought. That was the man who bought the articles from me" (31/4767).

22.71 However, at interview on 10 September 1990 (see CP 469) Mr Gauci did not select Talb's photograph from a large number shown to him by the police (CP 1244;

31/4762-4764). Similarly, on 6 December 1989 Talb's photograph was among a number shown to Mr Gauci but again he did not pick this out as even resembling the purchaser (31/4765-4766). While it is impossible to tell whether Mr Gauci's exposure to *The Sunday Times* article in fact influenced his identification of Talb on 5 March 1990 (and in evidence), in the Commission's view the fact that he failed to pick out photographs of Talb when these were shown to him in less suggestive circumstances certainly does not assist in dispelling such a concern. It is worth adding that, in terms of the Crown case at least, Talb could not have been the purchaser of the clothing.

22.72 At an early stage in the review the Commission instructed Professors Tim Valentine and Ray Bull, both of whom specialise in the psychology of eyewitness identification, to provide opinions on aspects of Mr Gauci's evidence (see appendix). The Commission recognises that these opinions are by and large inadmissible in terms of current law. The purpose in instructing them was to obtain a general insight into the psychology of eyewitness identifications and an assessment of how factors such as delay and exposure to media coverage might have impacted upon Mr Gauci's evidence. Neither opinion has played any part in the Commission's decision to refer the case on this ground, and the Commission would merely note that both experts expressed concern over the possible effect of Mr Gauci's exposure to the *Focus* magazine so close to the date of the parade.

22.73 At interview with the Commission's enquiry team, Mr Gauci did not believe at all that the photographs of the applicant he had seen affected his ability to identify the purchaser of the clothing. In particular, he did not believe that when he attended the identification parade there was a risk that he was simply identifying someone whose photograph he had seen in the media on a number of occasions. In the Commission's view it is unlikely that at the parade Mr Gauci was able to put these photographs, including the one he saw only four days previously, out of his mind completely. In any event his assurances in this connection do not lessen the risk that his identification was influenced by such factors. This is not to suggest that Mr Gauci was seeking at interview to hide the possibility that his identification of the applicant was unreliable, simply that he himself may not be fully aware of the extent to which his identification evidence was affected by what he had seen in the media. It is perhaps worth noting in this connection that at interview Mr Gauci's partial

identification of the applicant was elevated to one in which the applicant was "100 per cent the right person".

22.74 The Commission recognises that nothing in Sergeant Busuttil's statement detracts from the fact that Mr Gauci picked out the applicant from a photo-spread on 15 February 1991 as resembling the purchaser of the clothing, and that he did so at a time when photographs of the applicant had not yet appeared in the media. Understandably the Crown cited this as a factor in support of the reliability of Mr Gauci's identification evidence and, as indicated, both the trial and appeal courts considered this to be of some significance. In the Commission's view, however, this aspect of the identification evidence must be seen in context. Mr Gauci's identification of the applicant by photograph was, on any view, equivocal. His initial position in his statement of 15 February 1991 is that the applicant's photograph was "similar" to the man who bought the clothing. He told the police that it had "been a long time now", and that he could "only say that [the applicant's photograph] resembles the man who bought the clothing, but it is younger". Later in the statement Mr Gauci adds that he could "only say that of all the photographs I have been shown [the applicant's photograph] is the only one really similar to the man who bought the clothing if he was a bit older, other than the one my brother showed me." This last comment was a reference to the photograph of Talb which appeared in *The Sunday Times*, as described above.

22.75 In the Commission's view it is also important to bear in mind that Mr Gauci's identification of the applicant by photograph occurred well over two years after the events themselves took place and after he had been shown numerous other photographs of potential suspects. It is also impossible to view the photographic identification in isolation from the substantial discrepancies between Mr Gauci's original description of the height and age of the purchaser and the applicant's height and age at the relevant time; and, indeed, of the Commission's doubts as to the date of the purchase as established by the trial court (see chapters 21 and 24). In any event the trial court's acceptance of Mr Gauci's evidence was based not just on his selection of the applicant's photograph on 15 February 1991 but also on his identification of the applicant at the parade and in evidence.

22.76 Taking these factors into account the Commission does not consider the potential significance of Mr Gauci's exposure to the *Focus* magazine and other publications to be significantly diminished by his earlier identification of the applicant by photograph.

22.77 A further issue that requires to be considered in assessing the significance of the failure to disclose Sergeant Busuttil's statement relates to the passage in which he describes Mr Gauci as having pointed to the photograph of the applicant in the *Focus* article and having uttered the words "dan hu" (or, in English, "that's him"). Had Sergeant Busuttil's statement been disclosed to the defence it is clear that this passage would have played a significant part in the defence assessment of the evidence and whether it should be led. In examination in chief Mr Gauci could not remember uttering these words and seemed to recall that he had told Mr Scicluna something like, "This chap looks like the man who bought the articles from me". Nevertheless, one can understand that the defence might well have been reluctant to call Sergeant Busuttil given the possibility that his evidence would support the Crown case.

22.78 This view was reflected in the accounts given at interview by some of the applicant's former representatives. On being shown a copy of Sergeant Busuttil's statement, Mr Beckett observed that it was "slightly fortuitous" that Mr Gauci did not speak in evidence to the words attributed to him in the statement. Mr Duff considered that the statement might have posed a dilemma on the basis that if the defence had led it in evidence the Crown would have been able to rely on Mr Gauci's identification of the photograph as correct. In Mr Duff's view "[i]t would have been in our minds at the time whether to use it or to leave it alone". If Mr Gauci had indeed said "that's him", as Sergeant Busuttil maintained, according to Mr Duff this would have been the "high point of his evidence". Mr Duff considered Mr Gauci to be a difficult witness who was a "moving target" and who "never spoke precisely".

22.79 Mr Taylor, on the other hand, considered Sergeant Busuttil's statement as "potentially very significant". This was because it could have shown that Mr Gauci still had the *Focus* article in his possession four days before the identification parade, and so raised the issue of suggestibility. According to Mr Taylor if the statement had been disclosed it would have provoked enquiries by the defence which might have

started the process of undermining the identification completely. Mr Taylor's attention was drawn to the passage in the statement in which Mr Gauci reportedly uttered "that's him", and to Mr Gauci's earlier identification of the applicant by photograph. While Mr Taylor still maintained that the defence would have wanted to find out everything it could about the contents of the statement, he conceded that the evidence would not necessarily have been used.

22.80 In the Commission's view the extent to which the Crown could have relied upon Mr Gauci's "identification" of the applicant's photograph in *Focus* magazine cannot be separated from the highly suggestive context in which it appeared. In other words any positive "identification" of the applicant from a published photograph of him which appears beneath the caption "Who planted the bomb?" is not, in the Commission's view, capable of bolstering an otherwise equivocal identification.

The confidential report dated 20 March 1999 and the *It Torca* articles

22.81 Viewed alongside Sergeant Busuttil's statement, the report of 20 March 1999, and the *It Torca* articles themselves, assist in shedding further light upon the extent to which Mr Gauci was exposed to images of the applicant prior to the trial. At the very least, the report constitutes evidence of the kind which at appeal was considered important by the court (and by the Crown) in the context of the applicant's submissions on the prejudicial effect of pre-trial publicity.

22.82 At interview Mr Taylor claimed that if he had been aware of the report of 20 March 1999 or the *It Torca* articles he would have used these in his cross examination of Mr Gauci. As the articles were published in 1999 Mr Taylor considered them to be of great significance. In particular, he would have made something of the fact that the officer who prepared the report had said that the publication of "the article" had a "profound effect" on Anthony and Paul Gauci. If he had had articles of the kind which appeared in *It Torca* it would, Mr Taylor said, have undermined the evidence of the identification parade and was patently something that would have to be taken into account. The evidence of the *It Torca* articles was, in Mr Taylor's view, of a similar kind to the evidence in Sergeant Busuttil's statement and would have been used in a similar way. If one had personal knowledge that a witness had recently been

shown a photograph of an accused then, according to Mr Taylor, "nobody could fail to use it". Indeed, Mr Taylor suggested that it might even have vitiated the identification parade. He compared the situation to one in which, at a video identification parade, a photograph of an accused person was shown on the screen before the witness viewed the parade. Mr Taylor said that in such a case he would want to argue that evidence of the identification parade was inadmissible on the basis of the conduct of the police.

22.83 Asked why, in these circumstances, the defence had not led evidence as to the extent to which the applicant's photograph had appeared in the media, Mr Taylor replied that he considered this to be common knowledge and therefore within judicial knowledge. In response to the suggestion that the precise extent to which Mr Gauci had been exposed to such photographs would not have been within judicial knowledge, Mr Taylor maintained that it was within judicial knowledge that Mr Gauci was unlikely to have escaped such exposure. He accepted that, using hindsight, it could be said that the defence ought to have led evidence as to the extent of the pre-trial publicity and cross examined Mr Gauci as to his experiences of this, but he questioned whether it would have been possible for the defence to review all the Maltese publications to which Mr Gauci might have been exposed. According to Mr Taylor the view taken by all the members of the defence team was that the issue of media coverage was so obvious that it would have been pointless to show a list of the publications. He added that the defence believed – wrongly, as it turned out – that the judges were not going to accept the identification evidence.

Conclusions

22.84 Applying the principles in *McLeod* and those set out by the Privy Council in *Holland* and *Sinclair*, the Commission is of the view that Sergeant Busuttil's police statement and the report of 20 March 1999 should have been disclosed to the defence. Both items were likely to have been of material assistance in the proper preparation or presentation of the applicant's defence and to have been of real importance in undermining of the Crown case.

22.85 Even with the benefit of the court's reasons for the conviction it is difficult to assess the potential impact of these items on the course of the trial and the eventual verdict. In terms of the accounts given by the defence representatives it is by no means clear that the contents of Sergeant Busuttil's statement would have been led in evidence by the defence. The defence might well have concluded that the value of Sergeant Busuttil's statement in casting doubt upon Mr Gauci's identification of the applicant at the parade was outweighed by his "identification" of the applicant's photograph in the article. While the same risk perhaps did not apply to leading evidence of the report of 20 March 1999 and the *It Torca* articles it is possible, notwithstanding Mr Taylor's comments at interview, that the defence would have opted not to raise such matters with Mr Gauci for fear of an unhelpful response from him.

22.86 In that sense the present case bears some similarity to the circumstances in *Holland*. There the undisclosed evidence consisted partly of details of outstanding charges faced by the two complainers which could have been used to undermine their credibility. One of the factors relied upon by the High Court in rejecting the initial appeal was that cross examination of the complainers as to their character "would have risked the disastrous consequence that the court might permit the Crown to refer to the appellant's criminal record" (*Holland* (High Court) 2003 SCCR 616, Lord Justice Clerk (Gill) at paragraph 43). On appeal to the Privy Council, however, Lord Rodger, while recognising the existence of such a risk, was unable to say that cross examination of the complainers on this basis "would inevitably have led to the Crown being permitted to cross examine the appellant on his previous convictions" (at paragraph 82). The Privy Council thereafter quashed the appellant's convictions.

22.87 In other words the approach taken by the Privy Council was that while the appellant would have faced the risk of adverse consequences to his own defence if he had made use of the undisclosed evidence, that was not a sufficient basis for upholding the conviction unless these consequences were inevitable.

22.88 Applying the same approach to the present case, the Commission is of the view that it cannot be said that evidence of Sergeant Busuttil's statement, the report of 20 March 1999 and the *It Torca* articles would inevitably have had adverse

consequences for the applicant's defence. Indeed, if the trial court had rejected the evidence of the parade because of the undisclosed evidence, it might also have rejected the dock identification on the same basis. In such circumstances it might well have rejected the identification evidence in its entirety. That this is more than a mere possibility is perhaps demonstrated by the court's acknowledgment in its judgment that there were "undoubtedly problems" with Mr Gauci's identification of the applicant (at paragraph 64), and that the differences between Mr Gauci's initial description of the purchaser and that of the applicant at the time amounted to a "substantial discrepancy" (at paragraph 68). Moreover if, as paragraph 55 of its judgment suggests, the trial court was under the mistaken impression that the identification parade took place on 13 August 1999 (as opposed to 13 April) evidence that Mr Gauci had seen the *Focus* article at the end of 1998 or beginning of 1999 might not have been considered particularly significant given that, on this view, the period between exposure and the parade was about 8 months. Sergeant Busuttil's statement, of course, shows that this period was in fact four days, a time frame which the court might well have considered critical in determining whether the identification evidence should be accepted.

22.89 In any event, standing the approach taken in *Holland* it was for the defence to decide upon the use to which the information might be put, if any, and for the court to determine its significance as appropriate (Lord Rodger at paragraph 72).

22.90 Adopting the test applied by the Privy Council in *Holland* and *Sinclair*, the Commission is unable to conclude that evidence of the undisclosed items "might not possibly" have affected the verdict in the applicant's case. Accordingly the Commission considers that the failure to disclose the items may have resulted in a miscarriage of justice.

22.91 In referring the case on this ground, the Commission recognises that by taking part in a television interview with the US journalist Pierre Salinger on 26 November 1991 (CP 1728; evidence 72/8855-8899) the applicant may himself have contributed to the dissemination of his own image in the media. As noted above, however, Mr Gauci had no recollection of seeing this interview. In other words, unlike the position in relation to the *Focus* and *It Torca* articles, there is no indication

that Mr Gauci's identification of the applicant at the parade or in evidence was in any way influenced by his having seen the Salinger interview.

CHAPTER 23
UNDISCLOSED EVIDENCE CONCERNING"REWARD" MONIES

Introduction

23.1 During the course of its enquiries the Commission obtained from D&G various "diaries" that were kept by Mr Bell during his time in Malta in which he recorded developments in the police investigation there. The present ground relates not to an entry in those diaries but to a typewritten memorandum by Mr Bell found within one of them. The memorandum, dated 21 February 1991, was sent by Mr Bell to Supt James Gilchrist, the deputy senior investigating officer at the time, and relates to the events of 15 February 1991 when Anthony Gauci picked out the applicant from a photo-spread. A copy of the memorandum is contained in the appendix.

23.2 In the Commission's view the contents of the memorandum are potentially significant in any assessment of Mr Gauci's credibility. Two other documents recovered by the Commission - a further memorandum by Mr Bell dated 14 June 1991 (see appendix) and a confidential report by officers from Strathclyde Police dated 10 June 1999 (see appendix of protectively marked materials) - are also relevant to this issue.

23.3 By letter dated 8 March 2007 Crown Office confirmed to the Commission that Mr Bell's memorandum of 21 February 1991 was not disclosed to the defence. According to the letter, Crown Office has no record of this document in its files and no one there who dealt with this part of the case has any recollection of having seen it before. By letter dated 16 February 2007 Crown Office confirmed that the report by Strathclyde Police dated 10 June 1999 was also not disclosed to the defence. In terms of a further letter dated 27 April 2007 Crown Office explained that although a copy of the report could not be found in its files, given its nature the possibility could not be excluded that a copy was made available to them at the time or that they were made aware of its contents. As Mr Bell's memorandum of 14 June 1991 is only significant when seen in the context of his earlier memorandum, in the Commission's view there would have been no reason to disclose this in isolation.

23.4 In this chapter any references to "Mr Gauci" are to Anthony Gauci and not to his brother, Paul Gauci.

Background

23.5 Before setting out the contents of the three documents it is important to have regard to the manner in which the Crown and the defence approached the issue of Mr Gauci's credibility in their respective submissions and to how the matter was dealt with by the trial and appeal courts.

23.6 Since no challenge was made in cross examination to Mr Gauci's credibility the Crown's submissions to the trial court on this issue were brief, the advocate depute suggesting simply that "Mr Gauci appears as a credible witness and a witness whose reliability can be tested by other evidence in the case" (78/9444).

23.7 For the same reason the defence submissions make only passing reference to Mr Gauci's credibility as a witness. While counsel for the applicant variously described Mr Gauci's identification of the applicant as "utterly unreliable" (82/9871) and "plainly wrong" (82/9872) he expressly excluded from his submissions any suggestion that Mr Gauci was deliberately lying (82/9911). Counsel went on, however, to make the following observations about Mr Gauci's demeanour while giving evidence:

> *"An obviously important factor in assessing the reliability of any witness is the impression which the witness makes in court. The submission I make is that this witness's demeanour could not give the court much confidence at all in his reliability. He was reluctant to look his questioner in the eye during cross examination. He was, it's submitted, a slightly strange and lonely man. He may have given Your Lordships the impression that he's rather enjoyed the attention he's been paid as a result of the incident"* (82/9911-9912).

23.8 In the event the trial court rejected these criticisms:

"In assessing Mr Gauci's evidence we should first deal with a suggestion made in the submissions of the first accused that his demeanour was unsatisfactory – reluctant to look the cross examiner in the eye, a strange and lonely man, and enjoying the attention he was getting. We have to say that we find no substance in any of these criticisms. We are not clear on what basis it was said that he was strange and lonely, and as far as enjoying attention is concerned, he made it clear that his co-operation with the investigation was a source of friction within his family. The clear impression we formed was that he was in the first place entirely credible, that is to say doing his best to tell the truth to the best of his recollection, and indeed no suggestion was made to the contrary" (paragraph 67).

23.9 The court went on to say the following about Mr Gauci's identification of the applicant:

"From his general demeanour and his approach to the difficult question of identification, we formed the view that when he picked out the first accused at the identification parade and in Court, he was doing so not just because it was comparatively easy to do so but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser, and we did regard him as a careful witness who would not commit himself to an absolutely positive identification when a substantial period had elapsed" (paragraph 69).

23.10 Although counsel made a further sustained attack on Mr Gauci's reliability in his submissions in the appeal, there were again no submissions on the subject of his credibility.

The evidence not heard by the trial court

(i) Mr Bell's memorandum dated 21 February 1991

23.11 As noted above Mr Bell's memorandum consists of a report to Supt Gilchrist following upon Mr Gauci's identification of the applicant from a photo-spread on 15 February 1991. Entitled "Security of Witness Anthony Gauci, Malta", the memorandum details Mr Bell's concerns as to Mr Gauci's personal security in light of

that identification and discusses the possibility of his inclusion in a witness protection programme. Its final paragraph, however, makes reference to a different matter:

> *"During recent meetings with Tony he has expressed an interest in receiving money. It would appear that he is aware of the US reward monies which have been reported in the press. If a monetary offer was made to Gauci this may well change his view and allow him to consider a witness protection programme as a serious avenue."*

23.12 As indicated Crown Office has confirmed to the Commission that no part of Mr Bell's memorandum of 21 February 1991 was disclosed to the defence. Nor does it appear that the defence was made aware of the information through its own enquiries. In particular there is no reference to Mr Gauci's alleged interest in money in Mr Bell's defence precognition or in the precognition obtained from Mr Gauci himself. In addition none of the applicant's former representatives who were interviewed could recall being aware of evidence of this kind.

(ii) Mr Bell's memorandum dated 14 June 1991

23.13 Additional information as to when these alleged meetings with Mr Gauci might have taken place is given in a further memorandum by Mr Bell to senior officers, the final paragraph of which reads as follows:

> *"I have had no personal contact with the witness Anthony Gauci since he made the 'Partial Identification of Abdel Baset'. The overall security of this witness will obviously require to be assessed should there be further developments or press attention."*

23.14 In other words, given that Mr Bell had no contact with Mr Gauci in the period between 15 February 1991 and 14 June 1991, it follows that any reference in his memorandum of 21 February 1991 to "recent meetings" must relate to dates on or before 15 February 1991, the date on which Mr Gauci identified the applicant from a photo-spread.

(iii) Report by Strathclyde Police dated 10 June 1999

23.15 In 1999 steps were taken to assess Mr Gauci for possible inclusion in a witness protection programme administered by Strathclyde Police. The results of this assessment are contained in a confidential report dated 10 June 1999 prepared by officers of that force. Although the Commission has seen this document in its entirety, it sought the consent of D&G to refer to only four paragraphs in the statement of reasons. D&G has consented to the disclosure of these paragraphs but does not wish the remainder of the report to be disclosed. Furthermore, as at least one of the officers involved in the production of the report continues to work in the field of witness protection no reference is made to their identities here or in the copy of the report contained in the appendix of protectively marked materials.

23.16 In the report Mr Gauci is described as being "somewhat frustrated that he will not be compensated in any financial way for his contribution to the case". The report adds, however, that he has not at any stage been offered inducements of any kind in return for giving evidence and that "great care" had been taken in this connection. Mr Gauci is described in the report as a "humble man who leads a very simple life which is firmly built on a strong sense of honesty and decency."

23.17 The officers concerned also interviewed Paul Gauci in connection with his inclusion in the programme. The following passage in the report details their conclusions in this respect:

> *"It is apparent from speaking to him for any length of time that he has a clear desire to gain financial benefit from the position he and his brother are in relative to the case. As a consequence he exaggerates his own importance as a witness and clearly inflates the fears that he and his brother have. He is anxious to establish what advantage he can gain from the Scottish police. Although demanding, Paul Gauci remains an asset to the case but will continue to explore any means he can to identify where financial advantage can be gained. However, if this area is explored in court with this witness however* (sic) *he will also strongly refute that he has been advantaged."*

23.18 The report makes clear that at that stage the Gaucis had received no payment in respect of their participation as witnesses in the case:

> *"Nonetheless it is important that any liaison with the subject should display an element of understanding of their personal difficulties notwithstanding of the need to demonstrate the complete lack of any incentive for the subject to cooperate with the judicial authorities."*

Further enquiries

(i) Dumfries and Galloway Police

23.19 Enquiries with D&G have established that, some time after the conclusion of the applicant's appeal against conviction, Anthony and Paul Gauci were each paid sums of money under the "Rewards for Justice" programme administered by the US Department of State. Under that programme the US Secretary of State was initially authorised to offer rewards of up to $5m for information leading to the arrest or conviction of persons involved in acts of terrorism against US persons or property worldwide. The upper limit on such payments was increased by legislation passed in the US in 2001.

23.20 The background to the payments made to Anthony and Paul Gauci is given in a number of protectively marked documents recovered by the Commission from D&G. Again clearance has been given to disclose redacted versions of these items, copies of which are contained in the appendix of protectively marked materials.

23.21 On 7 February 2001, a week after the conclusion of the trial proceedings, the then senior investigating officer in the case, Det Chief Supt McCulloch, wrote to the US Embassy in The Hague nominating Mr Gauci for a reward under the programme. In the letter DCS McCulloch highlighted the significance of Mr Gauci's evidence to the applicant's conviction and also referred to an occasion when Mr Gauci was allegedly visited by two men at his shop who invited him to Tripoli for a "meeting with Government officials and members of the Defence Team". According to the letter Mr Gauci had been informed by the men that he "would not return home empty

handed" and would be "handsomely rewarded". Although Mr Gauci had refused the invitation DCS McCulloch suggests in the letter that the alleged incident was evidence of Mr Gauci's continued vulnerability.

23.22 In support of Mr Gauci's nomination DCS McCulloch enclosed with his letter a confidential report dated 12 January 2001 prepared by one of the officers who had interviewed Mr Gauci in 1999 in connection with his inclusion in the witness protection programme. The Commission sought and obtained the consent of D&G to disclose various passages in this report, a redacted version of which is contained in the appendix of protectively marked materials. Entitled "Impact Assessment Anthony and Paul Gauci", the report highlights the contributions made to the case by both witnesses and the anxiety they had experienced as a result of their involvement. Both witnesses, the report explains, have refused all requests for interviews and offers of payment in this connection. Although the specific threat against them was considered low, according to the report it was not possible to rule out the possibility of "some form of action being taken against them". Their relocation, it is explained, would be an extremely expensive option and would have a severely detrimental impact upon them.

23.23 The report concludes with the following passages:

> *"The issue of financial remuneration has not previously been discussed in detail with the witnesses and no promises exist. It is considered that the witnesses may harbour some expectation of their situation being recognised however whilst proceedings were still 'live' they displayed a clear understanding that such matters could not be explored.*
>
> *From the outset of the investigation the efforts of the Scottish Police Service and the Crown Office have established a strong reputation for integrity and professionalism. The management of these witnesses who are the subject of this report has reflected the established regard that not only the witnesses but the Maltese police have for the Scottish police. Dumfries and Galloway Constabulary have of course ensured that the highest standards have been maintained through not only the last ten years but also the immediate pre-trial phase and during the*

trial. The conduct of the Gauci brothers reflects both their own integrity and their response to the manner with which the police have dealt with them. It is therefore vital that they continue to perceive that their position is recognised and they continue to receive the respect that their conduct has earned.

It is considered that the implementation of the foregoing recommendations will ensure that when the inevitable reflections and media examinations take place in future years the witnesses who are the subject of this report will maintain their current position and not seek to make adverse comment regarding any perceived lack of recognition of their position. Nor is it anticipated would they ever seek to highlight any remuneration received."

23.24 The sequence of events following upon Mr Gauci's initial nomination for a reward is not entirely clear. An undated, confidential document obtained from D&G entitled "Anthony and Paul Gauci Reward/Compensation Payments" (see appendix of protectively marked materials) sets out certain "key considerations" in the payment of any rewards. The document broadly reflects the "Impact Assessment" report sent to the US Embassy in connection with Mr Gauci's initial nomination for a reward and refers to such matters as the Gaucis' refusal of offers of payment from the media, their fear of repercussions and their reluctance to be relocated. It also highlights that both witnesses depended on their shop for income and that their current financial position would suffer considerably if they left the business. The report also contains the following passage on the subject of reward payments:

"At no time prior to the conclusion of the trial was the subject of a reward/compensation payment discussed. The motivation of both witnesses has never at any stage been financial, as can be seen from their refusal of money from the media. They have received no financial gain from the Scottish Police; as a result, their integrity as witnesses remains intact. This has been the priority from the outset… The very fact that the witness was not motivated by financial gain and as a result his integrity as a crucial witness was maintained, reinforces the need to ensure that at this stage his contribution and more importantly the manner of his contribution is recognised."

23.25 The report concludes with the following passage regarding Paul Gauci:

"In relation to Paul Gauci, it was a decision of the Crown not to call him to give evidence and agree a joint minute for elements of his evidence. His evidence was important as it related to the identification of the clothing. However, it should never be overlooked that his major contribution has been maintaining the resolve of his brother. Although younger, Paul has taken on the role of his father (died 7 years ago) with regard to family affairs. His influence over Anthony has been considerable (It is considered critical that the contribution of Paul is recognised in order to preserve their relationship and prevent any difficulties arising in the future)."

23.26 Despite Mr Gauci's nomination for a reward by DCS McCulloch on 7 February 2001 it appears that the matter was not in fact followed up until shortly after the rejection of the applicant's appeal. On 19 April 2002 DCS McCulloch wrote to the US Department of Justice confirming Anthony and Paul Gauci's nominations for rewards. DCS McCulloch's letter followed an earlier meeting with a member of staff at the Department of Justice on 9 April 2002 when DCS McCulloch had proposed payment of specific sums of money to both witnesses. In the letter, DCS McCulloch explains that although he had consulted with Crown Office about the nominations, they could not become involved and it would therefore be improper for them to offer a view on the matter. According to the letter, however, Crown Office recognised the contribution to the case made by both witnesses.

23.27 It is worth adding in this connection the contents of a note which appears at the end of Mr Gauci's Crown precognition (a copy of the precognition is contained in the appendix to chapter 24):

"He [Mr Gauci] *has never at any stage sought to benefit from his involvement. His brother, whilst not openly seeking any reward, has been more alive to the possibility of obtaining substantive assistance from the police which, in accordance with good practice, has been restricted to matters ensuring their immediate safety."*

(ii) Anthony Gauci

23.28 As explained in previous chapters Mr Gauci has not approved the terms of his statement to the Commission and the following account has therefore not been verified by him. The Commission is confident, however, that it reflects what he said at interview.

23.29 Mr Gauci was asked to comment on the terms of Mr Bell's memorandum of 21 February 1991. It is worth quoting the relevant passages from his statement in full:

> *"I am asked if I can recall the discussions referred to in the above passage. I did not ever ask for money. I refused all offers of money from news reporters. I met with Harry Bell many times but I did not ask for money. I asked for protection. I agreed with Harry Bell and Godfrey Scicluna that all of what I told them should remain secret and confidential. However, I was betrayed because what I said appeared in newspaper reports. I never asked for money. Not only the local journalists but also British journalists called into the shop to offer money.*
>
> *I dispute the passage of Harry Bell's report which has been read out to me. I could have taken money from the newspapers. I am asked if at the time of the report in 1991 I was aware of the US reward money on offer. I was aware of the reward money because it had been reported on television in 1991, but I was not interested in a reward. I was interested in my personal security and the security of my shop.*
>
> *I am asked whether I recall any discussion of financial payment between my first meeting with the Scottish Police and my giving evidence. I recall that Gadaffi sent for me. I recall that a person came into the shop to sell me some goods. The person had lived in Libya. He told me that Gadaffi had offered to send a private jet for me and he had said that I would not return empty-handed. I said that I was not interested.*
>
> *I am asked whether, given the terms of Mr Bell's report, I can recall the issue of money ever being discussed at my police interview on 15 February 1991 when I*

partially identified Megrahi from photographs. There was no discussion of money at this meeting. I recall that after the trial my brother Paul mentioned that there was a reward.

I am asked whether at any time prior to the trial I was ever promised payment of a reward in return for giving statements or evidence. No, I was never promised this. I am asked whether police officers ever tried to encourage me to give statements in return for a financial payment. No, this did not happen" (at paragraphs 50-53 and 55).

(iii) Paul Gauci

23.30 Paul Gauci was also asked to comment on the passage in Mr Bell's memorandum on 21 February 1991. He explained that he was not present at the meeting referred to by Mr Bell but that it was well known in the press that a reward would be given. He had insisted on this payment after the appeal but no encouragement was given by police officers in the way of offers of this kind.

(iv) Harry Bell

23.31 Mr Bell was questioned extensively about the contents of his memoranda and on the subject of reward monies in general.

23.32 Asked whether he could recall what Mr Gauci had said during the meetings referred to in his memorandum of 21 February 1991 Mr Bell said only that the discussions would have involved Paul Gauci. According to Mr Bell, Paul Gauci was pushing the issue of a reward as compensation for the hassle caused to him and his family by the case. Mr Bell had explained to Paul Gauci that he could not discuss the issue of rewards with him. Paul Gauci raised the issue on a number of occasions and Mr Bell would "clamp down" on such discussions. If Anthony Gauci was present during such a discussion then he (Mr Bell) would clamp down on it as well. The American officers involved in the enquiry had made it clear to Mr Bell that they would pay money to the Gaucis.

23.33 According to Mr Bell there was no discussion of money at his meeting with Mr Gauci on 15 February 1991 when Mr Gauci had picked out the applicant from a series of photographs shown to him. Mr Bell was referred to the passage in his memorandum of 14 June 1991, in which he had reported having no personal contact with Mr Gauci since 15 February 1991, and it was suggested to him that if that was correct Mr Gauci must have raised the issue of money on or prior to that date. Mr Bell repeated that there had been no discussion of a reward on 15 February 1991 and said that it would have been inappropriate to discuss such a thing. Mr Bell was reminded that the last statement taken from Mr Gauci prior to his statement of 15 February 1991 is dated 10 September 1990. In light of this, Mr Bell was asked again when Mr Gauci was likely to have discussed the issue of a reward with him. In response Mr Bell explained that he might have seen Mr Gauci on an occasion when a statement was not taken.

23.34 Given the reference in his memorandum of 21 February 1991 to "recent meetings" with Mr Gauci, Mr Bell was asked if he could recall on how many occasions Mr Gauci had raised the issue of money. Mr Bell replied that "you would have to rely upon what is in the memo". He repeated that he would "shut down Tony straight away when he mentioned a reward", but that "Paul was more difficult to shut down". Paul Gauci, Mr Bell said, was "more forceful on the subject".

23.35 Mr Bell was asked when it was that Paul Gauci had raised the issue of a reward and, in particular, whether he recalled any discussions with him on the subject during the early stages of the latter's involvement in the case. Mr Bell replied that the discussions about money did not come about until "way past that point". Paul Gauci was, to Mr Bell's mind, the first to bring up the subject of a reward "because of what was reported in the media".

23.36 Mr Bell was asked how his assertion that he was able to quell any discussions of a reward with Mr Gauci squared with the fact that, according to his memorandum of 21 February 1991, Mr Gauci appears to have raised the issue at more than one meeting. In reply he said that "the issue could have been raised by Tony because of press reports or because it was raised with him by Paul."

23.37 Mr Bell denied that offers or promises of money were made to the Gaucis by any police officers in order to secure their cooperation in the enquiry. He was referred in this connection to the following entry in his diary for 28 September 1989 (see appendix):

> *"He* [Agent Murray of the FBI] *had authority to arrange unlimited money for Tony Gauci and relocation is available. Murray states that he could arrange $10,000 immediately."*

23.38 Mr Bell was asked if Agent Murray had ever met Mr Gauci, to which he replied "I cannot say that he did not do so". Mr Bell recalled that when he went to Malta during the Crown's preparations for trial he told Agent Murray "not to make any comments which might upset Tony". With regard to an earlier reply by him to the effect that FBI Agent Hosinski had met with Mr Gauci alone on 2 October 1989, Mr Bell said that he would "seriously doubt that any offer of money was made to Tony during that meeting". According to Mr Bell there had been no communication of the $10,000 offer to Mr Gauci by him or anyone else.

23.39 Mr Bell was referred to a further entry in his diary for 5 March 1990 (the date on which Mr Gauci partially identified Abo Talb ("Talb") from a photograph in *The Sunday Times*) in which he detailed various discussions he had had that day with FBI Agent Knisely and, separately, with the Maltese police officers, Mr Grech and Mr Scicluna. Mr Bell's attention was specifically drawn to the entry: "reward money mentioned but as a last resort". According to Mr Bell it must have been Agent Knisely who had raised this issue. A copy of the diary entry is contained in the appendix.

23.40 Mr Bell was also referred to an entry in his diary for 19 April 1990 (see appendix) in which he recorded that the US would be putting out a notice regarding an award of $3m for any form of information on the terrorists. He believed that this notice was "a standing one in general terms for combating terrorists" and that it may have generated awareness of the US reward monies.

23.41 Mr Bell confirmed that he had no knowledge of Anthony and Paul Gauci having received money in respect of their involvement in the case. Although he might have favoured such a reward in his memorandum of 21 February 1991 he had not raised the issue with Anthony Gauci.

Potential significance

23.42 The principles governing the Crown's duty of disclosure have been highlighted in chapter 22, along with the test which has been applied by both the High Court and the Privy Council in assessing the significance of undisclosed evidence.

23.43 As noted above, there was no challenge to Mr Gauci's credibility in cross examination and consequently there were no submissions by the defence on this issue to either the trial or appeal courts. At least part of the reason for this was that the defence had little or no material on which to found such a challenge. In the Commission's view the memoranda by Mr Bell and the report by officers of Strathclyde Police dated 10 June 1999 would have provided such a basis had they been disclosed to the defence.

23.44 The contents of Mr Bell's memorandum of 21 February 1991 suggest not only that Mr Gauci expressed an interest in money during the police investigation but also, when taken together with Mr Bell's memorandum of 14 June 1991, that he might have done so at the time of his identification of the applicant on 15 February 1991 or shortly before. Furthermore, the report by Strathclyde Police dated 10 June 1999 is capable of demonstrating that Mr Gauci's interest in a reward continued in the period leading up to his giving evidence, and also that he was frustrated at apparent indications that he would not be compensated financially for his involvement. The same report indicates that Paul Gauci had also shown an interest in a financial reward.

23.45 There is little doubt that the defence would have regarded such information as significant. At interview Mr Taylor confirmed that the defence had no evidence at the time of the trial or appeal to the effect that Mr Gauci had asked for, or received, payment in connection with his role as a witness. According to Mr Taylor any such information would have affected the approach he had taken to cross examination, in

that he would have treated Mr Gauci as a hostile witness. As it was, Mr Taylor had tried to "coax [Mr Gauci] into the correct position for the defence". If he had known that Mr Gauci had been asking for money he would have approached his cross examination in the same manner as he had the cross examination of the witness Abdul Majid Giaka.

23.46 Mr Taylor's views were reflected by those of Mr Duff. According to him all the defence knew about were the "fishing trips that Gauci had been taken on" and that "it was very vague". In Mr Duff's view, evidence that Mr Gauci had been paid a large sum of money, or that he had asked about the possibility of such payment, would have been significant.

23.47 Mr Beckett could not remember evidence to the effect that Anthony and Paul Gauci had been paid a sum of money or had expressed an interest in such payment prior to the trial. Asked whether evidence of this kind would have been used in Mr Gauci's cross examination, Mr Beckett considered that this would "very much depend on the circumstances". Without details of such evidence, however (which were not revealed at interview), Mr Beckett felt unable to answer the question fully.

23.48 It is impossible to say for certain what evidence would have been adduced had the various items been disclosed and what, if any, impact this would have had upon the court's verdict. It has to be said that if Anthony and Paul Gauci were motivated primarily by money, one might have expected them to display a greater degree of enthusiasm for the police enquiry than is often evident from their police statements. In his statement of 26 September 1989 (CP 460), for example, Anthony Gauci stated that Paul Gauci had told him not to say anything more to the police "because they will keep coming back and the man might come back and then there will be bother". Referring to Paul Gauci and their father, Mr Gauci added "They are frightened". In his statement of 30 January 1990 (CP 464) Mr Gauci told police that he would try to get them access to his shop while Paul Gauci and their father were away. Similarly, in his statement of 10 September 1990 (CP 469) Mr Gauci is noted as saying that his father and his brother did not wish him to help the police. It is also clear from his statements that on several occasions Mr Gauci declined requests to sign police production labels.

23.49 Paul Gauci was himself on occasions unwilling to assist the police in their enquiries. For example it is clear from the note inserted at the foot of the HOLMES version of his statement of 19 October 1989 (S4680D, see appendix) that on 14 December of that year he refused to provide the police with a statement concerning the football matches he might have watched on television in November and December 1988.

23.50 Likewise, the nature and quality of Mr Gauci's identification evidence are not necessarily supportive of any allegation that he was influenced by the prospect of a financial reward. In particular it does not seem that Mr Gauci's limited identification of the applicant from a photo-spread in 1991 was subsequently enhanced at the identification parade or in evidence. In terms of his statement of 15 February 1991 Mr Gauci believed the photograph of the applicant to be "similar" to the purchaser and "the only one really similar to the man who bought the clothing…other than the one my brother showed me". While it is confused, Mr Gauci's comment at the identification parade ("Not exactly the man I saw in the shop. 10 years ago I saw him but the man who look a little bit like exactly is the number five") can hardly be described as an unequivocal identification. The same applies to his evidence at trial in which he said that the applicant resembled the purchaser "a lot" (31/4777).

23.51 There is also no indication in Mr Gauci's evidence of any corresponding "dilution" of his identification of Talb, something one might perhaps have expected if Mr Gauci had been driven by the prospect of a financial reward. In an undated statement (CP 463) relating to an interview which took place on 2 October 1989 Mr Gauci is reported as saying that a photograph of Talb obtained by utilising the freeze-frame facility on a video recorder was "similar" to the purchaser but was unable to say that it was definitely the same person. In his statement of 5 March 1990 (CP 467) he said of a photograph of Talb which featured in an article in *The Sunday Times* that he thought it "may have been the same man who bought the clothing". In evidence Mr Gauci's identification of Talb was, if anything, stronger. Referring to the photograph of Talb in *The Sunday Times* Mr Gauci "thought it was the one on this side, I thought.

That was the man who bought the articles from me" (31/4767). In cross examination he said of the same photograph, "He resembles him a lot" (31/4829).

23.52 One might also have expected that if Mr Gauci was truly motivated by financial considerations, he would have given the Crown a more helpful response to questioning regarding what he allegedly told Mr Scicluna when he first showed them the applicant's photograph in *Focus* magazine. As explained in chapter 22 above, however, Mr Gauci's position in evidence was that he could not remember uttering the words "that's him" to Mr Scicluna and recalled saying only that the applicant's photograph "looked like" the purchaser.

23.53 In addition, challenging Mr Gauci on the basis of the undisclosed items would not have been without risk to the defence. As noted earlier, in his letter to the US Embassy in the Hague of 7 February 2001 DCS McCulloch makes reference to an alleged incident in which Mr Gauci was invited to Tripoli for a "meeting with Government officials and members of the Defence Team". A similar allegation was made by Mr Gauci at interview with members of the Commission's enquiry team. Had it been put to Mr Gauci that he had expressed an interest in money it is at least possible that he would have referred to this alleged incident. On any view this would not have been helpful to the defence.

23.54 On the other hand there are several factors which suggest that the trial court, having heard evidence of the undisclosed items, might have rejected Mr Gauci's identification of the applicant. While one cannot say for certain what would have transpired had Mr Gauci been cross examined on this basis, it is at least possible that his position would have been similar to that which he adopted at interview with members of the Commission's enquiry team. If so his denial that he had ever expressed an interest in money to Mr Bell would have placed his evidence in sharp conflict with the terms of Mr Bell's memorandum of 21 February 1991. One might expect that if Mr Bell had been cross examined on the contents of his memorandum he too would have given answers similar to those he gave at interview. In that case he might have confirmed that both Anthony and Paul Gauci had expressed an interest in money during the investigation and specifically that he had "shut Tony down straight away when he mentioned a reward", but that "Paul was more difficult to shut down".

23.55 In light of such evidence, the defence could have relied not only on Mr Gauci's alleged expression of interest in a reward at or close to the time of his identification of the applicant by photograph, but also upon his denial of this and the resultant conflict which would then have opened up between his own evidence on the matter and that of Mr Bell. In the Commission's view any such conflict was likely to have been resolved in Mr Bell's favour. It is difficult to accept that he simply made up the relevant passage in his memorandum, and it is clear from the report produced by Strathclyde Police that Mr Gauci raised the subject of a reward again in 1999. It is also important to note that at interview with the Commission Mr Gauci did not dispute the entire passage in Mr Bell's memorandum. While he denied having raised the issue of money with Mr Bell he fully accepted that in 1991 he was aware of the US reward monies on offer.

23.56 In addition, while it is true that the nature and quality of Mr Gauci's identification of the applicant have remained relatively consistent, there are several aspects of his accounts which clearly have not. One example of this concerns Mr Gauci's assessment of the purchaser's height and age. In his statement of 1 September 1989 (CP 452) Mr Gauci described the purchaser as "about 6 feet or more in height". In his statement of 13 September 1989 (CP 455), he added that the purchaser was "about 50 years of age". A similar account was given in his statement of 10 September 1990 (CP 469) in which he said that his description of the purchaser was "exactly the same", and that he was "about 50 years".

23.57 In examination in chief, however, when Mr Gauci was asked about the purchaser's build, he replied "I think he was below six feet. I'm not an expert on these things. I can't say" (31/4752). Similarly, when asked the purchaser's age, he replied "…under 60… I don't have experience on height and age" (31/4753). Similar responses were given in cross examination. There, when the relevant passage in his statement of 1 September 1989 was put to him, Mr Gauci replied "I always said six foot, not more than six feet" (31/4789). He adopted a similar position in his Crown precognition dated 18 March/25 August 1999, in which again he said that he was not an expert on age or height.

23.58 Accordingly, Mr Gauci's position in evidence regarding the purchaser's height and age differed from that adopted in his prior statements. Specifically, in contrast to what he said in his statements, he claimed that the purchaser was below 6 feet and under 60 years of age. He also sought to emphasise that he had "no experience" of height and age.

23.59 As detailed in chapter 22, shortly before the identification parade Mr Gauci saw an article in *Focus* magazine concerning the case. Within the text of the article is the following passage:

> *"Eighteen months later, Gauci told* [the police] *the shopper had actually been al-Megrahi. He even described him: 50 years old, 6 ft tall and of strong build. But al-Megrahi was actually 36 when he's alleged to have met Gauci, 5 ft 8in tall and not particularly strongly built."*

23.60 At interview with members of the Commission's enquiry team, Mr Gauci recalled this passage having been read to him by someone. According to Mr Gauci, his response at the time was that he "did not have a tape measure to measure the man's height".

23.61 In the Commission's view, the passage in question is an example of the kind of issues which might have been raised with Mr Gauci in cross examination, had the decision been taken to challenge his credibility as well as his reliability. In particular, the Commission considers that it might have been possible for the defence to suggest that the passage had given forewarning to Mr Gauci of possible challenges to his identification of the applicant, and had influenced what he said in evidence regarding the height and age of the purchaser. The defence might then have gone on to suggest that the change in his description of the purchaser had itself been influenced by the hope of a reward. Although at interview the applicant's former representatives offered differing views as to the significance of the passage in *Focus* magazine, in the Commission's view there is no telling what approach might have been taken had Mr Bell's memoranda and the report by Strathclyde police been disclosed.

Conclusions

23.62 Applying the principles in *McLeod* and those set out by the Privy Council in *Holland* and *Sinclair*, the Commission is of the view that Mr Bell's memoranda and the passages from Strathclyde Police report quoted above ought to have been disclosed to the defence. Taken together, all three items were likely to have been of material assistance to the proper preparation or presentation of the applicant's defence and were likely to have been of real importance in undermining the Crown case.

23.63 As to whether the Crown's failure to disclose the items has resulted in a possible miscarriage of justice, the Commission, again adopting the test applied by the Privy Council in *Holland* and *Sinclair*, is unable to conclude that evidence of the reports "might not possibly" have affected the verdict in the applicant's case.

23.64 In referring the case on this ground the Commission is concious of the potential impact of its decision upon Mr Gauci who may well have given entirely credible evidence notwithstanding an alleged interest in financial payment. On the other hand there are sound reasons to believe that the information in question would have been used by the defence as a means of challenging his credibility. Such a challenge may well have been justified, and in the Commission's view was capable of affecting the course of the evidence and the eventual outcome of the trial. Although there were risks in taking such a course, in the Commission's view they were no greater than those described in *Holland*, nor any more likely to have had undesirable consequences for the defence (Lord Rodger's opinion at paragraph 82). In any event, standing the approach taken in that case, it was for the defence to decide upon the use to which the information might be put, if any (Lord Rodger at paragraph 72) and for the court to determine its significance as appropriate.

CHAPTER 24
THE DATE OF PURCHASE

Introduction

24.1 As well as accepting Anthony Gauci's evidence that the applicant resembled the purchaser, the trial court found that the purchase itself had taken place on 7 December 1988. As explained in chapter 21 this finding was important to the applicant's conviction because, although the applicant had visited Malta on a number of other occasions in December 1988, in terms of the evidence 7 December was the only date on which he would have had the opportunity to purchase the items. The evidence showed that on that date he was staying at the Holiday Inn in Sliema located close to Mary's House.

24.2 Although the defence made significant efforts to undermine this aspect of the Crown case, there was no dispute that the purchase had taken place on a weekday between 18 November (the date on which an order of Yorkie trousers was delivered to Mary's House) and 20 December 1988 (the day prior to the bombing). It is worth noting again the factors on which the trial court relied in narrowing the range of possible dates to 7 December:

- Mr Gauci's evidence that his brother, Paul Gauci, did not work in the shop that afternoon because he had gone home to watch a football match on television; and the terms of joint minute number 7 which, according to the trial court, agreed that whichever football match or matches Paul Gauci had watched would have been broadcast by Radio Televisione Italiana ("RAI") either on 23 November or 7 December 1988;

- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the former Chief Meteorologist at Luqa airport, Major Joseph Mifsud, to the effect that there

was a 10% probability of rain in Sliema at the material time on 7 December 1988;

- Mr Gauci's evidence which, according to the trial court, was that the purchase was "about the time when the Christmas lights would be going up" in Tower Road; and

- Mr Gauci's evidence that the purchase "must have been about a fortnight before Christmas".

24.3 The outcome of the Commission's enquiries into the evidence of the football broadcasts is described in chapter 4. The following section details the Commission's findings regarding the erection and illumination of the Christmas lights in Tower Road. Thereafter a further issue concerning the date of purchase is addressed, namely a failure by the Crown to disclose to the defence a passage within Anthony Gauci's Crown precognition.

(a) The Christmas lights in Tower Road

The applicant's submissions

24.4 Although it did not feature prominently in the judgment, in determining the date of purchase the trial court relied in part upon Mr Gauci's evidence concerning the Christmas lights in Tower Road. In the further submissions made by MacKechnie and Associates concerning Anthony Gauci (see chapter 17), reference is made to "new" evidence concerning the Christmas lights in Tower Road which was obtained by the applicant's former representatives during the appeal. According to the submissions, although no attempt was made to lead it at appeal, this evidence would have cast doubt upon the date of purchase established by the trial court.

24.5 Before setting out the new evidence it is important to consider the passages of Mr Gauci's statements and evidence relating to the Christmas lights, the

approaches taken to this issue by the trial and appeal courts and the results of enquiries undertaken by the police in this connection in 1990/91.

Mr Gauci's statements and evidence

Statement: 19 September 1989 (CP 454)

> *"At Christmas time we put up the decorations about 15 days before Christmas, the decorations were not up when the man bought the clothing. I am sure it was midweek when he called."*

Statement: 10 September 1990 (CP 469)

> *"I have been asked again to try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday, there were no Christmas decorations up as I have already said, and I believe it was at the end of November."*

Crown precognition: 18 March/25 August 1999

> *"I told* [the police] *that this Libyan man had come into the shop one midweek night in the winter before the Christmas lights were on."*

Examination in chief

> *Q. I wonder if we can try and approach* [the date purchase] *then from a slightly different angle. Did the Tower Road in Sliema put up Christmas lights?*
>
> *A. Yes. Yes.*
>
> *Q. How long before Christmas, generally, was that?*
>
> *A. I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I*

can't say exactly.

Q. I would like you to think carefully about that, Mr Gauci, if you can, whether at the time when you sold to the Libyan the Christmas lights were on or not.

A. Yes, they were putting them up. Yes.

Q. Do you remember being asked about that by the police when they came to see you?

A. Yes, they had said. And I had said the lights were there when they came to buy.

Q. Am I right in thinking that you, from the time when the police came first to see you, at the beginning of September, were seen by the police on quite a large number of occasions?

A. Yes, they came a lot of times. They used to come quite often, didn't they.

Q. And that would be in the months after they came first to see you, was it?

A. Yes. Not months after. They used to come after. I don't know exactly when they used to come, but I did not take notes when they used to come. But they used to come quite often to see me. They used to come and ask questions, and they used to take me to the depot and things like that.

Q. And when you were interviewed by the police on these occasions, was your memory of the sale to the Libyan better than it is now?

A. Yes, of course. That is 12 years – 11 years after. I mean, 11 years are a long time for me, but in those days I told them everything exactly, didn't I?

Q. And if you told them, in one of these interviews, that the sale was made before the Christmas decorations went up, might that be correct?

A. I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights, though, in those times.

Q. But in any event, you explained that you thought it was about a fortnight before Christmas?

A. Something like that, yes, because I don't remember all these things, do I, when they put the lights on and when they turned them on. I'm not really interested so much because I don't even put decorations, Christmas decorations myself in my shop (31/4739-4741).

Cross examination

Q. [referring to Mr Gauci's statement of 10 September 1990]… *And then about the middle of the page, Mr. Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November.*

Now, I am going to come back to that, in view of what you said in your evidence in chief, Mr. Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr. Bell, in September of 1990, that it was a weekday --

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date.

Q. I understand that. And I promise you, I am not trying to catch you out. You and I have agreed, Mr. Gauci, that --

A. -- yes, yes, of course I understand. But I want to speak fair. I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas

decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies.

Q. But if a policeman was coming to get you, that would be during the period you were being interviewed.

A. Yes, of course, to tell them about these description [sic].

Q. Yes. And no doubt there were Christmas lights at such occasions, but we are looking at Christmas lights in the context --

A. I remember that there were Christmas lights.

Q. Well, so you say. But we'll examine together in detail what it was you said to the police on the subject of Christmas lights at the time, 10 and 11 years ago.

Now, I want you to look at another statement, please. This is Production 454 [Mr

Gauci's statement of 19 September 1989]...

Q. Now, without going into it again, the first paragraph deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.

A. Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that.

Q. Undoubtedly. Now, let's deal with two aspects of that last paragraph. One is we can see that the statement was given by you to Mr. John Crawford, Detective Constable John Crawford, about ten to 1.00 on the 19th of September 1989. Is that right? Do you see that?

A. Yes, yes.

Q. And what you say is that the Christmas decorations were not up when the man bought the clothes. So would I be right in thinking that on the 19th of September of 1989, you believed that there were no Christmas decorations up when the man bought the clothes, and you told that to DC Crawford?

A. Maybe (31/4802-4810).

The trial court's approach

"... Mr Gauci's evidence was that he was visited by police officers in September 1989. He was able to tell them that he recalled a particular sale about a fortnight before Christmas 1988, although he could not remember the exact date. His recollection was that the Christmas lights were just being put up" (paragraph 12).

"In his evidence in chief, Mr Gauci said that the date of the purchase must have been about a fortnight before Christmas. He was asked if he could be more specific under reference to the street Christmas decorations. Initially, he said 'I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I can't say exactly'. In a later answer when it had been put to him that he had earlier said that the sale was before the Christmas decorations went up, he said 'I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights though in those times'" (paragraph 56).

"... The position about the Christmas decorations was unclear, but it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas... Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of the purchase was Wednesday 7 December" (paragraph 67).

The appeal court's approach

24.6 In terms of the applicant's ground of appeal A1(e), it was submitted that in relying upon Mr Gauci's evidence that the purchase was about the time that the Christmas lights were going up the trial court had ignored or failed to have proper regard to the following factors (see paragraph 328 of the opinion):

(i) that Mr Gauci gave conflicting evidence as to whether the Christmas lights were up or being put up at the time of the purchase;

(ii) that in statements given to the police in September 1989 and September 1990 he had said that the lights were not up at the time of purchase;

(iii) that there was no evidence, apart from a prior statement from Mr Gauci, as to when Christmas lights were put up in Sliema; and

(iv) the confusion in Mr Gauci's evidence as to whether his recollection of the Christmas lights related to the date of purchase or to occasions when he had been interviewed by the police.

24.7 At appeal, counsel for the applicant argued that the trial court had a duty to record the contradiction between Mr Gauci's police statements and his evidence that the lights had been going up and, in general, to give reasons for preferring the latter. In counsel's submission the trial court's failure to recognise the materiality of prior inconsistent statements by a witness giving evidence 11 years after the event amounted to a material misdirection (paragraph 330).

24.8 In reply the advocate depute said that the court had set out in paragraphs 12 and 56 of its judgment the different accounts which Mr Gauci had given in evidence and to the police. Although not expressly referred to in the judgment, the court was conscious of the confusion in Mr Gauci's evidence between the position on the date of purchase and at the times when the police came to collect him. In any event, the advocate depute submitted, the court's conclusion on the issue of Christmas lights was expressed in a very tentative manner (paragraph 331).

24.9 In the appeal court's view the trial court was fully justified in finding that the position about the Christmas lights was unclear and that Mr Gauci's recollection was confused. However, the appeal court was not satisfied that the trial court had been shown to have ignored material factors in respect of that evidence. The trial court had recognised that Mr Gauci's evidence was confused but in the circumstances was entitled to say that it seemed consistent with his recollection that the purchase was about the time when the lights would be going up which, in turn, was consistent with his recollection that it had taken place about two weeks before Christmas. In the appeal court's view evidence as to the Christmas lights was only one of the factors taken into account by the trial court in determining the date of purchase and appeared not to have been one given a great deal of weight (paragraph 332).

The police enquiries in 1990/91

24.10 Although not evidence at trial, in 1990 the police conducted various enquiries to establish the date on which the Christmas lights in Tower Road were erected and illuminated in that year. The outcome of these enquiries is detailed in statements given by various officers, copies of which are contained in the appendix.

24.11 According to Mr Bell's statement (S2632AM) during November and December 1990 he instructed daily checks to be made of Tower Road in order to establish the day and date on which the Christmas lights were erected and illuminated. Mr Bell had given these instructions in light of Mr Gauci's statement of 10 September 1990 in which he said that there were no Christmas decorations in Tower Road at the time of the purchase. Mr Bell hoped that, taken together with that account and interviews with any organisers of the decorations, the daily checks would clarify the purchase date. According to his statement Mr Bell was aware at this time that Paul Gauci had identified 7 December 1988 as the "probable" date of purchase.

24.12 On Wednesday 5 December 1990 Mr Bell visited Tower Road in the company of Ch Insp John McLean (S5320D) and noted that the Christmas lights had been erected to a point past Mary's House. Mr Bell learned from Ch Insp McLean that this was the first time during the daily checks that the lights had appeared. The lights were not illuminated at that time.

24.13 On 6 December 1990 Mr Bell returned to Tower Road, this time accompanied by FBI Special Agent Phillip Reid (S5486). Mr Bell noted that although it appeared that the Christmas lights had been fully erected they had not yet been illuminated.

24.14 The following evening, 7 December 1990, Mr Bell noted that the Christmas lights outside Mary's House in Tower Road were switched on and fully illuminated.

24.15 In 1991 DS Peter Avent was instructed by Mr Bell to make enquiries as to when the Christmas lights were erected and illuminated in Tower Road in 1988. According to DS Avent's statement (S5388BC), however, "all lines of enquiry which

the Maltese were willing and able to pursue failed to pin point the exact date of illumination in 1988."

The evidence obtained in 2002

Background

24.16 The background to the additional evidence is contained in a precognition given during the appeal proceedings by Dr Giannella Caruana Curran, one of the Maltese lawyers instructed by the defence (see appendix). In this, Dr Curran explained that despite a number of enquiries prior to the trial she had been unable to establish the dates on which the Christmas lights in Tower Road were erected and illuminated in 1988. In May 2001, however, the applicant's solicitor Mr Duff asked her to revive these enquiries. As a result she had established that the Maltese energy provider Enemalta supplied temporary meters to monitor the consumption of electricity by Christmas lights installations throughout the country.

24.17 According to her precognition Dr Curran thereafter made contact with the finance manager of Enemalta, Tarcisio Mifsud, who confirmed that such a meter had been supplied and fitted in respect of the Christmas lights in Tower Road in 1988. Mr Mifsud later provided Dr Curran with copies of various records held by Enemalta (see appendix). These showed that an application (reference T/1938/88) was made to Enemalta for a temporary meter for the period 30 November 1988 to 10 January 1989 in respect of Christmas lights in Tower Road. According to the records the meter was installed by Enemalta on 30 November 1988 and removed on 22 February 1989.

24.18 Mr Mifsud also provided Dr Curran with a letter dated 22 January 2002 (see appendix) in which he informed her that the person responsible for making the above application was a James Busuttil.

24.19 Following Dr Curran's enquiries, on 28 January 2002 Mr Duff obtained precognitions from a number of witnesses (see appendix). Summaries of their accounts are given below.

Tarcisio Mifsud

24.20 Mr Mifsud explained that the records which he had passed to Dr Curran formed part of a workbook kept by Charles Tabone who in 1988 was employed in the temporary meter section of Enemalta. He explained that in the case of Christmas lights, an application for a temporary meter would not be submitted until the lights had been erected. According to Mr Mifsud the records he had obtained showed that an application for a temporary meter in Tower Road in the name of James Busuttil was received on 29 November 1988. The reference number of that application (T/1938/88) corresponded with the entry in Mr Tabone's register relating to Christmas lights in Tower Road.

24.21 Mr Mifsud confirmed that the meter to which Mr Busuttil's application related was installed in Tower Road on 30 November 1988. The meter would be installed by a member of staff who would then test the whole set up. According to Mr Mifsud it was therefore "absolutely necessary" that the lights were erected before the meter was fitted.

24.22 As far as Mr Mifsud knew the lights would be officially illuminated on the same day as the meter was fitted and the installation tested. In respect of the Christmas lights in Tower Road in 1988, the supply was due to commence from 30 November and, as far as Mr Mifsud knew, the consumer would start using it immediately.

24.23 Mr Mifsud confirmed that he had never been questioned by the police in respect of this matter.

Charles Tabone

24.24 Mr Tabone informed Mr Duff that in 1988 he was responsible for record keeping within the temporary meter section of Enemalta. He explained that temporary meters would be installed whenever a temporary electricity supply was needed. In order to obtain such a meter, contractors would submit to Enemalta an

application form giving details as to the location of the supply, its purpose and the period for which it was required.

24.25 In respect of Christmas lights Mr Tabone said that meters would not under any circumstances be fitted until the lights themselves had been erected. According to Mr Tabone having fitted the meter and connected the supply it was Enemalta's duty to test the system, something which could not be done until the lights were up. Assuming the system worked, it would be switched off and it was then up to the contractor or the person who required the supply to switch it on "that night". Mr Tabone could not say exactly when the lights would be switched on by the contractor, but he always assumed that this would be done on the date specified in the application form.

24.26 Like Mr Mifsud, Mr Tabone claimed never to have been interviewed by the police about this matter.

James Busuttil

24.27 Mr Busuttil said that in 1988 he worked in a jeweller's shop owned by his father which was located at 43 Tower Road. In 1988 and 1989, he organised the erection and illumination of the Christmas lights in Tower Road on behalf of the shopkeepers there. This involved negotiating a deal with a contractor with whom a starting date would be agreed. The shopkeepers would want the bulk of the use to be in December, before Christmas.

24.28 Mr Busuttil recalled "people from the electricity supply company" coming to connect the supply, fit the meter and "test the whole thing." On being informed by Mr Duff that the meter in Tower Road had been installed on 30 November 1988, Mr Busuttil said that the lights would not have been erected long before this date as the contractors would not want the lights to be unused for long in case of storm damage. The lights, he said, would have been officially illuminated not long after 30 November, although there might have been a delay of a few days. He felt sure that in 1988 the lights would have been switched on after 30 November but before 7 December as, in his view, the latter date "just sounds too late."

24.29 According to Mr Busuttil, he had arranged for the then Minister of Tourism, Michael Refalo, to switch on the lights.

Memorandum

24.30 A memorandum prepared by Mr Duff dated 28 January 2002 confirms that after obtaining Mr Busuttil's precognition, he and Dr Curran met Dr George Hyzler, Parliamentary Secretary for the Ministry of Economic Services in Malta. At Mr Duff's request Dr Hyzler telephoned Michael Refalo who checked his diary for 1988 and confirmed that on 6 December of that year he had an engagement to switch on the Christmas lights in the Tower Road area. According to the memorandum the ceremony was performed at "the Ferries", an area located at the foot of the "Mary's House section" of Tower Road. A copy of the memorandum is contained in the appendix.

Summary

24.31 The evidence obtained by Mr Duff in 2002 can be summarised as follows:

- Applications for temporary meters in respect of Christmas lights are submitted to Enemalta once the lights themselves have been erected;

- The Christmas lights must be erected before the temporary meter is fitted, to allow the fitter to test the installation;

- On 29 November 1988 Enemalta's district office in Sliema received an application in the name of James Busuttil for a temporary meter in respect of Christmas lights in Tower Road;

- On 30 November 1988 the meter to which Mr Busuttil's application related was fitted in Tower Road;

- In 1988 the Christmas lights in Tower Road were erected during the night over two nights and would not have been erected long before 30 November;
- In 1988 the Christmas lights in Tower Road were officially illuminated by Michael Refalo on 6 December at a ceremony which took place close to Mary's House at a location known as the Ferries.

24.32 Accordingly, on a literal reading of Mr Gauci's evidence that the lights were being put up at the time of the purchase (ie the account which the trial court accepted) the evidence obtained by Mr Duff would suggest that the purchase took place on or prior to 29 November 1988 (the date on which a copy of Mr Busuttil's application was received at the district office); or, at the very latest, on or prior to 30 November 1988 (the date on which the meter was installed). Either way, since there was no evidence at trial that the applicant had visited Malta in November 1988, the evidence obtained by Mr Duff was capable of undermining the court's conclusion that the applicant was the purchaser.

The decision not to lead the evidence at appeal

24.33 It is clear that a good deal of consideration was given as to whether the above evidence should be led at appeal. Included within the materials submitted to the Commission by MacKechnie and Associates were notes on the subject prepared by two of the applicant's counsel, David Burns QC and John Beckett QC (see appendix). While the evidence was considered to be of value, both counsel were concerned that it might be construed by the appeal court in such a way as to undermine the defence position. Mr Burns, for example, believed that were the new evidence to be led, the appeal court would "view it as supporting [Mr Gauci's] first position in evidence, that the sale took place when the lights were on and supporting his evidence that it took place about a fortnight before Christmas." In Mr Burns' view, both of these factors supported 7 December 1988 as the purchase date. Mr Burns also believed that, because the new evidence directly contradicted Mr Gauci's prior statement of 19 September 1989 in which he said that the decorations were put up about 15 days before Christmas, the trial court would be seen to have been justified in rejecting his prior statements to the effect that there were no Christmas decorations up at the time

of the purchase. Furthermore, Mr Burns considered that if the appeal court were to view the choice of dates as narrowed to 23 November and 7 December 1988, the new evidence would not support the former.

24.34 According to Mr Beckett's note, if the new evidence had been known about at the time of trial the defence would have lodged it as a production. This was on the basis that prior to the trial the defence had reason to think that the court would accept the version of events given by Mr Gauci in his police statements. Had the court done so then, in Mr Beckett's view, the new evidence would have excluded 7 December 1988 and indeed any date after 30 November of that year. At the same time, however, the defence would have been in difficulty with Mr Gauci's initial position in evidence in which he said that the Christmas lights were on at the time of the purchase. According to Mr Beckett, had the court accepted that evidence, 7 December 1988 would have been a perfect candidate for the date of purchase and any date prior to 6 December would have been excluded.

24.35 Mr Beckett considered that, viewed in terms of the court's finding that the purchase took place "about the time the Christmas decorations would be going up", the new evidence suggested that the purchase took place circa 30 November 1988. The attraction of the evidence for Mr Beckett was that it would enable the appeal court to quash the applicant's conviction without criticising the trial judges. Like Mr Burns, however, Mr Beckett was concerned about the impact of the new evidence in the event that the appeal court viewed the choice of dates as narrowed to 23 November and 7 December 1988. If so, then according to Mr Beckett's note "23 November is excluded and 7 December is not necessarily excluded."

24.36 Mr Beckett also considered that by leading the new evidence the defence "would be introducing a reference point which is presently absent." The position, he noted, was that:

> *"we have argued and possibly demonstrated that the finding that there was consistency between the fortnight before Christmas spoken to in evidence and the decorations being up depended upon a prior statement which said that the decorations were not up at the time of the purchase. There is a possible, we have*

argued otherwise, construction of chief against us although this is not advanced in the Crown skeleton."

24.37 Mr Beckett concluded his note with the following observations:

"Given the various positions which can be taken, it is far from certain that even if permitted this evidence would persuade the court that there has been a miscarriage of justice… If the evidence is not advanced now there will be no other opportunity to do so. We cannot be confident that we are presently winning the appeal."

24.38 At interview with the Commission's enquiry team Mr Beckett maintained that there were pros and cons to leading the new evidence but said that ultimately it was the applicant himself who did not wish it to be led. Support for Mr Beckett's position is contained in a handwritten file note dated 1 February 2002 extracted by the Commission from the defence files (see appendix). The note contains details of a meeting on that date between the applicant and his representatives in which a "possible new ground of appeal" was discussed. Towards the end of the note appear the words, "Baset says we should not use the evidence" and "unanimous". At interview Mr Duff confirmed that the note was in his handwriting and that it related to the evidence he had obtained concerning the Christmas lights.

The Commission's enquiries

24.39 As an initial step the Commission obtained from Dr Curran copies of the records passed to her by Mr Mifsud at the time of the appeal. Further records were obtained by the Commission following a visit to Enemalta's headquarters in Malta in December 2005 (see appendix). Thereafter a number of witnesses were interviewed by the Commission, including several members of staff at Enemalta and Dr Michael Refalo, now Malta's High Commissioner to the UK. The Commission also traced the individual who had installed the temporary meter in Tower Road in 1988, Carmel Vella, and obtained a statement from him in which he described his working practices at that time. Although attempts were made to trace Reno Cianter, the contractor who had erected the Christmas lights in Tower Road in 1988, the Commission was

informed by other witnesses that he is now deceased. The witness Charles Tabone was too ill be interviewed. The Commission was unable to trace James Busuttil.

24.40 Copies of all statements obtained by the Commission as a result of its enquiries in this area are contained in appendix of Commission interviews. The following is a summary of those considered to be of significance.

Dr Michael Refalo

24.41 At interview Dr Refalo produced his Ministerial diary for 1988. The final entry on the page relating to 6 December is as follows:

"5.30 Xmas lights (Ferries)"

24.42 According to Dr Refalo the entry referred to an invitation received from shop owners in Sliema to perform the Christmas illuminations ceremony and was inserted in his diary by his personal assistant at the time, Manuel Darminin, who is now deceased. Dr Refalo's impression was that in 1988 the lights were located in Bizazza Street (which runs parallel to the lower section of Tower Road: see CP 865), the lower section of Tower Road itself (where Mary's House is situated) and possibly part of "the Ferries" (a section of the Strand located at the foot of Tower Road). He could not recall who had requested him to perform the ceremony but it was normally a shopkeeper from the area. Although Dr Refalo did not know anyone by the name of James Busuttil, he knew Robert Busuttil who he recalled owned a jewellers in Tower Road.

24.43 Dr Refalo recalled having performed the Christmas illuminations ceremony in Sliema about 2 or 3 times. He had some recollection that on 6 December 1988 the ceremony had taken place in Bizazza Street, although he accepted that he might be wrong about this. Given that his diary entry referred to the Ferries area, in Dr Refalo's view this suggested that he had switched on the lights at a ceremony held there. Whatever the location of the ceremony in 1988 the illuminations would, he said, have included the lower part of Tower Road. He was certain that he was not

involved in the illumination of Christmas lights in more than one area in the same year.

24.44 Dr Refalo confirmed that his diary was "very reliable" and that he definitely would have conducted the official ceremony to which the entry of 6 December 1988 relates.

24.45 A certified copy of the relevant page of Dr Refalo's diary is contained in the appendix.

Paul Portelli

24.46 Mr Portelli has been employed by Enemalta since 1979 and in 1988 was a meter fitter. He explained that in 1988 applications for temporary meters in respect of Christmas lights would be submitted to Enemalta by contractors. The normal procedure was for applications to be made some time before the power supply was required. Although it was supposed to be the case that meters would not be fitted until the lights were erected, according to Mr Portelli "in fact it would never be like that." When shown the records indicating that in 1988 the meter in respect of Christmas lights in Tower Road was fitted on 30 November 1988, Mr Portelli replied: "it was normally the case that the lights would require to be erected by this date, but in 99% of cases this was not done." According to Mr Portelli the fact that the lights were not officially illuminated until 6 December 1988 would have given the contractor a period of time to erect the lights after the meter had been fitted.

Tarcisio Mifsud

24.47 Mr Mifsud's initial position at interview was the same as that adopted by him at defence precognition, ie that in the case of Christmas lights these would require to be erected before a temporary meter was installed. He explained that prior to 1993, when new regulations came into force, meter fitters employed by Enemalta were responsible for carrying out safety tests to installations. According to Mr Mifsud there were "no situations" in which a meter would be installed before Christmas lights were erected.

24.48 Mr Mifsud was informed that according to Mr Portelli, while it was proper procedure to fit meters before lights were erected, in fact in the vast majority of cases this was not followed. In reply Mr Mifsud said that if meter fitters were not following procedure this was not something he would know about. The rules, he said, were clear: the meter was to be installed only once the lights had been erected. In Mr Mifsud's view Mr Portelli was confusing the position which applied before and after 1993, when responsibility for testing the installation was transferred from the meter fitter to the contractor. He added, however, that if a fitter wished to shoulder responsibility for someone being electrocuted "then he could effectively do what he liked."

24.49 Mr Mifsud was referred to an excerpt of the Enemalta meter room workbook from 1990 (see appendix). This showed that the meters in respect of the Christmas lights in the upper and lower sections of Tower Road were installed on 4 December of that year. Mr Mifsud's attention was also drawn to the statements given by Mr Bell and other police officers which indicated that in 1990 the first sign of any Christmas lights in Tower Road was on 5 December 1990. Asked whether, taken together, these sources suggested that in 1990 the meters in Tower Road were installed before the lights were erected Mr Mifsud replied that he could not say either way.

<u>Carmel Vella</u>

24.50 In terms of the records obtained by the Commission from Enemalta (see the extract from the meter room work book in the appendix) Mr Vella was responsible for installing temporary meters in connection with Christmas lights in the upper and lower sections of Tower Road on 30 November 1988. He has since retired from the company.

24.51 At interview Mr Vella confirmed that as his name appeared on the records he could say that he had definitely fitted the meters in question. According to Mr Vella it was not necessary for Christmas lights to be erected before meters were installed as sometimes contractors would add more lights once the meter was in place. It would only be on rare occasions, however, that a fitter would install a meter without the

lights being erected. According to Mr Vella there would have to be at least some lights erected as this was necessary in order for the fitter to test the system. The testing would entail the fitter checking that the meter was running which would require him to switch on the lights.

24.52 Mr Vella could not remember ever fitting a meter when there were no lights erected. Asked whether it was possible that he might have done so on occasion, he replied "I do not think so." He repeated that it was not necessary for all the lights to be erected, adding "in almost all the sites I attended the Christmas lights would almost always be erected." Likewise, he could not remember any occasion in which he did not test a meter he had installed. In response to the suggestion that although this was proper procedure it was rarely followed in practice, Mr Vella replied "I always followed the procedure."

Charles Pace

24.53 Mr Pace worked in the meter room at Enemalta and in 1990 was a meter fitter. He confirmed that in 1988 fitters were responsible for carrying out general safety checks to Christmas lights installations and would require to sign papers confirming that these had been completed. Most of the time, he explained, the lights would be up by the time the meter was fitted. On very rare occasions, however, the meter was installed before the lights were erected. According to Mr Pace different fitters would take different approaches. If a meter was installed without the lights being erected the fitter would not be able to test the installation. If he did not test the installation then he would be in the wrong, even though it was really the contractor's fault for not putting up the lights in the first place.

24.54 According to Mr Pace most fitters would be unwilling to install a meter without the lights having been erected. This was because the fitter was required to guarantee the safety of the installation. However, there were rare cases when the meter was fitted before the lights were erected. According to Mr Pace it would depend on the relationship between the particular contractor and the meter fitter involved.

24.55 Mr Pace was referred to an excerpt of the meter room workbook from 1990 (see appendix) which records that on 4 December of that year he installed the meter in respect of Christmas lights in the lower section of Tower Road. He was also informed that, in terms of statements given by several police officers, the Christmas lights in that area did not appear until 5 December 1990. It was suggested to Mr Pace that, taken together, these items indicated that on this occasion he had installed the meter before the lights were erected. Mr Pace accepted that he had probably installed the meter in question but maintained that he was unclear as to whether the records suggested that the lights were erected the following day. He added, however, that the contractor who erected the lights would normally be a friend and that it was possible that the meter was fitted before the lights were erected.

Peter Micallef

24.56 Mr Micallef is employed as a senior meter fitter with Enemalta and would have been a meter fitter in 1988. According to him it would not always be necessary to have Christmas lights erected prior to installation of the meter. He did not know how many times he had installed a meter without any lights having been erected. Although the lights were all supposed to be up when the meter was installed, sometimes contractors would fit more lights after this was done. If there were no lights up then, according to Mr Micallef, the fitter would not install the meter as in 1988 it was necessary for him to carry out safety checks. Mr Micallef did not know about any other fitter but he himself would always carry out these checks.

Potential significance

The relevant tests

24.57 The tests applied by the High Court in assessing the significance of evidence led for the first time at appeal are set out in *Al Megrahi v HMA* 2002 SCCR 509 (see chapter 22). It is sufficient to note for present purposes that in order to hold that a miscarriage of justice has occurred in the applicant's case, the court will require to be persuaded that the additional evidence is: (a) capable of being regarded as credible

and reliable by a reasonable court; and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

Evidence as to the erection of the Christmas lights

24.58 As noted earlier the evidence obtained by Mr Duff in 2002 indicated that in 1988 the Christmas lights in Tower Road were erected on or before 30 November at the latest. Accordingly, viewed alongside Mr Gauci's account that the lights were "going up" at the time, the evidence was capable of demonstrating that the purchase had taken place at a time when there was no evidence that the applicant was in Malta.

24.59 In the Commission's view the results of its own enquiries undermine that evidence. In particular while there is little doubt that in 1988 Enemalta required that meters be installed only once Christmas lights were erected, it seems that adherence to this procedure was dependent upon the attitude of individual fitters and that often meters would be fitted prior to the erection of the lights. In other words, whether or not the Christmas lights in Tower Road were erected prior to the installation of the meter on 30 November 1988 depends upon the extent to which Mr Vella followed proper procedure.

24.60 At interview Mr Vella claimed always to have followed procedure and did not think he had ever fitted a meter when no lights were erected. To some extent this was vouched by certain comments made by Mr Pace at interview and by Mr Busuttil who in his defence precognition recalled representatives of the electricity company connecting the supply, fitting the meter and testing "the whole thing." On the other hand, given that the installation of meters in breach of procedure is tantamount to a failure to perform safety checks, Mr Vella might simply have been reluctant to admit to having done this. In any event, even if Mr Vella adhered to proper procedure it is clear in terms of his own account and that of Mr Micallef that only some lights needed to be in place for this purpose, and that the contractor might add more after the meter was installed. If that is correct then, notwithstanding that the meter in Tower Road was installed on 30 November 1988, it cannot be ruled out that from the perspective of passers-by such as Mr Gauci the Christmas lights in Tower Road might still have been "going up" after this date.

24.61 Given this element of doubt, had the Commission been faced only with evidence relating to the erection of the Christmas lights in Tower Road it might have been difficult to determine whether this warranted inclusion as a ground of referral. However, when viewed alongside evidence concerning the illumination of the lights the Commission considers a reference on this ground to be fully justified.

Evidence as to the illumination of the Christmas lights

24.62 While it may not be possible to identify the date on which the Christmas lights in Tower Road were fully erected in 1988, in the Commission's view there is little doubt that they were officially illuminated at a ceremony performed by Dr Refalo on 6 December 1988. Although there is perhaps some uncertainty as to whether the ceremony in that year took place in Bizazza Street or the Ferries, given the proximity of both locations to Mary's House this is not important. As Dr Refalo said at interview, whatever the location of the ceremony in 1988 the illuminations extended to the lower section of Tower Road in which Mary's House is located.

24.63 In the Commission's view it can be inferred from Dr Refalo's account that prior to 6 December 1988 the Christmas lights in the lower section of Tower Road were not illuminated. While it is possible that the lights, or some of them, were switched on temporarily in order to test the installation, it seems reasonable to assume that any such period was brief and therefore unlikely to have confused observers into thinking that the lights had been officially illuminated.

24.64 It is also reasonable to assume that the lights in the lower section of Tower Road remained illuminated from the evening of 6 December 1988 until the end of the festive season. Although records obtained from Enemalta (see appendix) suggest that the power supply to the Christmas lights in an upper segment of Tower Road (known as "Joinwell") was interrupted at some point prior to 14 December 1988, in terms of the accounts given by several witnesses (see eg the statements by Mr Portelli, Mr Mifsud and Mr Vella) this would not have affected the illuminations elsewhere.

24.65 In assessing the significance of Dr Refalo's account it is worth highlighting again the court's conclusions in respect of the Christmas lights evidence which was led at trial:

> *"... The position about the Christmas decorations was unclear, but it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas"* (paragraph 67).

24.66 Whatever may have been unclear about the Christmas decorations, the reference in the above passage to them "going up" indicates that the court was prepared to accept Mr Gauci's evidence that "they were putting up the lights" at the time of the purchase. Viewed literally, however, if the purchase was "about the time when the lights would be going up" then in terms of Dr Refalo's diary the date is unlikely to have been 7 December 1988 as by that time the lights were illuminated. Given that on the evidence led at trial 7 December 1988 is the only date on which the applicant would have had the opportunity to purchase the items, it follows that Dr Refalo's account is capable of undermining the court's conclusion that the applicant was the purchaser.

24.67 As noted at the beginning of this chapter Mr Gauci's position in his statements of 19 September 1989 and 10 September 1990 was that the Christmas lights were "not up" when the purchase took place. At trial, both in chief and in cross examination, he accepted that his memory of events was more likely to be accurate at the time when he gave these statements. Furthermore when asked by counsel for the applicant whether on 19 September 1989 he believed that there were no Christmas lights up when the man bought the clothing and that he had informed DC Crawford of this, Mr Gauci replied "Maybe" (31/4810). Despite this, the trial court was prepared to rely upon the confused and contradictory account given by him in evidence. As explained in chapter 21 the approach taken by the court to this aspect of Mr Gauci's evidence is one of the factors which has led the Commission to doubt the reasonableness of the verdict. In light of that finding the Commission considers it appropriate to assess the significance of Dr Refalo's account not only in terms of Mr

Gauci's evidence as accepted by the court, but also his accounts to the police which the trial court impliedly rejected.

24.68 Viewed against Mr Gauci's more contemporaneous (and clear) recollections in 1989 and 1990, Dr Refalo's evidence would again exclude 7 December 1988. If one accepts that the Christmas lights were not up at the time of the purchase, evidence that the lights were illuminated as of 6 December 1988 indicates that the transaction took place on or before that date. Unlike the trial court, the police attached some weight to these early accounts in that Mr Gauci's recollection in his statement of 10 September 1990 was the motivation for the daily checks undertaken by officers in Tower Road in November and December of that year. In the Commission's view it is reasonable to conclude that had the police recovered Dr Refalo's diary during the course of those enquiries it would have cast significant doubt upon the prevailing view at that time that 7 December 1988 was the "probable" date of purchase.

24.69 On the other hand, as Mr Beckett suggests in his note, Dr Refalo's diary entry might have placed the defence in some difficulty in relation to Mr Gauci's initial evidence that the Christmas lights were "on" at the time of the purchase. In the Commission's view there is little doubt that if the court had accepted Mr Gauci's evidence that the lights were on at the time of the purchase, the entry in Dr Refalo's diary would have provided support for the Crown's contention that the date of purchase was 7 December 1988. Indeed, by excluding any date prior to 6 December 1988, Dr Refalo's entry would also have undermined defence efforts to show that 23 November 1988 was a better candidate.

24.70 However, in order to accept this aspect of Mr Gauci's evidence the trial court would require to have ignored not only the general confusion in his account but also the terms of his prior statements in which his position was different. In the Commission's view, for the same reasons as stated in chapter 21, this would not have constituted a reasonable approach to Mr Gauci's evidence.

24.71 Mr Burns appears to suggest in his note that had the evidence obtained by Mr Duff been led at appeal the court would have been entitled to view this as supporting Mr Gauci's evidence that the lights were on at the time of the purchase. In the

Commission's view, however, given that there were no grounds of appeal based on section 106(3)(b) of the Act the appeal court would require to have assessed the new material in light of the evidence as accepted by the trial court, namely that the Christmas lights were "going up" at the time of the purchase.

Admissibility

24.72 In the Commission's view there can be no criticism of the applicant's former representatives for not leading Dr Refalo's evidence at appeal. While nothing in the notes by Mr Burns and Mr Beckett alters the Commission's decision to refer the case on this ground, it appears that ultimately the decision not to lead the evidence was based upon the applicant's instructions, albeit these were possibly influenced by any advice he was given.

24.73 In terms of sections 106(3)(a) and (3A) of the Act, evidence not heard "at the original proceedings" may found an appeal only where there is a reasonable explanation "of why it was not so heard." In *Campbell v HMA* 1998 SCCR 214 the court held that in assessing the reasonableness of any explanation proffered under section 106(3A) much might depend on the steps which the appellant could reasonably be expected to have taken in the light of what was known at the time. The underlying intention of the provision, it was observed, was that the court should adopt a broad approach in taking into account the circumstances of the particular case (Lord Justice Clerk (Cullen) at p 242). The test was intended to be applied flexibly, and the court should order the new evidence to be heard if it considered it necessary or expedient in the interests of justice (Lord McCluskey at p 262). The test would not be satisfied, however, where the reasonable explanation was simply that a tactical decision had been made not to lead the evidence at trial (Lord Justice Clerk at p 242; Lord Sutherland at p 270; *R v Shields and Patrick* [1977] Crim LR 281).

24.74 In the Commission's view the explanation as to why Dr Refalo's evidence was not heard at trial is simply that, despite what appear to have been reasonable enquiries by both the police (in 1990/91) and the defence (in 1999/2000), it did not come to light until the appeal hearing itself. The Commission considers that such an

explanation is capable of being seen as reasonable by the court in terms of section 106(3A).

24.75 While in most cases a reasonable explanation for the absence of evidence at trial will be sufficient to satisfy the statutory provisions, it is unclear how these apply in cases in which an appellant who has opted not to lead evidence at appeal seeks to do so at subsequent appeal proceedings (ie in the event of a reference by the Commission). In particular, given that the provisions require an explanation for the absence of the evidence "at the original proceedings", at any future appeal the applicant might need to explain not only why Dr Refalo's evidence was not heard at trial, but also why it was not heard at his previous appeal. If so, then standing the approach in *Campbell* the tactical nature of the decision not to lead Dr Refalo's evidence at that time would be significant in determining its current admissibility. As the correct interpretation of the legislation is unsettled on this point, the Commission has not considered it necessary to address the matter.

Conclusion

24.76 For the reasons given the Commission considers that Dr Refalo's account is capable of being considered as credible and reliable by a reasonable court, and is likely to have had a material part to play in the determination by such a court of a critical issue at trial, namely the date on which the items were purchased from Mary's House.

(b) Anthony Gauci's Crown precognition

Introduction

24.77 Although in his police statements and in evidence Mr Gauci was unable precisely to say when the purchase had taken place, this was not the position he adopted when precognosced by the Crown and defence in 1999 (see appendix). In both precognitions he suggests that the purchase took place on a specific date and in his Crown precognition he provides a basis for this recollection.

24.78 By letter dated 24 August 2006 Crown Office confirmed to the Commission that the contents of Mr Gauci's Crown precognition were not disclosed to the defence. According to the letter this was consistent with the Crown's practice at the time and its obligations under *McLeod v HMA* 1998 SCCR 77.

24.79 Before setting out the relevant passage in Mr Gauci's Crown precognition it is important to consider what he said in evidence when asked about the day and date of purchase (some of this evidence is also quoted in the first part of this chapter). As a number of passages in Mr Gauci's police statements were put to him in evidence there is no need to detail these separately. However, it is worth noting that in several statements not referred to in evidence Mr Gauci makes passing reference to the purchase having taken place in "November or December 1988" (see eg his statement of 13 September 1989; CP 455); "December 1988" (see eg his statement of 13 September 1989; CP 457); "during 1988" (statement of 31 August 1990; CP 468); and "November *and* December 1988" (undated statement relating to an interview which took place on 2 October 1989; CP 463).

Mr Gauci's evidence

Examination in chief

Q. The police came to see you at the beginning of September 1989. Were you able to remember when this particular sale had taken place?

A. No. Exactly, I couldn't remember the date, but I remember all the clothes I had sold.

Q. Were you able to tell them that it was towards the end of 1988?

A. Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas, but I can't remember the date (31/4730).

Q. You mentioned a little earlier on that you thought that the date that he sold -- you sold the clothes to the Libyan would be about a fortnight before Christmas.

A. Something like that, yes. Not exactly, because I did not have -- possibly did not have the system we have today. Today we punch in and out and we know everything, but we didn't have that system then… We didn't know exactly when you sold an item (31/4738-39).

Q. Are you able to say which day of the week it was?

A. No, I have no idea. I can't say. I have no idea. If I said that, I wouldn't be -- I would have no -- nothing to count on (31/4779).

Cross examination

Q. … Now, turning to page 9 for my purposes at the top of the page, what you said to Mr Bell on 1 September [1989; CP 452] *was this: I cannot remember the day or date that I met this man. I would think it was a weekday, as I was alone in the shop. My brother Paul did not work in the shop that afternoon, as he had gone home to watch a football match on television. He may be able to recall the game, and this could identify the day and date that I dealt with the man in the shop. Do you see that?*

A. Yes. Yes (31/4792-93).

Q. … And then about the middle of the page [page 3 of Mr Gauci's statement of 10 September 1990; CP 469] *Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date because what he's written down is this: I have been asked to again try and pinpoint the date that I sold the man the clothing. I can only say it was a weekday, there were no Christmas decorations up as I have already said, and I believe it was at the end of November.*

Now I am going to come back to that, in view of what you said in your evidence in chief, Mr Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr Bell, in September of 1990, that it was a weekday --

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date.

Q. I understand that. And I promise you, I am not trying to catch you out. You and I have agreed, Mr. Gauci, that --

A. -- yes, yes, of course I understand. But I want to speak fair. I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies (31/4802-04).

Q. Now, without going into it again, the first paragraph [of Mr Gauci's statement of 19 September 1989; CP 454] *deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci.'*

A Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that.

Q. I understand that. Now, we've covered, I think, some of this ground --

A. Because if I knew what was going to happen, I would have taken note of it, but I knew nothing. I don't know anything about dates and things like that (31/4809-10).

Q. Now, the last sentence is: I am sure it was midweek when he called.

A. Yes.

Q. When we discussed matters earlier, in terms of your normal opening hours and so on, you told me what the hours of the day were that the shop was open, and you told me it was open from Monday to Saturday?

A. Yes.

Q. So can I take it, then, that by 'midweek,' you mean not a Monday and not a Saturday?

A. No, certainly not Saturday. I believe. But I've already told you, I have nothing, no dates. I don't want to say anything about it, because if I don't know, I

don't know. It's simply that. I don't want to mention a date. Why should I say or do so when I do not know? Do you understand?

Q. I do understand. Under our procedure, Mr. Gauci, I ask the questions and you answer them.

A. Yes. Yes. But I'm trying to help.

Q. Indeed.

A. That's what I mean, I don't want to give you a date or say it's Friday. I don't want to tell lies. You understand? (31/4810-11).

A. I can't remember the dates. I don't want to say -- I don't want to give out dates if I am not that sure, sir (31/4816).

Q. When you use the word "midweek", what day of the week do you have in mind, or what days? Would it be --

A. Wednesday, I think. That's how I see it.

Q. Wednesday.

A. But I stress the point, I don't know dates. I don't know the dates (31/4819-20).

Mr Gauci's precognitions

<u>Crown precognition: 25 August 1999</u>

"I have been asked to go over the date [of purchase]. *It was sometime at the end of November beginning of December 1988. Something makes me think it might have been 29 November 1988 (a Tuesday) because something happened that day (At this point the witness became flustered and lapsed into Maltese and a*

discussion with Detective Sergeant Mario Busuttil who sat in in the precognition of 25 August 1999; through him he said that he had a row with his girlfriend that day but he doesn't want to talk about it any more). Paul was definitely at home that afternoon so it would have been a Wednesday."

Defence precognition: 8 October 1989

"The police asked me about selling these items and what I was able to tell them was the following. One day, it was not a Saturday, a man came in to the shop. I am asked when it was and I remember it was the 29th of the month. I think it was November. I am asked why it was the 29th and all I can say is that is what I think. I know it was not a Saturday."

The Commission's enquiries

24.80 Copies of the statements referred to in this section are contained in the appendix of Commission interviews.

Sergeant Mario Busuttil

24.81 At interview Sergeant Busuttil remembered Mr Gauci being asked by Mr Brisbane (the procurator fiscal who obtained the Crown precognition) about the date on which the man came to his shop, but he could not recall Mr Gauci's response. He was read the relevant passage in the precognition and recalled Mr Gauci telling him that he had had an argument with his girlfriend and that he had "split from her." Sergeant Busuttil could not recall what the argument was about but said that Mr Gauci had been upset by the break-up. Mr Gauci had only said a few words about this and did not discuss the matter again. Sergeant Busuttil knew only that Mr Gauci had a girlfriend and that it came out at precognition. He did not know the name of the girlfriend but thought that she might be living in the St Julians area of Malta. His recollection was that this was the only time during the investigation that Mr Gauci had mentioned having an argument with his girlfriend.

Anthony Gauci

24.82 It is worth quoting in full the relevant passages in Mr Gauci's statement:

"I have been read [the passage in my Crown precognition]… *It was not only on one occasion that I fought with my girlfriend. We had lots of arguments. I am asked whether I had a girlfriend at the time of the purchase of the clothing. I do not recall having a girlfriend in 1988 but I am always with someone. It is possible that I had an argument with my girlfriend that day. My girlfriend would cause arguments by suggesting a wedding day or suggesting that we buy expensive furniture. I did not have a fixed income at that time. It is possible that in 1988 I had a girlfriend, but I am not sure. I could have had an argument with my girlfriend on the day of the purchase.*

I am told that in both my Crown and defence precognitions I am recorded as saying that the man may have come into my shop on 29th November 1988. I recall telling them the date 29th November, but I was not sure then that the purchase took place on that date. I do not remember what made me think that the purchase took place on 29th November. I used to argue with my girlfriend a lot. I am asked if I can recall the name of my girlfriend at that time. My philosophy is not to have a fixed girlfriend.

I am asked whether, if I can recall arguing with my girlfriend a lot, this suggests that I had a specific girlfriend at the time. I do not recall. I do not know why Mr Brisbane has made this note in the Crown precognition. I told him that I had many arguments with my girlfriend. It is probable that Mr Brisbane misunderstood me, and he mentioned in the report that the argument was on the day that the man came into the shop. I am asked whether I ever told the police that the purchase took place on 29th November. It is possible that I told the police this but I do not recall now what I said to them."

Paul Gauci

24.83 The passage in Mr Gauci's Crown precognition was also read to Paul Gauci at interview. In response Paul Gauci said that he would not know if Mr Gauci had a girlfriend in 1988 and that it was a matter personal to Mr Gauci.

Henry Bell

24.84 Mr Bell was asked if Mr Gauci ever informed him that he had had a row with his girlfriend on the date of purchase. Mr Bell recalled Mr Gauci having had a girlfriend whom he wanted to marry but who did not wish to marry him, or else that he had liked a girlfriend more than she liked him. According to Mr Bell, Mr Gauci could have been going out with her at the time of the purchase in 1988. However, Mr Bell said that it was possible that he was confused and that the woman to whom he was referring was actually Paul Gauci's girlfriend. As far as Mr Bell could recall Mr Gauci had never tried to pinpoint the date of purchase by reference to an argument that he might have had with a girlfriend.

John Beckett QC

24.85 Mr Beckett confirmed that Anthony and Paul Gauci's Crown precognitions were not disclosed to the defence and in general said that he would not have expected them to be disclosed then or now. According to Mr Beckett if a Crown precognition contained something exculpatory then the Crown must address this but in terms of the law one cannot cross examine about the contents of a precognition. In the present case the approach taken to the relevant passage in Mr Gauci's defence precognition was that if he was to have repeated in evidence that the purchase had taken place on 29 November 1988 this would have been helpful to the defence. However, in Mr Beckett's view he could not have been cross examined about the contents of his defence precognition. According to Mr Beckett the impression the defence had of Mr Gauci was that he was liable to say anything. Mr Beckett added that if Mr Gauci had made reference in his evidence to 29 November 1988 the Crown would no doubt have referred to his various prior statements in which his position was different.

Alistair Duff

24.86 Mr Duff did not think that the defence was aware of the contents of Mr Gauci's Crown precognition. He suspected that at the time of the trial the defence would not even have thought to ask the Crown for this as under the "old regime" they would not have been given it. Under the present system, however, Mr Duff considered that if Mr Gauci's Crown precognition contained something significant about his identification of the purchaser then it should have been disclosed.

24.87 Mr Duff was referred to the relevant passage in Mr Gauci's defence precognition and was asked whether, even though this could not have been put to Mr Gauci in evidence, it might have been possible to ask him about it in cross examination. In reply Mr Duff said that Mr Gauci could have been asked how sure he was about the date. Mr Duff accepted that Mr Gauci might also have been asked whether he had ever said that the purchase had taken place upon a particular date, but he explained that if the witness had denied having done so it would not have been possible to put the precognition to him. Accordingly, in Mr Duff's view it was arguably a pointless exercise since there was no ability to "snap the trap shut" on the witness.

William Taylor QC

24.88 Mr Taylor was referred to the relevant passage in Mr Gauci's defence precognition and was asked if any consideration was given to cross examining him about whether he had ever specified the date of purchase. Mr Taylor said that if Mr Gauci had been asked about this, and had denied having done so, one would have been stuck with his answer. According to Mr Taylor "if you do not want to be stuck with the answer, you should not ask the question." In response to the suggestion that Mr Gauci might well have accepted that he had previously specified the date, Mr Taylor replied that "it would be a brave counsel that would ask him about that."

24.89 Mr Taylor was shown the relevant passage in the Crown precognition and confirmed that it had not been disclosed to the defence. The Crown, he said, had a duty to disclose any matters which assisted the defence or undermined the Crown

case. In Mr Taylor's view, the passage in question was disclosable under both of these categories. On being reminded that Mr Gauci had also suggested in his defence precognition that the purchase had taken place on 29 November 1988, Mr Taylor replied:

> *"If you are trying to ascertain a date, and Gauci says that he remembers that at the end of November he had a fight with his girlfriend, you would go to the girlfriend, you would enquire with her whether she could recall the date of this argument."*

24.90 It was suggested to Mr Taylor that this would assume that one could locate Mr Gauci's girlfriend or indeed that one exists. In Mr Taylor's view, however, the witness was clearly upset at Crown precognition. Malta was like a village and so it would have been possible to find her. Had the efforts to do so come to nothing Mr Taylor would have arranged for Mr Duff to precognosce Mr Gauci again and ask him about the row. It was possible, for example, that the argument might have been about a film they had seen, in which case the defence could have made enquiries about the dates on which the film was shown. In Mr Taylor's view if Mr Gauci had been vague about the matter and was unable to remember which girlfriend it was this would have affected his credibility. If Mr Gauci had denied having a girlfriend Sergeant Busuttil could have been called to testify that Mr Gauci had said that he did have one and that he had become flustered when he was asked about this. According to Mr Taylor it would not have been necessary to refer to Mr Gauci's Crown precognition in order to bring this into the evidence. Enquiries could have been made with Sergeant Busuttil.

Consideration

The Crown's duty of disclosure in respect of precognitions

24.91 As explained in chapter 22, at the time of the applicant's trial the Crown's obligations in respect of disclosure were as set out in *McLeod v HMA* 1998 SCCR 77. There, the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown has a duty at any time to disclose to the defence information in its possession that would

tend to exculpate the accused, or is likely to be of material assistance to the proper preparation or presentation of the accused's defence (Lord Justice General (Rodger) at p 97); and information in its possession and knowledge which is significant to any indicated line of defence, or which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt upon it (Lord Hamilton at p 100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the European Convention of Human Rights (Lord Rodger at paragraph 65).

24.92 In the Commission's view it is clear that in *McLeod* the court did not seek to restrict the Crown's disclosure obligations to particular classes of information. Accordingly while in terms of current practice Crown precognitions are not routinely disclosed, *McLeod* provides no basis for withholding these in circumstances where they contain information likely to be of material assistance to the defence. This was recognised in *Wotherspoon v HMA* 1998 SCCR 615, in which the court remarked that the Crown had "very properly" informed the defence at trial of what had been said by a witness at Crown precognition. More recently in *Holland* the Crown, before both the High Court and the Privy Council, conceded that it had infringed the appellant's article 6(1) Convention right by failing to disclose to the defence at trial a remark made by a complainer at Crown precognition.

24.93 Once disclosed, however, there are limitations on the extent to which Crown precognitions can be used in evidence. Under section 263(4) of the Act a witness may be examined as to whether he has on any previous occasion made a statement on a matter pertinent to the issue at trial different from the evidence given by him; and evidence may be led to prove that the witness made the different statement on the occasion specified. Although the term "statement" is not defined in section 263 it is well established that it does not extend to precognitions obtained by the Crown and defence in preparation for trial: *Al Megrahi v HMA* 2000 SCCR 1003; *Coll Petitioner* 1977 SLT 58; *Kerr v HMA* 1958 JC 14; *McNeilie v HMA* 1929 SLT 145. The effect of these decisions is that neither the Crown nor the defence can put to a witness in evidence an inconsistent account given by him at precognition (other than one given

at precognition on oath: *Coll Petitioner*). Nor can evidence be led of the contents of Crown and defence precognitions.

24.94 On the other hand there is nothing to prevent the Crown and defence from using the contents of precognitions generally as a basis for questioning witnesses (indeed, where, for any reason, police witness statements are not available they are likely to be the only such basis: see eg *Sinclair v HMA* 2005 SCCR 446). The Commission therefore does not accept Mr Beckett's comment at interview that a witness cannot be cross examined "about" the contents of a precognition.

24.95 In *Holland* the undisclosed remark made by the complainer at Crown precognition was to the effect that following her attendance at an identification parade, in which she had not identified the appellant, a police officer had told her that she "didn't do too well". In determining the significance of the Crown's failure to disclose this information at trial the Privy Council said the following:

> *"Similarly, it is hard to make any precise assessment of the significance of the Crown's failure to disclose the remark made to Miss Gilchrist after the identification parade. One can be sure, however, that if the defence had been aware of it* [the appellant's counsel] *would have deployed it in her cross examination of Miss Gilchrist. It would have been one more reason for suggesting to her – and ultimately the jury – that her dock identification of the appellant was not to be trusted. By withholding the information the Crown deprived the defence of the opportunity to advance this additional argument on the crucial issue of identification"* (Lord Rodger at paragraph 83).

24.96 It is not clear from the Privy Council's judgment precisely how the information in question might have been used in cross examination but one assumes that it would have entailed counsel asking the complainer whether she recalled being spoken to by a police officer after the parade and if so what he had said to her. In terms of the authorities referred to above, however, if the complainer had denied discussing the matter with a police officer it would not have been competent for counsel to put to her directly the remark she was noted as having made at Crown precognition.

Potential significance

24.97 In the Commission's view there are two questions to consider. The first is whether the Crown was under a duty to disclose to the defence the relevant passage in Mr Gauci's Crown precognition, or at least the information contained in that passage. The second is, assuming such a duty did arise, whether the Crown's failure in this respect indicates that a miscarriage of justice may have occurred.

24.98 In respect of the first question it is important to examine closely what Mr Gauci said at Crown precognition on the subject of the date. It is clear from the passage quoted above that at no time did Mr Gauci express certainty that the purchase had taken place on 29 November 1988. Indeed that date is not consistent with Mr Gauci's recollection in the same passage that the purchase might have taken place at the "beginning of December 1988", or with an earlier passage in which he recalls the purchase as having occurred "just before Christmas." Furthermore, as 29 November 1988 fell on a Tuesday Mr Gauci's belief that the purchase might have occurred on that date runs contrary to his final position at precognition, namely that as Paul Gauci was at home that afternoon "it would have been a Wednesday." There is also perhaps some uncertainty as to whether the use of the term "that day" in the passage indicates that Mr Gauci specifically recalled having a row with his girlfriend on the date of purchase or on 29 November 1988.

24.99 In the Commission's view while such factors might affect the weight to be attached to Mr Gauci's recollections, they do not justify the Crown's decision not to disclose details of the passage to the defence. The Crown's position throughout its preparation and presentation of the case was that the items were purchased from Mr Gauci on 7 December 1988, a date on which there was evidence that the applicant was not only in Malta but staying at a hotel close to Mary's House. Indeed, had the court concluded that the purchase had taken place on some other date in November or December 1988 this would effectively have eliminated the applicant as the purchaser since, on the evidence, it was only on 7 December that he would have had the opportunity to buy the items. Viewed in that context, information from Mr Gauci not only that the purchase might have taken place on 29 November 1988 but that he had

an argument with his girlfriend that day, is of obvious significance to the defence. While Mr Gauci's final position in the precognition might cast doubt upon the reliability of that recollection, in the Commission's view this did not relieve the Crown of its duty to disclose the information contained in the passage. Similarly, the fact that the defence was aware of Mr Gauci's belief that the purchase had taken place on 29 November 1988 is relevant to determining the significance of the Crown's failure to disclose the passage, not to whether it ought to have been disclosed in the first place.

24.100 In the Commission's view the information contained in the relevant passage in Mr Gauci's Crown precognition ought to have been disclosed to the defence prior to the trial. Not only was it likely to have been of material assistance to the preparation or presentation of the applicant's defence, it also potentially undermined an important element of the Crown case.

24.101 The second question, as to whether the Crown's failure to disclose the information in question indicates that a miscarriage of justice may have occurred, must be assessed in terms of the test applied in *Holland* for determining the significance of undisclosed evidence:

> *"Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge (2). At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross examination would have been. But applying the test suggested by Lord Justice General Clyde in Hogg v Clark… I cannot say that the fact that counsel was unable to cross examine in this way might not possibly have affected the jury's (majority) verdict on charge (2) – and hence their verdict on charge (3)"* (Lord Rodger at paragraph 82).

24.102 At the very least the Crown's failure to disclose the information deprived the defence of the opportunity to carry out enquiries to establish the identity of any girlfriend Mr Gauci had in 1988 and whether she could recall an argument between them in November of that year. While the Commission's own enquiries in this area were inconclusive as a result of Mr Gauci's responses at interview, there is no telling

what he would have been able to recall had he been precognosced on the matter in 1999.

24.103 As has been said, the defence was aware of Mr Gauci's belief that the purchase had taken place on 29 November 1988. Indeed, the account given by him in his defence precognition is, if anything, more certain: "I remember it was the 29th of the month. I think it was November." The defence also put to Mr Gauci in cross examination the terms of his statement of 10 September 1990 in which he said he believed the purchase "was at the end of November." In these circumstances it might be said that the applicant was not prejudiced as a result of the Crown's failure to disclose that particular passage in Mr Gauci's precognition: *Kelly v HMA* 2006 SCCR 9.

24.104 In the Commission's view, however, Mr Gauci's apparent recollection of the purchase date in his Crown precognition cannot be separated from the basis he provides for this. Had the defence been aware that Mr Gauci had specified the same date in both precognitions this might well have altered Mr Taylor's approach as to whether Mr Gauci ought to have been cross examined about that date, even though the precognitions themselves could not have been put to him. Although the pattern of Mr Gauci's evidence on this issue suggests that he would have remained reluctant to be drawn on the date, it is again impossible to tell what he would have said had he been asked about this in the context of whether he recalled an argument with his girlfriend that day. Indeed, based upon his statement to the Commission's enquiry team his evidence might well have been that he recalled "telling them the date 29th November", that he was not sure that the purchase had taken place on that date and that he did not remember what made him think that it had.

24.105 The defence might also have sought to call Sergeant Busuttil to speak to what Mr Gauci had said during Crown precognition. Although there might have been obstacles to such a course, in the Commission's view these would not necessarily have been insurmountable (*Holland*, Lord Rodger at paragraph 82). Any evidence by Sergeant Busuttil on the matter would have been inadmissible to the extent that it sought to prove the truth of what Mr Gauci had said at precognition, but it would have been admissible for the limited purpose of demonstrating that Mr Gauci had in fact

said such things. Accordingly, based on the contents of his statement to the Commission, Sergeant Busuttil might have testified that in response to questioning regarding the date of purchase Mr Gauci had told him that he recalled having an argument with his girlfriend that day but that he didn't want to talk about it anymore. He could also have spoken to Mr Gauci telling him about his upset at the break-up of the relationship. Although at interview with the Commission Sergeant Busuttil was unclear as to whether he recalled Mr Gauci saying at precognition that the purchase had taken place on 29 November 1988, again it is impossible to say what his recollection might have been nearer the time.

24.106 In these circumstances, if Mr Gauci had been unable to recall in evidence whether he had a girlfriend at the time of the purchase this might have been contrasted with Sergeant Busuttil's recollections of what Mr Gauci had said on the matter at Crown precognition. At the very least this might have given the trial court further reason to doubt the reliability of Mr Gauci's evidence. Indeed, had the defence established that Mr Gauci had at one stage believed that the purchase had taken place on 29 November 1988 this might have cast doubt upon his other evidence that the purchase had occurred "about a fortnight before Christmas". If so then a key factor in the trial court's determination of the purchase date would have been undermined.

24.107 By its nature the above assessment is speculative. Although Mr Taylor was adamant that steps such as these would have been taken, it is impossible to say for certain what would have occurred had the information in Mr Gauci's Crown precognition been disclosed prior to the trial. Clearly there would have been obstacles to leading Sergeant Busuttil's evidence on the matter and even if these had been overcome it is impossible to know what evidence might have emerged and the view that might have been taken of it by the trial court. However, the Commission is unable to say that the defence, had it sought to take such steps, would inevitably have been unsuccessful in its efforts. Likewise the Commission is unable to say that the evidence which might have emerged would not have been helpful to the defence in undermining further the reliability of Mr Gauci's evidence as to the date. In any event, standing the approach taken by the Privy Council in *Holland* it was for the defence to decide upon the use to which the information might be put, if any, and for the court to determine its significance as appropriate (Lord Rodger at paragraph 72).

24.108 In conclusion, the passage in Mr Gauci's Crown precognition might have played a useful part in the preparation and presentation of the defence case in that it would have assisted in challenging Mr Gauci's evidence that the purchase took place about a fortnight before Christmas and in undermining the date of purchase advanced by the Crown. In the Commission's view by withholding this information the Crown deprived the defence of the opportunity to take such steps as it might have deemed necessary. Given the importance which the trial court attached to the date of purchase in drawing the inference that the applicant was the purchaser the Commission is unable to say that such measures might not have affected the verdict.

Overall conclusion

24.109 In the Commission's view the grounds addressed in this chapter, taken together or in isolation, indicate that a miscarriage of justice may have occurred. In particular, both grounds cast further doubt upon the trial court's conclusion that the purchase of the items from Mary's House took place on 7 December 1988.

24.110 In referring the case on this basis the Commission has taken into account a passage in the applicant's first supplementary defence precognition in which he said that he could travel to Malta from Tripoli in such a way as to leave no record of having done so. For the reasons given in chapter 27, however, the Commission does not consider that this information undermines the grounds set out in this chapter.

CHAPTER 25
UNDISCLOSED PROTECTIVELY MARKED DOCUMENTS

25.1 In 2006 Crown Office informed the Commission of the existence of two protectively marked documents in its possession. These documents were made available for viewing by a member of the Commission's enquiry team on 21 September 2006 at Dumfries police station on the condition that they would be treated as if they had been supplied under the minute of agreement between the Commission and D&G. Notes were permitted to be taken of the items and these notes are currently in the possession of D&G.

25.2 It was subsequently established that copies of the items, along with other documents relevant to them, were also held by D&G under the HOLMES reference D9661. These documents were examined by a member of the Commission's enquiry team whose notes are currently in the possession of D&G.

25.3 By letter dated 27 April 2007 Crown Office confirmed that neither of the protectively marked documents was disclosed to the defence. According to Crown Office's letter, "[the] documents were considered carefully by the Crown for the purposes of disclosure and the conclusion was reached that the documents did not require to be disclosed in terms of the Crown's obligations." It was also pointed out in the letter that "it has never been the Crown's position in this case that the MST-13 timers were not supplied by the Libyan intelligence services to any other party or that only the Libyan intelligence services were in possession of the timers."

25.4 Crown Office also confirmed to the Commission that neither they nor the police had carried out further enquiries or recovered any further information in connection with information contained in one of the protectively marked documents.

25.5 On 29 March 2007 the Commission sought the consent of Crown Office and D&G to disclose the documents under the minute of agreement. On 27 April 2007 the Commission was informed by Crown Office that such consent could not be given without the permission of the relevant authorities of the country from which the

documents originated. Although attempts were made on behalf of Crown Office to obtain the consent of those authorities, as at the date of issue of the Commission's statement of reasons this had not been given.

25.6 In the Commission's view the Crown's decision not to disclose one of the documents to the defence indicates that a miscarriage of justice may have occurred in applicant's case. In reaching this decision the Commission has taken into account paragraphs 49, 73 and 74 of the trial court's judgment.

25.7 In any other circumstances the Commission would have explored in detail its reasons for referring the case on this basis. However, in light of the restrictions placed upon its disclosure of the items it is unable to do so.

25.8 The Commission considered applying to the court for an order under section 194I of the Act requiring Crown Office to produce the documents. However, given the need to finalise the review, and the fact that other grounds of referral had been identified, the decision was taken not to do so. In any event, even if an order had been obtained by the Commission under section 194I of the Act, in terms of paragraph 6(5) of Schedule 9A it would have been open to Crown Office to notify the Commission that onward disclosure might be contrary to the interests of national security. In such circumstances, the Commission would have been bound to deal with the material in a manner appropriate for safeguarding the interests of national security. It is therefore unlikely that the Commission would have been any less constrained in its ability to disclose the documents had it made use of its statutory powers.

CHAPTER 26
OTHER MATTERS

Introduction

26.1 Before assessing whether it is in the interests of justice to refer the case under section 194C(b) of the Act (see chapter 27), it is appropriate first to address a number of other matters which were considered by the Commission during the course of the review. Although in the Commission's view these matters do not indicate that a miscarriage of justice may have occurred, nevertheless in some cases it considers them to be a source of concern.

The identification of the purchaser as Libyan

26.2 As explained in chapter 4 the application to the Commission seeks to cast doubt upon Mr Gauci's identification of the purchaser as a Libyan. Details of what Mr Gauci said in his statements and evidence in this connection are provided in chapter 18. Having considered these accounts, along with others given by several Maltese witnesses during the course of the review (eg George Grech and Godfrey Scicluna, see appendix of Commission interviews) the Commission decided that further enquiries were necessary in this connection. The Commission therefore instructed two psychologists in the UK, Professors Tim Valentine and Ray Bull, to undertake a research study in Malta. The aim of the study was to assess the extent to which Maltese men of similar age and occupational background to Mr Gauci were able reliably to distinguish men of Libyan nationality from those of other Arab nationalities. The research took place in July 2005 and the findings are contained in a report by Professors Valentine and Bull dated 10 November 2005, and a supplementary report by Professor Valentine dated 5 January 2006 (see appendix).

26.3 The testing involved controlled one-to-one interactions between samples of Maltese and Arab men, including Libyans. In order to simulate as closely as possible the circumstances of the transaction described by Mr Gauci, an experimental task was devised in which participants were asked to communicate as far as possible in

Maltese, English and Arabic. Maltese participants were required to be of similar age to Mr Gauci and to have day to day contact with persons foreign to Malta who spoke languages other than Maltese or English. Arab participants were also required to fulfil certain criteria.

26.4 The principal finding of the study was that Maltese men of similar age and experience to Mr Gauci are able to judge the nationality of Libyans more accurately than would be expected by chance, and more accurately than they can judge the other Arab nationalities included in the study. Indeed, almost half of the Libyan participants were correctly classified as Libyan. According to the researchers this finding provides some support for the contention that Mr Gauci was able accurately to judge the purchaser's nationality as Libyan.

26.5 However, that conclusion is subject to the following caveats:

> *"First, the ability of the Maltese men, although better than chance, was far from perfect. Almost one quarter of non-Libyans whom they met were incorrectly classified as Libyan. When a judgement of Libyan nationality was made, it was accurate on only 40% of occasions. These data suggest that there is a substantial possibility that* [Mr Gauci] *might be mistaken in his judgement.*
>
> *"The second caveat is that the confidence of the Maltese men was not directly associated with their performance. Men who expressed strong confidence in their judgement that a man was Libyan, tended to be less likely to be accurate in their judgement than men who were 'fairly confident'. There was a tendency for 'very confident' Libyan decisions to be over-confident. Decisions described as 'very confident' were more likely to incorrectly classify a non-Libyan as 'Libyan' than decisions made with any other level of confidence. These data suggest that the confidence that the witness expresses should not be used to infer the accuracy of his judgement."*

26.6 The second caveat is of relevance given the high level of confidence which Mr Gauci expressed in the Libyan identification when interviewed by the Commission's enquiry team (see appendix of Commission interviews). In terms of

the findings, when Maltese participants were faced with a Libyan the accuracy of "very confident" judgments was high (66%). However, the false positive rate (ie the rate by which non-Libyans were wrongly identified as Libyan) was higher for very confident judgments (42%) than for any other level of confidence expressed. The study also found that there was a "slight bias" on the part of the Maltese participants to label Arab participants as Libyan.

26.7 In assessing the significance of the findings the Commission has considered whether they are (a) capable of being regarded as credible and reliable by a reasonable court and (b) likely to have had a material bearing upon, or a material part to play in, the determination by a reasonable court of a critical issue at trial (*Al Megrahi v HMA* 2002 SCCR 509; *Cameron v HMA* 1987 SCCR 608).

26.8 In respect of the first of those tests it is important to highlight some of the difficulties which occurred during the recruitment of Maltese and Arab participants for the study. Although the selection criteria for participants were for the most part satisfied, in some cases they were not. For example, one of the requirements was that Arab participants should not have spent any considerable period outside their countries of origin such as might distort any characteristics which could assist in the correct identification of their nationality. However, as the recruitment of all participants took place in Malta it was inevitable that those in the Arab sample would have spent some time in that country. Although the majority of the Libyan participants had spent only limited periods abroad, two of them had lived extensively in Malta. Furthermore, while Arab participants were required to prove their nationality by means of a passport, identity card or driving licence, one of them was unable to do so. Although it is not mentioned in the report, the participant in question formed part of the Libyan sample. In the Commission's view both of these factors might be viewed as undermining the reliability of the findings.

26.9 In any event, although the precise basis for Mr Gauci's identification of the purchaser as Libyan remains unclear (see his statement to the Commission; also chapter 21) it cannot be said that he is unique among Maltese men of similar age and experience in being able accurately to do so. In that sense, the findings are distinguishable from those produced by the research described by the court in

Campbell v HMA 2004 SCCR 220, where none of the participants was able to recall, verbatim, comments attributed by police officers to two of the appellants. Accordingly, while the results of the present study do not inspire confidence in the trial court's conclusion that this aspect of Mr Gauci's evidence was "entirely reliable", in the Commission's view they are not capable of demonstrating that his evidence was unreliable.

26.10 For these reasons, the Commission has reached the view that the findings are not sufficiently material to satisfy the second arm of the test described above.

26.11 The Commission has also considered under this heading a police statement given by a witness, David Wright, on 15 December 1989 (HOLMES reference S5114). A copy of the statement is contained in the appendix along with relevant correspondence from Crown Office and D&G**.** As the existence of this statement only became known to the Commission at a late stage of the review it was not possible to put its contents to Mr Gauci at interview or to make further enquiries with Mr Wright himself. In these circumstances, although the statement may be relevant to the Libyan identification, the Commission has not been able to reach a view as to its potential significance.

Anthony Gauci's other sightings of the purchaser

26.12 In chapter 18 the Commission addressed an allegation concerning the decision by the applicant's trial representatives not to cross examine Mr Gauci about other possible sightings he had made of the purchaser. One of those sightings is detailed in Mr Gauci's statement of 26 September 1989 (CP 459) in which he described a man as having entered his shop on Monday 25 September 1989. According to the statement Mr Gauci was immediately startled as he believed that this man was the "same man" as he had described in his previous statements (ie the purchaser). At the foot of the HOLMES version of this statement (see appendix to chapter 18) there is a note by the police to the effect that when initially seen Mr Gauci said that the man described in the statement had visited his shop on 21 or 22 September 1989. However, when the statement was noted he said that the visit had

taken place on 25 September and was not questioned about the date change. The note also refers to evidence that the applicant was in Malta on 21-24 September 1989.

26.13 In his statement of 4 October 1989 (CP 462) Mr Gauci described the man who bought the dresses as being only "similar" to the purchaser and as having come to his shop "last Monday" ie 25 September 1989. In his statement of 10 September 1990 (CP 469) he repeated that the man who bought the dresses was only "similar" to the purchaser and he could not say for definite that it was the same person. However, when questioned by the police again on 4 November 1991 (CP 471) he suggested that the man he saw in September 1989 was the "twin" of the purchaser. When asked at that stage to explain why on the morning of 26 September 1989 he had told the police that the man who purchased the dresses had come to his shop on 21 or 22 September, but when seen on the evening of 26 September had said that the incident had taken place the previous day, Mr Gauci was unable to do so. He could only say that he had problems at the time with his father and brother who did not want him to speak to the police anymore, and that he might have got things mixed up.

26.14 Further reference to this incident is contained in a report apparently compiled by Henry Bell. The report was attached to a Joint Intelligence Group ("JIG") fax numbered 1438 (see appendix of protectively marked materials) and describes a meeting with Mr Gauci on 2 October 1989. It contains the following passage:

> *"Tony then left to speak with FBI Hosinski in presence of BKA Frank Leidig, to allow them to assess him and his credibility. He (Tony) now states that he can only be 50% sure that it was the same 'Man' in the shop on Monday 25 September 89. The question now is with an apparent ability to recall in detail events of November and possibly December 1988 coupled with his recollection of the 'Shooting trip' several years ago Tony can only be 50% sure of a week old sighting. DCI Bell pointed out that Tony was still under pressure from his father and brother Paul not to give information. "*

26.15 By letter dated 8 March 2007 Crown Office confirmed that it has no record of this report within its files and that it was not disclosed to the defence. On 18 December 2006 a member of the Commission's enquiry team examined a number of

protectively marked Security Service documents held at Thames House including a file containing JIG Fax 804. JIG Fax 804 contains the complete version of the report detailed in JIG Fax 1438. The notes taken in this connection are currently in the possession of the Security Service. It was apparent from a note within the relevant file that its contents had been examined by the Crown on 21 March 2000.

26.16 At interview with the Commission's enquiry team Mr Bell stated that there was no sinister reason why the incident described in the report was not recorded in a statement. He suggested that Mr Gauci would have been under great pressure at that time and that this might explain his change in position regarding the sighting.

26.17 In chapter 18 the Commission concluded that the risks associated with cross examining Mr Gauci on his other possible sightings of the purchaser justified the decision by the defence not to do so. In terms of the accounts given by Mr Beckett and Mr Duff at interview, it seems highly unlikely that the disclosure of Mr Bell's report would have resulted in the defence adopting a different approach to this issue.

26.18 Nevertheless the fact remains that within a week of identifying the man who bought the dresses as the "same man" as the purchaser, Mr Gauci could only be "50% sure" of this. As Mr Bell seems to suggest in his report, Mr Gauci's ability to recall with only fifty per cent certainty a positive sighting made by him seven days previously might call into question his ability to recall the man who purchased the items from his shop ten months previously (not to mention his ability to do so more than a decade later at the identification parade and in court). Furthermore, as highlighted in chapter 18, over the course of 26 September 1989 Mr Gauci also altered his position from one in which the man who bought the dresses had come to his shop the previous week, to one in which he had come the previous day.

26.19 In the Commission's view it is a matter of concern that none of this evidence was before the trial court, which proceeded on the basis that Mr Gauci had seen the purchaser on only one occasion. As indicated the Commission considers there to be sound reasons as to why the defence did not seek to cross examine Mr Gauci on the other possible sightings. However, the same might not apply to the Crown whose approach to such evidence should perhaps have been dictated by more than simply

tactical considerations, even if the evidence about the other sightings did not amount to a "plain contradiction" of Mr Gauci's testimony (cf *Kelly v HMA* 2006 SCCR 9, at para 22).

Other photographs viewed by Anthony Gauci

26.20 The final matter to be addressed in this chapter arises from another JIG document, known as fax 731. The document is dated 8 September 1989, a week after the police first spoke to Mr Gauci. It states:

> *"Following the description given by Anthony Gauci, Inspector Anthony* [sic] *Scicluna of the Maltese Police Security Branch thought that he recognised the description of the suspect as being that of No 1 on the accompanying sheets.*
>
> *Bell (for evidential reasons) did not wish at this stage to have the witness shown photographs but Scicluna did so on his own. The witness did not i/d No 1 but he said that the suspect had a hairstyle identical to No 2 (afro-style) and the facial features of No 20."*

26.21 A redacted version of this document is contained in the appendix, in which the names and other details of the individuals whose photographs were shown to Mr Gauci have been removed. The Commission has seen the document in unredacted form. The Commission is not aware of any police statements or other records which record that Mr Gauci was shown these photographs.

26.22 By letter dated 8 March 2007 Crown Office confirmed that it has no record of fax 731 within its files and that it was not disclosed to the defence. On 18 December 2006 a member of the Commission's enquiry team examined a number of protectively marked Security Service documents held at Thames House including a file containing JIG Fax 731. The notes taken in this connection are currently in the possession of the Security Service. It was apparent from a note within the relevant file that its contents had been examined by the Crown on 21 March 2000.

26.23 At interview with the Commission's enquiry team, Mr Bell stated that he would have been present when Mr Gauci was shown the photographs and that Mr Scicluna would not have done so by himself. Mr Bell said he was clear in his mind that Mr Gauci had not identified the purchaser on this occasion. He was asked whether he considered Mr Gauci's description of photograph number 20 to be in any way similar to the terms of Mr Gauci's identification of the applicant by photograph on 15 February 1991 (when he said that the applicant had the same eyebrows, chin and shape of face as the purchaser). Mr Bell replied that it would be a "quantum leap" to compare the two incidents in this way and pointed out that Mr Gauci had described a number of other individuals as having similar features to those of the purchaser. He explained that on the occasion in question Mr Gauci's initial position would have been that he could not see the purchaser in the photo-spread. Mr Gauci's comments regarding photograph number 20 would, Mr Bell said, have been made as a result of being asked whether he saw anyone similar to the purchaser in the photo-spread.

26.24 The Commission also raised this matter with Mr Gauci whose account provides support for Mr Bell's position. So far as Mr Gauci could recall he had never been shown photographs without a Scottish police officer being present. He was shown the photographs attached to fax 731, in response to which he said that the purchaser's hair was like the hairstyles of the men shown in photographs number 2 and 23. He said of photograph number 20 that the purchaser's face was not dark like the man pictured in that photograph and that the purchaser did not have a moustache. He confirmed that the man in photograph 20 was not the purchaser.

26.25 It is a matter of concern to the Commission that this incident was never recorded in a police statement. However, in light of its enquiries the Commission does not consider that the non-disclosure of fax 731 breached the applicant's right to a fair trial. It appears that on the occasion in question Mr Gauci simply highlighted the features of the men in the photographs which he recalled as similar to those of the purchaser. Although he believed the man in photograph number 20 had the facial features of the purchaser, in terms of the accounts given by Mr Bell and Mr Gauci, it is clear that this did not amount to an identification.

26.26 It is worth noting in this connection that the Commission knows of no other instances in which the showing of photographs to Mr Gauci by the police was not recorded in his statements. In particular the Commission has found no evidence to suggest that the police showed Mr Gauci a photograph of the applicant on any occasion other than 15 February 1991 (see chapter 5).

CHAPTER 27
INTERESTS OF JUSTICE

Introduction

27.1 In terms of section 194C of the Act, where the Commission believes that a miscarriage of justice may have occurred, it may refer the case to the High Court only where it also believes that it is in the interests of justice that a reference should be made.

27.2 There is little in the way of guidance, either statutory or judicial, as to the correct interpretation of the interests of justice test. The circumstances in which the Commission might contemplate refusing to refer a case on this basis would have to be somewhat special. For example, notwithstanding its conclusion that a miscarriage of justice may have occurred in a particular case as a result of, say, a misdirection by the trial judge, the Commission might decide not to refer where the applicant's guilt is nevertheless beyond doubt, such as where the applicant has made a full confession to the Commission, or where the evidence against him was so overwhelming that the only logical conclusion is his guilt. The Commission recognises, however, that faced with a similar situation at appeal the High Court might consider that the overall circumstances did not warrant the finding that there had been a miscarriage of justice in the first place. Thus it is arguable that such matters should be considered by the Commission under the first branch of the test in section 194C.

27.3 In any event, in considering whether or not it is in the interests of justice to refer the applicant's case to the High Court, the Commission is of the view that the accounts given by the applicant and the co-accused at precognition and at interview with the Commission must be considered. Notwithstanding its conclusions in chapters 21 to 25 above, if the entirety of the evidence in the case, including their accounts and the other information which has been uncovered during the review, were such as to leave the Commission in no doubt about the guilt of the applicant the Commission might be led to conclude that it is not in the interests of justice to make a reference.

27.4 The positions of the applicant and the co-accused (referred to in this chapter as "Mr Fhimah") in respect of a number of important aspects of the Crown's case are set out below. Thereafter the Commission sets out its conclusions as to whether it is in the interests of justice to refer the applicant's case.

(i) The applicant

General

27.5 The areas covered in this section include the applicant's connections to the JSO; his association with MEBO; his movements in December 1988 and his use of a coded passport. Other matters of interest to the Commission, but which did not feature at trial, such as the applicant's Swiss bank account and his ability to travel without leaving a record, are also addressed. In order to provide some context for these issues, a brief biography of the applicant is included.

27.6 There are three main sources for the accounts given by the applicant. First, the applicant was interviewed in Libya by the US journalist, Pierre Salinger, in November 1991 ("the Salinger interview"), a transcript of which formed Crown production number 1728. Secondly, the applicant's trial representatives obtained a total of thirty-seven precognitions from him between 1 June 1999 and 13 September 2000 (although the last account is undated). The Commission obtained copies of these precognitions from MacKechnie and Associates, although one (the 25th supplementary precognition) was missing. Copies are contained in the appendix. Lastly, two members of the Commission's enquiry team interviewed the applicant at HM Prison Barlinnie on a number of dates between 24 August and 9 September 2004 ("the Commission interview"). The interview was tape-recorded and a transcript is contained in the appendix of Commission interviews. A supplementary statement obtained from the applicant in relation to his Swiss bank account is also included in that appendix. Reference is made throughout this section to each of these sources.

Biography

27.7 The following details of the applicant's background are taken primarily from the account he gave in his initial precognition.

27.8 The applicant was born on 1 April 1952 in Tripoli. After studying English and maritime law for a year in Cardiff in 1970-1971, he joined LAA in 1972. He trained in the US in 1973 and was in the first group of LAA employees to receive the Federal Aviation Administration qualification as a flight dispatcher. He thereafter worked at Tripoli airport and by 1979 was Chief of Flight Dispatchers. Between 1979 and 1980 he worked at the University of Benghazi, before returning to his post at LAA. There he became Chief of the Operations Department and was responsible for organising the training of pilots. He later became a member of the committee which had responsibility for running Tripoli airport, and was also station manager there for a period. In 1984, he attended an airline safety training course in Stockholm. When the Tripoli airport committee was disbanded in 1985 the applicant was left without a role in LAA, although he continued to receive his salary. At that time, the JSO was responsible for security on LAA aircraft, and a decision was taken that LAA should assume responsibility for this. The applicant was therefore appointed as head of airline security, a post which he held for one year, until December 1986. The post involved him being seconded to the JSO for that period, in order to oversee the transition in responsibility from the JSO to LAA. Thereafter he became the co-ordinator of the Centre for Strategic Studies ("CSS"), a post which he held until 1991. Further details about the applicant's secondment to the JSO, and his employment at the CSS, are given below.

27.9 The applicant was also involved in a number of business ventures. In 1986 he joined El Badri Ben Hassan ("Badri Hassan") and others in a company Badri Hassan had established in Zurich called ABH. The company was engaged in arranging aviation deals to circumvent the US sanctions in place against Libya at that time, and the applicant's role involved him travelling frequently to Zurich. ABH dealt with a number of companies, including MEBO (of which there are further details below). The company ceased to exist in December 1988 following allegations that Badri Hassan had embezzled money from it.

27.10 The applicant was also involved with a number of other persons in organising the Libyan leg of the Paris to Dakar rally in 1988, and again in 1989 when Mr Fhimah was also involved. In 1991 he and a number of those who had organised the rallies, including Mr Fhimah, established a factory which manufactured plastic pipes.

27.11 After the indictments were issued in November 1991, the applicant was under a form of house arrest in Tripoli until 1999, when he travelled to the Netherlands for trial.

The applicant's accounts

Connections to the JSO

27.12 The trial court accepted that the applicant was a member of the JSO and that he had an association with the members of that organisation who purchased MST-13 timers from MEBO. The court considered that such "background circumstances" fitted together with other evidence in the case to form a real and convincing pattern proving the applicant's guilt (see paragraph 89 of the judgment).

27.13 In the Salinger interview the applicant denied having worked for Libyan intelligence. He stated that in his family and even in his society "you have to feel afraid to work with the Intelligence here", and that it was "not acceptable" to work in that field. He reiterated that he had never worked for Libyan intelligence in any way. He confirmed that he worked at the CSS but explained that he did this on a part time basis in the evening and that he was not a director there, as was alleged in the indictment.

27.14 In his defence precognitions and at interview with the Commission the applicant provided a substantial amount of information regarding his connections to the JSO and to certain members of that organisation. In both cases his position was that he was linked by "tribe" or direct family relationship to a number of individuals who held positions in the JSO. For example, in his initial precognition the applicant

confirmed that he was related by marriage to Ezzadin Hinshiri ("Hinshiri"), whom he considered a friend. Hinshiri, he confirmed, had held governmental positions in Libya such as Minister of Transport and Minister of Justice, and was at one period, which included the time of the US bombing of Tripoli in 1986, a director or manager in the JSO. At interview with the Commission, the applicant stated that Hinshiri left the JSO in 1987 and became Minister of Justice for Tripoli, at which time the applicant imported Audi motor cars for him through ABH. In terms of the evidence of the MEBO witnesses, and the defence precognition of Hinshiri himself, Hinshiri was also involved in the acquisition of MST-13 timers. According to the applicant Hinshiri was also involved in arranging the coded passport which the applicant used in connection with his visit to Malta on 20 and 21 December 1988 (as discussed below).

27.15 The applicant confirmed at interview with the Commission that another individual, Said Rashid ("Rashid"), was a member of his tribe, was related to him and was a personal friend. According to the applicant Rashid was seconded to the JSO in 1986 and was chief of the operations department there. He was therefore the applicant's superior while the applicant was seconded to the JSO as head of airline security. The evidence of the MEBO witnesses indicated that Rashid was also involved in purchasing MST-13 timers. The applicant was asked at his Commission interview if he was aware of Rashid's involvement in any illegal activities. The applicant said in response that while Rashid had never told him about his activities, he was aware through his contacts at Tripoli airport that Rashid had been wanted for trial in Italy. When it was suggested to him at interview that Rashid had been convicted *in absentia* by an Italian court of the assassination of a Libyan exile, the applicant said he had never heard that Rashid had been in Italy, and that he might have been convicted of "giving orders".

27.16 Another member of the JSO with whom the applicant had a close relationship was Abdullah Senoussi ("Senoussi"). Senoussi was said to be Colonel Gadaffi's brother-in-law and at one time occupied senior positions in the JSO. The applicant confirmed at interview that he had known Senoussi since about 1966, and was aware of the latter's conviction *in absentia* in France for the bombing of UTA flight 772 over Niger in 1989. According to the applicant another man convicted of

that crime, Abdessallam Hammouda, occupied a position in the JSO and was a member of his tribe.

27.17 The applicant also confirmed that he knew Mohamed Nayil ("Nayil", aka Marzouk and Wershafani), who was also a member of his tribe. He was aware that Nayil had been accused of a plot to assassinate the Prime Minister of Tunisia in the 1970s, and that he was arrested in Senegal in February 1988 whilst allegedly carrying a gun, explosives and a timer. The applicant also knew of Mansour Omran Ammar Saber, the individual arrested with Nayil in Senegal, whom the applicant was aware had worked at Tripoli airport in charge of security and intelligence.

27.18 The applicant also informed members of the enquiry team that through his work at LAA, he was familiar with Ibrahim Bishari ("Bishari"), one-time head of the JSO, and with Nassr Ashur ("Ashur"), a colonel in that organisation, although he did not know them personally. According to the applicant he had travelled with Ashur on one occasion in 1987 when both used coded passports (further details of this are given in the section on coded passports, below). The applicant added that the prevailing view of Libyans was that Ashur had connections with the IRA, although he had no personal knowledge of that.

27.19 Another individual mentioned in the indictment is Mohammed Abouagela Masud ("Masud"), with whom the applicant is alleged to have travelled on a coded passport from Malta to Tripoli on 21 December 1988. It was also alleged that he flew to Malta with Masud in October 1988 in an aborted attempt to travel to Chad. In a number of defence precognitions, and at interview with the Commission, the applicant consistently denied any knowledge of Masud. Two of the applicant's trial representatives, John Beckett QC and Alistair Duff, indicated during their interviews with the Commission that although the defence were able to precognosce a number of members of the JSO, including Hinshiri, Rashid, Senoussi and Ashur, they were advised by the defence lawyers in Libya that Masud could not be identified. At precognition and also during the Commission interview the applicant was shown a photograph allegedly of Masud (CP 313, photo 23) but maintained that he did not recognise this individual.

27.20 It is therefore clear that the applicant had personal relationships with various members of the JSO and that he knew others through his work at LAA. Moreover, as explained, the applicant was seconded to the JSO for around a year in 1986, as head of airline security. In terms of his precognitions and Commission interview the JSO had been responsible for security on LAA's aircraft but, as they were the cause of the majority of delays in LAA flights, a decision was made to transfer control of airline security to LAA. According to the applicant he was appointed to oversee this transition. The idea for his appointment was that of Senoussi, who at that time was second in command of the JSO, although the actual appointment was made by the Minister of Transport. The role involved the applicant in training JSO officers on LAA flights by, for example, replacing the use of guns with CS gas, for safety reasons. According to the applicant, while he was in this post he also received reports from JSO officers who were positioned as assistant station managers in foreign airports. One of the station managers from whom the applicant would receive reports was Abdul Majid Giaka ("Majid") who at the time was based at Luqa airport.

27.21 However, despite the fact that Senoussi, a senior JSO figure, was involved in appointing him to the post, and that Rashid was his superior while he was in the post, and despite the fact that he was responsible for junior JSO officers, the applicant maintained at interview that he was not employed by the JSO but was only seconded there. According to the applicant, not only did he continue to be paid by LAA, he also worked from an LAA office and was a civilian. His role involved airline security, not airport security. In particular, he had no knowledge of security at Luqa airport, either as a result of his role as head of airline security at LAA or from being a member of the committee at Tripoli airport. According to the applicant his positions did not permit him access to secure areas of airports from which LAA operated.

27.22 The accounts given by the applicant in his defence precognitions and at interview are inconsistent with the position he adopted in the Salinger interview. This is true of a number of the statements he made to Salinger, and there is a detailed examination of what he said at that interview later in this section. As regards his links to the JSO, the applicant explained at interview with the Commission that the advice he was given by his Libyan lawyer was to avoid discussing with Salinger his travel movements and his job. This advice, he said, was given in advance of the interview,

and the lawyer in question was not present during the interview itself. He was ashamed to have lied about this at the Salinger interview but claimed not to have known how to avoid answering the question. He had been told that the interview would be about his family.

27.23 However, later in the Commission interview, the applicant's position on this matter seemed to change. In particular, he maintained initially that he had told the truth when he informed Salinger that he was not connected to the JSO, and claimed that he was neither "an intelligence man" nor a member of the JSO. Thereafter, however, when the fact of his secondment was put to him, the applicant accepted that he had lied when he told Salinger he was not connected to the intelligence services "in any way". He went on to say that he had told Salinger the truth when he said it was shameful to one's family to be involved in intelligence. When asked what his family's attitude was to his secondment to the JSO, he explained that his family knew he was not employed by the JSO. He maintained that his own view of the JSO was that they were generally bad people who lacked morals and who would report on their own family members. However, when asked how this reflected on those in the JSO with whom he had close relationships (Hinshiri, Rashid and Senoussi), he explained that this did not apply to every individual in the JSO, and that it was simply a general attitude towards the JSO. He did not feel ashamed to have been seconded to the JSO as he considered himself still to be an LAA employee.

27.24 As regards the applicant's subsequent appointment as co-ordinator of the CSS, a position he held from 1987 to 1991, the applicant stated at interview with the Commission that this too was Senoussi's idea. His position with the CSS was one of "co-optee", in that he continued to be paid by LAA. He also explained that, because of Senoussi's influence, the CSS was partly funded by the JSO. He maintained, however, that it was not a JSO organisation, describing it at interview as like a charity, independent of any government department. He said it was established by academics assisted by Senoussi (although in a defence precognition the applicant indicated that the centre was originally the idea of Bishari, one time head of the JSO), and had various departments including geography, history, media monitoring, political analysis and translation. It was, he said, modest in its scope, its annual funding being around £30,000. Although most of this money came from the JSO, this

was because of Senoussi's involvement in that organisation. According to the applicant, if Senoussi had belonged to another department he would have arranged for that department to provide the funding.

27.25 At interview with the Commission, the applicant explained that in his role as co-ordinator he facilitated the work of the academics, and arranged matters such as travel and expenses for them. According to the applicant the studies conducted by the CSS were not intelligence-orientated, although on occasion the JSO requested information from them. In a defence precognition the applicant suggested that the only intelligence-related study conducted by the CSS concerned fundamentalism in Libya. He also explained that while the CSS employed three JSO members, these were just a driver, a typist and an administrative assistant, all of whom continued to be paid by the JSO as the CSS did not have the funding to pay salaries to them. The CSS building, he said, was not heavily guarded and various people had access to it, including, for example, the applicant's business associates in the Paris-Dakar rally, who used the facilities there to organise the rally.

27.26 Although the applicant was at pains to emphasise in his Commission interview that the CSS was not an intelligence organisation, it undoubtedly had close connections to the JSO, given that a senior JSO figure was involved in its establishment and funding, and in the appointment of personnel. Indeed, in his fifth supplementary defence precognition, the applicant is noted as saying that because the CSS's funding came from the JSO, "the Centre therefore became part of the Security or Intelligence Service. I therefore accept that I was effectively working in an office which was part of security or intelligence and I was the co-ordinator."

27.27 One aspect of the applicant's involvement with the CSS which, according to Mr Beckett, caused some concern to the defence, is referred to in the applicant's first defence precognition. There the applicant described the CSS and its role in monitoring the worldwide media, and how people around the world collected articles from newspapers and magazines and sent them back there. The precognition goes on: "I remember that there was a man in Spain who used to send back articles from the Spanish media. Sometime during the 1990s it turned out that he was an American spy

and he was assassinated." Mr Beckett considered such information potentially damaging to the applicant's defence.

27.28 The applicant's accounts to the Commission and to his legal advisers of his involvement with the CSS again contrast with the position he adopted at the Salinger interview. There he accepted that he worked at the CSS but said that this was on a part time basis in the evening, and that he was not a director, as was alleged in the indictment. This is to some extent consistent with the terms of his thirty-fifth supplementary precognition, in which the applicant describes his position in the CSS as co-ordinator rather than director. In that precognition he said that he explained to Salinger that he was connected to the work of the CSS but that, as he had some difficulty expressing himself in English, he spoke Arabic and one of Salinger's companions translated. In the final, undated precognition, the applicant again referred to his role at the CSS as being different from that of a "manager", as Salinger had suggested.

27.29 At interview with the Commission the applicant accepted that that he had lied to Salinger about this issue. He repeated that the reason he lied was that he had been told by his lawyer to avoid talking about his job. Following further questioning by members of the enquiry team he suggested that the advice he was given related only to those aspects of his employment, such as his involvement in the CSS, which were mentioned in the indictment, rather than his general employment history (which he had in fact described to Salinger). When pressed, however, he also accepted that it might simply have been his own decision not to tell the truth about his involvement with the CSS. He was asked whether the reason he had lied about this was because he feared that the links between the JSO and the CSS would be established. The applicant confirmed that this might have been one of his reasons for lying, and said that it would have taken time to explain the connections with the JSO, and that the CSS was not a JSO organisation.

Connections to MEBO and MST-13 timers

27.30 In addition to the various accounts referred to in this section, the applicant's connections to MEBO were, of course, spoken to in evidence by the MEBO witnesses.

27.31 In the Salinger interview the applicant stated that he would not recognise a timer unless he was told in advance what it was, and that he had never worked in that business. He claimed not to have any link with MEBO, although at another point in the interview he said he might have spoken to someone from MEBO at the airport (presumably Zurich airport). He had met several people there and he could not remember whether one of them was from MEBO. The applicant mentioned attempts to establish a business in Zurich with a former chairman of LAA (which was clearly a reference to ABH set up by Badri Hassan) but explained that no business was completed.

27.32 In his defence precognitions, and in his Commission interview, the applicant frankly accepted that he had dealings with MEBO through ABH. In his first defence precognition, he referred to ABH having purchased from MEBO a large satellite dish on behalf of the JSO which was used to monitor messages. However, in a subsequent precognition he said that the satellite dish was for Bishari, in order that he could watch television news programmes. At his Commission interview the applicant maintained that the satellite dish was obtained by Bishari in his personal capacity rather than in his capacity as head of the JSO. The applicant acted as an intermediary in this transaction.

27.33 In his initial precognition, his eighteenth supplementary precognition, and his Commission interview, the applicant also referred to ABH purchasing walkie-talkies from MEBO for use by the Libyan military in connection with the war against Chad. According to the applicant, there was also a proposed agreement between ABH and MEBO, whereby ABH would lend $500,000 to MEBO in exchange for a share in MEBO, and ABH would earn commission by assisting MEBO to conclude deals in Libya. ABH could not come up with the money, however, so the proposal was never carried through. The applicant stated that the only other dealings he had with MEBO

concerned his attempts to assist them in recovering money owed to them by various Libyan departments, including the JSO. At his Commission interview the applicant explained that it was his good connections with the JSO which allowed him to mediate in such payments. ABH, he said, had also rented an office from MEBO but he only visited that office once, very briefly, and MEBO had paid the rent for a number of months in exchange for the assistance in resolving debts. He had met Mr Bollier only on a few occasions, mainly in Switzerland but once in Tripoli.

27.34 The applicant's position on this matter at the Salinger interview is again in stark contrast to the accounts he gave at precognition and to the Commission. In his thirty-fifth supplementary precognition the applicant stated that when Salinger had asked him about MEBO he was "confused" and did not appreciate at that time that he had in fact been to MEBO's offices, as the offices he had visited had seemed like domestic premises (a fact to which he had referred in previous precognitions). He stated that it was only much later, after the Salinger interview, that Badri Hassan told him that those premises had in fact been MEBO's offices. In the same precognition he said that he had not appreciated that "MEBO" stood for the names Meister and Bollier. In his final, undated precognition the applicant is noted as saying that when he told Salinger that he did not know anything about MEBO what he meant was that the person who knew the company and the people in charge there was Badri Hassan.

27.35 At interview with the Commission the applicant at first suggested that his account to Salinger was "partly true" because it was Badri Hassan who "knew" MEBO rather than he himself, and that he had no knowledge of the timers to which Salinger had referred. However, when it was put to him that he denied to Salinger having any knowledge of MEBO, he accepted that he had lied and referred once again to the advice that his lawyer had given, namely that he should not talk about his movements or his job. He explained that his knowledge of MEBO was related to his travel movements, as he only knew about that company from his trips to Zurich. He had therefore lied about MEBO to avoid questions about his movements.

27.36 The applicant has, however, been consistent in his denial of any connection with the MST-13 timers. He maintained throughout his defence precognitions and his interview with the Commission that he had nothing to do with any transaction with

MEBO whereby timers were supplied to Libya, and that he had no knowledge of such timers until after the indictment had been issued. At interview he said that he did not enquire with Hinshiri or Rashid about the purchase of the timers, even after the issue of the indictments, nor did he ask Badri Hassan about the alleged order for forty timers in December 1988. He did not deny, of course, that he had a close association with all three men. Likewise, he said that he did not discuss with any of his friends or relatives in the JSO, including Senoussi, whether there was any truth in the allegations of Libya's involvement in the bombing or in any other terrorist activities. The only matter he said had been discussed with Senoussi concerned the testing of the MST-13 timers alleged to have taken place at Sabha, which Senoussi informed him were military tests.

Movements on 7 December 1988 and following dates

27.37 A crucial aspect of the applicant's conviction was the court's finding that on 7 December 1988 he purchased various items from Mary's House, many of which were established to have been within the primary suitcase. In the Salinger interview the applicant accepted that he was present in Sliema on 7 December, but denied that he had visited Mary's House, or that he bought clothing and an umbrella.

27.38 In his defence precognitions and at interview the applicant significantly expanded on the circumstances of his visit to Malta on 7 December. Broadly, he confirmed that he had flown to Malta from Tripoli on 7 December, and that on the following day he boarded a flight to Zurich from where he intended to travel to Prague. As a result of bad weather, however, the flight from Malta to Zurich was cancelled until the following morning. He stayed at the Holiday Inn in Sliema on both 7 and 8 December, although the second night was arranged by Swissair following the cancellation of his flight. Upon his eventual arrival in Prague on 9 December, he stayed at the Intercontinental Hotel where he remained until 16 December. On that date he flew back to Zurich, staying at the Zurich Hotel, before travelling on to Malta and then Tripoli the following day.

27.39 In his defence precognitions the applicant explained that his purpose in travelling to Prague was in order to purchase items for the house he was having built.

In his first defence precognition he stated that items were sold very cheaply in Prague, and that he bought crystal chandeliers and two carpets which he arranged to have sent back to Tripoli on a charter flight for Libyan military personnel and their families. He suggested that it was Abdulmajid Arebi Alesh (one of the individuals involved in ABH and with whom the applicant organised the Paris-Dakar rally and who was based in Prague at the time) who arranged for the transportation of the items. He claimed that, at the time of precognition, he still had these items in his house. In his twenty-first supplementary precognition he stated that he also purchased items for Christmas, along with a suit and one or two cheap bags in which to bring the items back with him. The applicant's account at his Commission interview was broadly similar, although he indicated that the charter flight from Prague to Tripoli was a cargo flight for check-in staff.

27.40 As regards his reasons for flying to Prague via Malta the applicant stated in his first precognition that this was the easiest way to travel, that other airlines were fully booked, and that by doing so he would be able to visit Mustapha Shebani ("Shebani"), then LAA station manager in Malta. It is also noted in that precognition that he booked the onward journey to Prague once he was in Malta, on 8 December. However, although the applicant confirmed in his Commission interview that he often travelled via Malta on the basis that it gave him an opportunity to meet Shebani, he did not recall that he had purchased his onward ticket to Prague only once he arrived in Malta. Indeed, he suggested that it would have been much cheaper for him to have bought tickets for the whole journey in Tripoli.

27.41 During the course of the Commission interview the applicant was questioned in some detail about his presence in Malta on 7 and 8 December. His position remained that he had stopped over in Malta to see Shebani, but he added that it would not have been possible to travel more quickly to Prague by any other route. This was because, although he could have flown direct from Tripoli to Zurich, he would still have required to stay overnight in Zurich before meeting his connecting flight to Prague. He claimed to be unable to remember anything about the night of 7 December. He considered it possible that he met with Shebani, as he recalled that Shebani had taken him to the airport the next day, and that they were together while he was at the airport.

27.42 The applicant's inability to remember the events of 7 December contrasts, to some extent, with the contents of his precognitions, in which he is noted as recalling various events of that day. In his first precognition, for example, the applicant describes meeting Shebani in Malta on 7 December and being told by him about Mr Fhimah having taken a year's leave to start a tourist agency (i.e. Medtours). According to the precognition, Shebani asked the applicant to help Mr Fhimah, and they then met Mr Fhimah, at which stage the applicant agreed to speak to his brother-in-law who worked at the Libyan oil company, ADWOC (referred to as "Adwick" in the precognition), and recommend Medtours to ADWOC.

27.43 On the other hand, in his nineteenth supplementary precognition the applicant recalled arriving in Malta at around noon on 7 December and being asked by Shebani to wait while he (Shebani) arranged for someone to take him to the hotel. According to the precognition Majid then offered to drive him. The applicant recalled that Majid had a small black Fiat hatchback which was parked right outside the departure area, and that he had to wait while Majid picked up an Air Malta employee, who later became Majid's wife. Majid dropped her off at her house on the way to the applicant's hotel.

27.44 As regards the crucial allegation that he bought the clothing found within the primary suitcase, in his twenty-eighth supplementary precognition the applicant denied visiting Mary's House on 7 December or at any other time. His initial position at interview with the Commission was similar, in that he said he had never seen Mr Gauci or Mary's House in his life. After further questioning, however, he said that he could not remember ever having shopped in Mr Gauci's shop, or in the Sliema area of Malta, and that he always shopped in Valletta. He remained steadfast that he did not purchase the items that were recovered at the crash site. While he did not rule out the possibility that when he was staying at the Holiday Inn he might have gone for a walk and passed Mr Gauci's shop, he maintained that he could not recall doing so and could not recall buying anything from that area. According to the applicant he stayed

at the Holiday Inn out of choice because of its good facilities but, in his view, Sliema had a bad reputation and because of this he did not frequent the area.

27.45 Later in the interview it was put to the applicant that as his position was simply that he could not remember whether he had shopped in Sliema, it was difficult to understand how he could say with certainty (as he had done at precognition and, initially, at interview) that he had never visited Mary's House. The applicant reiterated that he could not remember ever having shopped in Sliema or in Mary's House. He insisted he was not the man who bought the clothing, referring to the discrepancies in height, age and skin colour between him and the purchaser as described by Mr Gauci, and to other evidence which he suggested pointed away from 7 December as the date of purchase. The applicant also claimed never to have been to the Libyan People's Bureau in Malta, which was situated very close to Mary's House.

27.46 One other matter concerning the applicant's movements on 7 December relates to the passage in his first precognition in which he claims to have changed $200 to cover his accommodation and expenses, a transaction for which he claimed still to have the bank receipt. At interview Mr Beckett suggested that, had this been brought out in evidence, it might have been possible to infer that the applicant's purpose in changing this sum was to purchase the clothing.

27.47 Whether or not such an inference can legitimately be drawn would very much depend upon the exchange rates prevalent at that time. Based on certain CIA cables relating to Majid, the exchange rate in early 1989 was approximately LM1 to $3 (see eg the less redacted version of Crown production 819, a CIA cable dated 19 January 1989, which equates LM500 with approximately $1500). This accords with present rates, and would suggest that $200 would not in fact have been sufficient to cover the cost of the clothing and the applicant's hotel bill for 7 December. Crown production 757 indicates that on 8 December the applicant paid his hotel bill of LM43.50 (approximately $130) in cash. In terms of Anthony Gauci's first police statement the purchaser spent LM76.50 (approximately $230), although in subsequent statements Mr Gauci added to the list of items he sold, so the figure may in fact have been higher than this. Accordingly, in the absence of evidence that the applicant had a further sum of Maltese currency in his possession on 7 December, it would appear

that he would have required to change significantly more than $200 in order to purchase the clothing and meet his hotel bill.

27.48 As to the events of 8 December, the applicant recalled at his Commission interview that Shebani picked him up from the hotel and took him to the airport for around 11.30am or 12pm. However, there was thunder and lightning and the flight to Zurich, which was due to depart around 2pm, was delayed until after dark, around 7 or 8pm. The applicant boarded the flight at that time but it was then cancelled and he, along with the other passengers, was taken back to the Holiday Inn by Swissair. He did not think that he saw Shebani again that night. He flew out the next morning and arrived in Prague that day.

27.49 The applicant was asked in his defence precognitions about the fact that his hotel room in Prague was paid for by the Libyan Embassy. He explained in his first precognition that it was much cheaper to have the Embassy book a hotel room on his behalf, rather than for him to book it as an individual. According to the applicant this was not abnormal and many Libyans could make such arrangements, depending on whom they knew. He repeated this explanation at his Commission interview.

27.50 According to his twelfth supplementary defence precognition the applicant's solicitor showed him certain documents which the defence had apparently obtained in Tripoli, and which indicated that he was sent to Switzerland and Prague in December 1988 on business, rather than for personal shopping, as he claimed. The applicant replied that although he could not remember this particularly, it was possible, and that if there was any question of suspicion over the documents they should not be used (ie they should not be lodged as defence productions). At his Commission interview the contents of this precognition were put to the applicant. He denied that he had any business interests in Prague in 1988. He seemed to think that the precognition might relate to the fact that the Libyan Embassy booked his hotel in Prague, and that he had been concerned when giving the precognition that, although innocent, this might be misinterpreted as suspicious.

27.51 As to his return from Prague, the applicant explained in his second supplementary precognition that his original intention had been to fly to Malta on 15

December, but that there were often delays at that time of year owing to bad weather. He confirmed that his intention to be in Malta on 15 December tied in with the entry in Mr Fhimah's diary, which recorded that the applicant was coming to Malta from Zurich on that date. A similar account was given at interview with the Commission.

27.52 In his first precognition the applicant explained that on his way back to Tripoli on 17 December he met Shebani at Luqa airport, and that Shebani repeated that he hoped the applicant would assist Mr Fhimah's new business venture. According to the precognition Shebani also introduced him to Vincent Vassallo on this occasion. However, in later precognitions the applicant indicates that he first met Mr Vassallo on 20 December (as described below). At his Commission interview the applicant could not recall if he met Shebani or Mr Fhimah on 17 December, although he thought it more likely that he met Shebani. He also could not recall if he met Mr Vassallo that day or if the first meeting between them was on 20 December.

Movements on 20 and 21 December 1988

27.53 Evidence of the applicant's movements on 20 and 21 December 1988 was crucial to his conviction. The trial court relied on (1) the applicant's presence in Malta on those dates; (2) his use of a coded passport; and (3) his presence at Luqa airport at around the time the bomb would require to have been ingested on flight KM180, to draw the inference that the visit was in connection with the planting of the device.

27.54 On a number of occasions during the Salinger interview the applicant denied that he had travelled to Malta on 20 and 21 December 1988, and claimed that he was in Tripoli with his family. He also denied having stayed at the Holiday Inn on the night of 20 December and asserted that there would be no record at Tripoli airport of his travelling on that date. Understandably, given the weight of evidence to the contrary, the trial court did not accept these denials.

27.55 Whereas the applicant confirmed both at precognition and at interview with the Commission that he had in fact been in Malta on those dates, he maintained that he had nothing to do with introducing an unaccompanied bag on to KM180. He also

denied ever having been involved in discussions about destroying aircraft or having seen explosives. Given the importance of this aspect of the Crown case, it is necessary to examine the applicant's accounts in some detail.

27.56 According to the applicant's first defence precognition Mr Fhimah visited him at his office in Tripoli on 18 December to discuss Mr Fhimah's travel agency, Medtours, and the applicant's contact in ADWOC. At that stage, Mr Fhimah told the applicant that he was going back to Malta on 20 December and the applicant said that he would join him for one or two nights. They met again on 19 December, after Mr Fhimah had had a meeting at ADWOC, and the applicant repeated that he might go to Malta with Mr Fhimah the next day for a night or two. According to this first precognition the applicant thought it would be an opportunity to meet Mr Vassallo again and get a better idea of Mr Fhimah's new business. As explained, however, while in his first precognition the applicant suggested that Shebani had introduced him to Mr Vassallo on 17 December, in later precognitions he claimed never to have met Mr Vassallo until 20 December.

27.57 The applicant also explained in his first precognition that his purpose in travelling to Malta on 20 December was to purchase a banister he needed for the house he was having built. In his twenty-eighth supplementary precognition, however, he stated that on 19 December he had a conversation with Mr Fhimah about carpets he needed for his house. He had hoped that Mr Fhimah would buy these for him in Malta, but Mr Fhimah suggested it was better for the applicant to go to Malta and pick them himself. According to the precognition Mr Fhimah told him at that stage that he was going to Malta on 20 December and suggested the applicant come with him.

27.58 Thus, a number of different explanations were given by the applicant in his precognitions as to the purpose of his visit to Malta on 20 December. At interview with the Commission the applicant was asked about his meeting with Mr Fhimah on 18 December, but he was unable to remember details of the events that day. He explained that his memories at precognition had been assisted by discussions with Mr Fhimah. Accordingly, other than referring generally to the need to buy items for his

house and, in particular, his need for a banister, the applicant claimed to be unable to recall the purpose of his trip to Malta on 20 December.

27.60 The second additional explanation concerned the applicant's use of his coded passport in the name of Abdusamad ("the Abdusamad passport"). In particular, the applicant referred to the fact that on the Abdusamad passport (the use of which is discussed in more detail below) there was a stamp dated 22 June 1988 which, according to the applicant, entitled him to an allowance of $1000 in hard currency. This allowance had to be obtained by the end of the calendar year and was only valid once the passport had been stamped to show the applicant had travelled abroad. The applicant suggested that, as the year end was approaching, this might have been a factor in his travelling to Malta on 20 December, and that it was also a possible reason for his use of the Abdusamad passport on that occasion. According to the applicant, Libyans often travelled to places like Tunisia for a very short period in order to take advantage of the allowance.

27.61 The applicant repeated on a number of occasions at interview that he could not be certain of the precise purposes of his visit to Malta on 20 December. As the applicant had shown no uncertainty at interview as to the purpose of other trips he had made throughout the course of 1988, he was questioned as to why he should be so uncertain as to the reasons for this particular visit. In response the applicant explained that he was not in fact certain of the purpose of any of these other trips, and that he might be wrong about what he said had taken place on those occasions.

27.62 Given the importance of events on 20 and 21 December 1988, it is worth exploring the applicant's accounts in further detail. As regards 20 December, in his first and twenty-eighth supplementary precognitions the applicant indicated that he did not finally decide to travel to Malta until that day. According to these accounts he spoke to Mr Fhimah over the telephone and arranged to meet him at the airport, from where they caught the Air Malta flight. Although generally in his precognitions he claims to have purchased his ticket from an LAA ticket office in Tripoli, in his twenty-eighth supplementary precognition (and at interview with the Commission) he suggests that he sent a member of staff to buy the ticket on his behalf. The applicant is noted in the same precognition as saying that he and Mr Fhimah carried only hand luggage on the flight.

27.63 At interview with the Commission the applicant confirmed that he understood from documents he had seen that he only purchased the ticket for Malta on that day. His position, in that sense, was that the trip was not pre-planned. He could not remember himself or Mr Fhimah checking in any luggage, but explained that normally for a short trip he would only carry one item of hand luggage.

27.64 The applicant is also noted in his twenty-eighth supplementary precognition as recalling an incident on the flight to Malta, which was the first time he had travelled with Mr Fhimah. According to the precognition an individual sitting next to him, who was possibly Russian, had a bandaged hand and could not fill out his embarkation card. In the event, Mr Fhimah completed this for him. The individual in question was staying at a hotel in Malta which the applicant and Mr Fhimah knew to

be a very cheap, down-market hotel. The applicant repeated this account of events at his Commission interview.

27.65 As to the circumstances of his arrival at Luqa airport, at interview the applicant could not remember himself or Mr Fhimah taking anything off the luggage carousel. Likewise, he could not recall seeing Majid or Mr Vassallo at the airport. As to Majid's account that he had seen the applicant with Masud at the airport, the applicant again denied knowing Masud or having been in his company on 20 December. The photograph purportedly of Masud (CP 313; photograph 23) was again shown to the applicant but he maintained that he could not recall ever meeting with or speaking to such a man.

27.66 At trial the Crown submitted that Mr Fhimah's position as former LAA station manager at Luqa airport meant he might have received special treatment on arrival there. However, according to the applicant's eighth supplementary precognition everybody knew that Mr Fhimah was no longer station manager at Luqa, and therefore he would not have received any special privileges. On the other hand, at his Commission interview the applicant said that, as Mr Fhimah was well known at the airport, and was trusted and well-liked there, it was possible that staff would be reticent about checking his luggage at customs. However, the applicant suggested that this was more a question for Mr Fhimah. He denied that he or Mr Fhimah had carried a bag containing the bomb on the flight from Tripoli, and said that it would have been "crazy" to travel on the same aircraft as a bomb.

27.67 The applicant's account at precognition was that upon leaving Luqa airport on the evening of 20 December Mr Fhimah drove him to Mr Vassallo's home. As mentioned above, the applicant is inconsistent in his precognitions as to whether this was the first occasion on which he met Mr Vassallo: in his initial precognition, the applicant said that he was introduced to Mr Vassallo by Shebani on 17 December 1988, but in subsequent precognitions his position was that he first met Mr Vassallo on 20 December. Indeed, in the twenty-eighth supplementary precognition, the applicant suggested that Mr Fhimah first mentioned Mr Vassallo, and the fact that he would be a partner in Mr Fhimah's business, on 20 December while en route to Mr Vassallo's house.

27.68 According to the applicant's initial precognition he and Mr Fhimah stayed at Mr Vassallo's house for over an hour, discussing the travel agency business. In his twenty-eighth supplementary precognition, the applicant suggests that during the meeting he specifically discussed his connection at ADWOC, and also mentioned the possibility that Medtours could be involved in organising the following year's Paris-Dakar rally. He also refuted the suggestion by Mr Vassallo that in fact they had not discussed any business. The applicant consistently refers throughout his precognitions to admiring the banister on Mr Vassallo's staircase and to Mr Fhimah and Mr Vassallo telling him that they knew the carpenter.

27.69 The applicant's account of the visit to Mr Vassallo's home which he gave at his Commission interview was broadly consistent with those recorded in his precognitions. He recalled that Mr Fhimah drove him there in the Volvo car belonging to LAA. Although Shebani would likely have been at the airport to give them the use of this car, he could not recall having met him. The applicant suggested that the visit to Mr Vassallo and his family demonstrated that he was not trying to hide anything during the trip, and that he was not engaged in criminal activity. He gave a detailed description of events in the house. In particular, he referred to a conversation about Mr Vassallo's hunting rifle and his dog (matters which the applicant also mentions in his precognitions). Although he had been reluctant to discuss Mr Fhimah's proposed business with Mr Vassallo, since this was his first visit to the latter's house, the matter was briefly discussed. The applicant also referred to Mr Vassallo's staircase, and to the fact that Mr Fhimah arranged for carpenters to visit his house at the end of December 1988 to provide a quote for a banister. He stated that, at the time of trial, he still had the sample of material which the carpenters had left.

27.70 Whereas the applicant's accounts at precognition and at interview are relatively consistent as regards the visit to Mr Vassallo's house, his accounts as to what occurred thereafter contain a number of contradictions.

27.71 In his first precognition, the applicant said that, as Mr Fhimah was staying at a less desirable hotel (the Central Hotel), he himself chose to stay at the Holiday Inn,

at which they arrived at about 7 or 8pm on 20 December. He asked Mr Fhimah to come and meet him the next day to go and look at carpets and other items for his house, as Mr Fhimah knew where the carpet seller was – he was an individual who sold carpets from his garage. The receptionist who checked him in at the Holiday Inn was an ex-LAA employee, and Mr Fhimah asked that the applicant receive an airline discount, although the applicant did not think in the end that he received this. Mr Fhimah gave him the telephone number for Mr Fhimah's apartment and said that he could be contacted there. The next morning the applicant telephoned the number but it was not Mr Fhimah who answered, but a man who sounded drunk. The applicant was angry and hung up. He checked out of the hotel and got a taxi to the airport. He asked the taxi driver, whom he recalled was bald, whether he knew where to find the carpet seller who sold items from his garage, but the taxi driver just laughed. He went to the airport as he just wanted to go home. There, he met Shebani, who received a telephone call from Mr Fhimah apologising, and stating that he had gone to the Holiday Inn to find that the applicant had checked out. He explained that he had fallen asleep at his hotel, and had not got back to his apartment.

27.72 It is apparent from the preceding paragraph that the account given by the applicant in the first precognition contains a number of very precise details. However, in subsequent precognitions, the applicant's description of events after the visit to Mr Vassallo's house changes. In his sixth supplementary precognition, the applicant is noted as saying that he had already been over his account of 20 December 1988 a number of times (although the only previous account recorded in the precognitions is in the first precognition, as described above). He suggests that Mr Fhimah would be able to identify the carpet shop that they went to on 20 December, which was like a garage. The proprietor, he said, had a lower lip larger than his top lip, and did not speak clearly. The applicant is thereafter noted as saying: "I purchased carpets and [Mr Fhimah] arranged for them to be sent to Tripoli for me". Clearly, then, this account of events differs from the contents of his initial precognition.

27.73 According to the applicant's twelfth supplementary precognition, on leaving Mr Vassallo's house, Mr Fhimah suggested they go to the carpet seller. When the applicant suggested that it might be closed, Mr Fhimah told him that the man sold the carpets from his garage so they could just visit the man's house and he would open

the garage. Mr Fhimah thereafter drove the applicant to the carpet seller. En route, Mr Fhimah pointed out the office of Medtours, and they stopped at the Central Hotel in order for Mr Fhimah to collect keys for the hotel. On arrival at the carpet seller's house, the applicant stayed in the car while Mr Fhimah spoke to the man. They then drove a short distance to the man's garage where the man joined them. The man showed the applicant some carpets in the garage, and told him that, as he would be obtaining more stock at the end of the year, the applicant would see more if he came back in two months time. According to the precognition, the applicant selected two carpets which the man rolled up and put in Mr Fhimah's car. As the applicant did not have sufficient Maltese currency to pay for them, the man accepted 100 US dollars for each carpet.

27.74 The applicant goes on to say in the precognition that when he and Mr Fhimah went back to the Holiday Inn he thought of leaving the carpets in Mr Fhimah's car, but was worried that they might be stolen. He therefore took them to his hotel room. As he could not get hold of Mr Fhimah the next morning, he got a taxi to the airport and left the carpets at the check-in area while he went to Shebani's office. Although he could not recall the precise details of what took place at the airport, he told Shebani about the carpets, who said that he would organise for them to be put in the aircraft's hold. According to the precognition, Shebani must have done so as on his arrival at Tripoli the applicant collected the carpets.

27.75 Clearly, then, across three different precognitions there are three different accounts of events on 20 and 21 December: one in which the applicant did not visit a carpet seller or buy carpets; a second in which he bought carpets which Mr Fhimah arranged to be transported to Tripoli; and a third in which the applicant gives a detailed account of having purchased the carpets and of Shebani arranging for these to be transported to Tripoli. The applicant maintained this latter account in his twenty-eighth supplementary precognition.

27.76 At his Commission interview the applicant recalled that he bought carpets in Malta with Mr Fhimah on one occasion, that they cost $200, and that the carpet seller was small and had a speech impediment. However, he could not be certain if this took place on 20 December 1988 or on one of his other trips to Malta. Later in the

interview, he said that after visiting Mr Vassallo Mr Fhimah drove him past the Medtours office and pointed it out. They also drove past the workshop of the carpenter who made Mr Vassallo's banister, which was close to Mr Vassallo's house, but which was closed. Thereafter they went to the Holiday Inn.

27.77 Insofar as he mentions being driven to the carpenter's workshop, the applicant's Commission interview is effectively a further account of his movements on the evening of 20 December. Asked whether he had bought carpets that day, the applicant replied that it was possible but that he was not certain. When it was pointed out to him that in his previous accounts he had seemed sure that he had done so, the applicant repeated that he could not be 100% certain of this, and thought it was perhaps 70% possible that he had purchased the carpets on 20 December. The carpet seller, he said, was situated close to Mr Vassallo's house as well.

27.78 When asked at interview what happened to the carpets thereafter, the applicant was uncertain at first, explaining that he might have taken them to the hotel with him or Mr Fhimah might have held onto them. He then said, however, that he thought he could remember taking them to the hotel room with him, but then repeated that he could not recall what he did on the night of 20 December. He recalled that when he arrived at the Holiday Inn, Mr Fhimah was still with him and the receptionist, a former LAA employee, agreed to give the applicant an airline discount. Thereafter, however, he could not distinguish between what took place on that occasion from what took place on any of the other occasions when he visited Malta.

27.79 The applicant was reminded that he had provided detailed accounts of his movements on 20 December 1988 to his trial representatives. While he did not dispute giving the account described in his twelfth precognition, he explained that this was only what he thought had happened and that he had told his representatives that he could not be 100% sure that these events occurred on 20 December as opposed to some other date. It was pointed out to the applicant that he had not been noted as expressing any uncertainty about his accounts in any of his precognitions. The applicant replied that he had told Mr Duff what he thought he remembered, but that at a subsequent meeting he told him that he could not remember if that was exactly what happened and whether it happened on that day or some time before or after. A

passage from his twenty-eighth supplementary precognition which reflected the terms of the twelfth precognition was read to the applicant at interview, and it was suggested again that there was no indication of any difficulties on his part in recalling events. The applicant replied that while the account reflected his thinking at the time, he could not be certain that the events took place on 20 December.

27.80 When this matter was returned to later in the interview the applicant reiterated that he could not remember on exactly which occasion in Malta he had bought the carpets with Mr Fhimah. Although it had to be before November 1989, when he moved into the house he had built, he could not say for certain that it was the same day on which he had first visited Mr Vassallo's house. Likewise, he could not recall if he left the carpets with Mr Fhimah to arrange their return to Tripoli, or if he took them with him and arranged their return with Shebani at the airport. As to whether he recalled asking a taxi driver about the carpet seller (which he had referred to in his first precognition, when he had suggested he did not buy carpets on 20 December), the applicant said he might have done so, and that he had a memory of asking a taxi driver who laughed at his request. He could not remember where this took place, but he had only ever used a taxi in Malta on perhaps two occasions. One such occasion was when he took a taxi to the airport on 21 December, the other was when he was transported to the Holiday Inn on 8 December courtesy of Swissair. Asked whether the taxi ride on 21 December could have been the occasion when he asked the driver about the carpet shop, the applicant replied that it might have been.

27.81 As regards the telephone call to Mr Fhimah's apartment on the morning of 21 December, although the applicant accepted at interview that the call had been made, he could not recall why he had made it. Initially, he said that he could not recall if he spoke to Mr Fhimah or to anyone else. However, he then went on to say that he recalled telephoning the number but that as the person who answered was drunk, and was not Mr Fhimah, he had hung up. He also recalled Mr Fhimah telling him that he would be staying at his (Mr Fhimah's) apartment that night. The applicant was asked if he had ever enquired with Mr Fhimah as to who had answered the telephone, to which he replied that he had not done so on the basis that he respected Mr Fhimah's privacy. He had then taken a taxi from the hotel to the airport. Asked if he specifically recalled taking a taxi on this occasion (which, based on previous

responses at interview, it seemed he did), he could not say for certain and appeared to be basing his account on an assumption that he must have taken a taxi.

27.82 Later in the interview the applicant said that, although he recalled telephoning Mr Fhimah's flat on an occasion when a man answered who seemed to him to be drunk, he could not say for certain that this occurred on 21 December 1988. As to why he had called Mr Fhimah on 21 December, the applicant explained that this might have been to ask for a lift to the airport, or to remind Mr Fhimah about the banister. The applicant's attention was drawn to previous accounts in the twelfth and twenty-eighth supplementary precognitions in which he had said that on 20 December Mr Fhimah picked up keys for his room at the Central Hotel before driving the applicant to the Holiday Inn. In particular, it was put to him that this suggested Mr Fhimah had intended to stay at the Central Hotel that night.

27.83 The applicant was also unable to recall at interview the events at Luqa airport on 21 December. In particular, he could not remember whether he met Shebani there, although he explained that normally whenever he flew with LAA he would receive assistance at the local LAA station manager's office. Shebani could arrange it so that the applicant did not have to check-in formally at the desk in Malta. Shebani would take the applicant's ticket and obtain a boarding pass for him from the check-in staff, while the applicant waited in Shebani's office. This was a privilege he received as an employee of LAA. In addition, because of his seniority, he would never stand in a queue for check-in and would always be assisted by the local LAA staff. The applicant said that the check-in could be done on his behalf only if he had no luggage to check-in and there was no need for items to be weighed and tags attached. Later in the interview, however, he said that even if he had luggage the LAA staff would arrange for it to be weighed and tagged on his behalf.

27.84 The applicant was asked at interview about the carpets he had bought and how they had been transported to Libya (whether on 21 December or on some other occasion). He explained that as he was an LAA employee, such items could normally be sent on the aircraft as company cargo, or else under the name of a member of the

crew on the flight. Carpets, he said, would be treated as cargo rather than as normal hold luggage, and for normal passengers a cargo manifest would have to be completed. Depending on the capacity of the aircraft, there might not be room for all the cargo and luggage, and so items might be sent on a separate flight. He could not, however, remember anything specific about 21 December. When referred to the evidence of Anna Attard, who was recorded as having dealt with the applicant's check in on that day, he reiterated that he might not have been present with her when she checked him in. He accepted that, based on the records, he did not check in any luggage.

27.85 According to Mr Beckett and Mr Duff the applicant's account that on 21 December Shebani had arranged on his behalf for carpets to be placed on flight LN147 to Tripoli was a concern to the defence. This was because documentary evidence relating to that flight indicated that the applicant had not checked in any baggage. According to Mr Beckett, one of the difficulties in the Crown's case was the absence of any record of an unaccompanied bag on flight KM180. However, the applicant's account demonstrated that items could in fact be placed on to a flight without any record. More generally, Mr Beckett considered that the applicant's accounts of the assistance he received from Shebani would have been detrimental to his defence as it would have bolstered the Crown submission that the applicant received special assistance at Luqa.

27.86 The applicant was also asked at interview why it was that he had stayed in Malta for such a short time on this occasion, having arrived in the evening of one day and left on the morning of the next. He suggested that this was not exceptional, and that he had stayed in Malta for short periods on other occasions. In his thirty-third supplementary precognition, the applicant had indicated that there were two "good reasons" for wishing to return to Tripoli quickly after completing his business in Malta. First, he was in the middle of organising the Paris-Dakar rally, and the cars were due to arrive in Libya in the New Year. Secondly, his sister had given birth to a baby girl the week before, and there was a celebratory party taking place on the evening of 21 December which he wanted to attend. At interview he repeated these as possible reasons for his return, and also suggested that he might have wanted to return quickly to avoid his wife being suspicious about the length of time he was away.

27.87 As well as being mutually inconsistent, the applicant's various accounts of his movements on 20 and 21 December are in stark contrast to his position at the Salinger interview, in which he denied being in Malta at all on those dates. The applicant's explanation as to why he adopted that position with Salinger is linked to his explanation for denying that he had a coded passport, an issue dealt with in the following section.

Use of coded passport

27.88 Crucial to the trial court's basis for drawing an adverse inference about the applicant's visit to Malta on 20 and 21 December was his use of the Abdusamad passport. At the Salinger interview the applicant claimed not to know that name and said that it might be another person. Later in the interview he claimed to have only one passport. Again, the trial court rejected these denials.

27.89 In his precognitions and at interview with the Commission the applicant accepted that the Abdusamad passport belonged to him. In his eighteenth supplementary precognition the applicant explained that he had asked Hinshiri to obtain the passport in connection with his involvement in deals for aircraft spare parts, as he wanted to avoid being caught breaching the US sanctions in place against Libya. Hinshiri was the Minister of Justice for Tripoli at the time. In the same precognition and in his twenty-first supplementary precognition the applicant stated that the passport was obtained specifically for a trip he undertook to Nigeria in 1987 when he was part of a larger delegation which included Nassr Ashur. He confirmed that they returned from Nigeria to Tripoli via Zurich and Malta. His account bears out the part of the indictment which alleged that the applicant travelled from Zurich to Malta with Ashur and stayed with him in the Holiday Inn in Malta on 22 August 1987 before travelling to Tripoli the following day. However, in his sixth and eighth supplementary precognitions, when the applicant addressed the suggestion that he had stayed in Malta with Ashur, he failed to provide any of the details he mentioned in the subsequent precognitions, stating only that he recalled meeting Ashur in Malta on one occasion and that he recalled Ashur being on the same flight as him from Zurich to Malta on one occasion. Moreover, it is apparent that in August 1987 Ashur also

travelled under a coded passport, in the name of Nassr Salem, and that he booked into the hotel in Malta using that name when in the company of the applicant. However, in the sixth and eighth supplementary precognitions the applicant denied knowing that Ashur used that name.

27.90 In his precognitions the applicant insisted that he did nothing unusual or wrong on any of his trips abroad, including those which he made using a coded passport. Although the Abdusamad passport was issued in relation to obtaining spare parts for LAA, the applicant said he also used it for other purposes if it was the first one that came to hand. For example, he had used it on a pilgrimage to Mecca. In addition, when the passport in his own name was not in his possession, such as when it was at various embassies having visas applied, he would use the coded passport.

27.91 The applicant's account to the Commission broadly reflects the contents of his precognitions, although he could not recall whether he had requested Hinshiri to arrange for the Abdusamad passport to be issued to him. His initial position at interview was that the passport was issued at the request of the Minister of Transport and that approval was granted by the JSO (as it had to be for all coded passports), although he accepted that it was possible that he had asked Hinshiri to arrange for the passport to be issued. He explained that the form submitted by the JSO for the issuing of the coded passport (CP 1776, spoken to in evidence by Moloud Gharour 59/7783 et seq) was not a request that he be given such a passport, but rather was a pro forma which confirmed the JSO's permission for him to be given one. The applicant was also insistent that the issuing of the coded passport was not sinister. He pointed out that if he had been sent by Libya to plant a bomb on an aeroplane a new coded passport could have been issued to him within an hour, and that there were other ways in which he could have travelled to Malta without leaving any record (as described below). He confirmed that the Abdusamad passport was issued simply because he was dealing with people in Nigeria regarding aircraft parts, and he was concerned that Nigeria was a corrupt country with links to the West and he wanted to protect himself. According to the applicant the trip to Nigeria was the first occasion in which he was involved in "sanctions busting".

27.92 The coded passport issue is a further example of the applicant's accounts diverging between what he originally said at the Salinger interview and what he told his legal representatives and latterly the Commission. At his Commission interview he explained that he had lied about the passport at the Salinger interview in order to avoid being asked further questions about it. He had been shocked when he was asked such questions as he was told the interview was to be about his family, not the matters in the indictment. Asked if he had considered stopping the interview, he said that he was concerned that this would have been viewed as him escaping from answering the questions, and that it would be a problem "because I never did an interview."

27.93 As to his reasons for using the Abdusamad passport on 20 and 21 December 1988, the first recorded account given by the applicant is contained in his first supplementary precognition. There he said that he did not use the Abdusamad passport for any clandestine reason and that one possibility was that it was simply the first passport that came to hand. Another possibility, he said, was that he did not have his normal passport available. As it was almost the end of the year, it was possible that he had lodged his normal passport with the bank to obtain his allocation of US dollars before the year end, when he would lose his entitlement to that year's allocation. In his nineteenth supplementary precognition he simply could not recall why he had used that particular passport, but his guess was that he probably did not tell his wife that he was going to Malta and by using the coded passport his wife would see that his normal passport was still in the house. In his twenty-eighth supplementary precognition he stated that he definitely did not tell his wife that he was going to Malta as he had only just returned from Czechoslovakia and did not want to upset her by letting her think that he was going away overnight to a place where Libyans went in order to drink and womanise. He repeated that, as his own passport was almost certainly in his house, if he had taken it his wife would have known he was travelling abroad. He therefore used the coded passport which he brought from his office.

27.94 The applicant offered two explanations to the Commission for using the coded passport. The first was that he had to travel with this passport in order to take advantage of the allocation of US dollars to which the stamp in the coded passport

entitled him (as described above). Although this is not an explanation found in any of his precognitions, the applicant maintained that he had raised it with his representatives. It differs from the account given in the early precognitions, in which his reason for using the coded passport was because the passport in his own name was lodged at the bank. The second possible explanation was that he wanted to conceal his travels from his wife. His position was that, having just returned from Czechoslovakia, his wife would have been suspicious of him travelling abroad again so soon. According to the applicant, he would have lied to her about where he was going, and would likely have told her that he was going to a friend's wedding in Libya.

27.95 The applicant also stated at interview that he was issued with further coded passports, in the names Ali Mohammed Salah in 1989 ("the Salah passport") and Abdelbaset Zorgani in 1990 ("the Zorgani passport"). The reason that he was issued with the Salah passport was that his wife discovered the Abdusamad passport by chance in his jacket pocket and was upset about it, following which he made a promise to her that he would not use it again. As to the Zorgani passport, he obtained this in 1990 in connection with a trip to Brazil. His wife was abroad and had locked his normal passport in a safe in his house. He had therefore persuaded the head of the passport authority, who was a friend and neighbour of his, to issue him with a coded passport for the Brazil trip.

After the indictment was issued against him he was prevented from travelling abroad by the Libyan authorities, and his children were issued with coded passports in false names to allow them to travel abroad safely. He also knew people in LAA and in oil companies who had coded passports to protect them when they tried to arrange spare parts, in breach of the US sanctions.

27.96 The issue of these further coded passports is of relevance to the Crown's submissions that following its use on 20 and 21 December 1988 the Abdusamad passport was never used again, and that despite a period of frequent travel up to that point, as evidenced by the stamps in his standard passport, it appeared that the applicant did not travel abroad again until May 1989. At precognition the applicant

sought to explain the lack of travel during that period by the facts that ABH had been wound up and that there was no longer any need to travel to Zurich. He also said that at the beginning of 1989 he was working on the Paris-Dakar rally, that Ramadan was early in 1989 and that he had other business interests in Libya, all of which meant that there was no need to travel from Libya.

27.97 However, at interview with the Commission the applicant explained that he had in fact travelled between the start of 1989 and May of that year and had used the Salah passport to do so. In particular, he travelled to Saudi Arabia towards the end of Ramadan in April of that year. As to why the Abdusamad passport was not used again after 21 December 1988, the applicant explained that his wife discovered it in his jacket and became upset, as a result of which he promised not to use it again. According to the applicant his wife even crossed out pages of the passport so that he could not use it again. He therefore returned it to the immigration authorities.

27.98 As indicated, the applicant's acceptance that he used the Abdusamad passport to travel to Malta on 20 December 1988 is in complete contrast to his denial of this at the Salinger interview. According to his thirty-fifth defence precognition the applicant stated that he realised that although some of the list of allegations that his lawyers had told him had been made, such as the trip to Malta on the coded passport, were true, others were false. He said that he felt at the Salinger interview, that he should deny even the true allegations because if he admitted these then people would be inclined to believe the truth of other allegations that were false, and he would be reported as admitting some of the charges. The applicant had been concerned when Salinger asked about his visit to Malta on 20 and 21 December, as his lawyer had told him not to discuss this and, had he been present, his lawyer would have told Salinger not to ask about it. In these circumstances, the applicant felt he should deny it, just as he had the other allegations.

27.99 In addition, the applicant is noted as saying that his wife, who was pregnant at the time, was present during the interview and did not know about the existence of the coded passport or the trip to Malta on 20 December. Because of this he could not answer these questions. It is worth noting that this latter explanation contrasts with the position adopted by the applicant at interview with the Commission, as stated

above, which was that his wife knew about the coded passport during the early part of 1989 when, following a row between them, he had promised not to use it again.

Ability to travel to Malta without leaving a record

27.100 In his precognitions and at interview the applicant said that his use of a coded passport on 20 and 21 December 1988 did not justify a suspicious inference being drawn against him. For example, he referred to matters such as his visit to Mr Vassallo and the fact that he stayed at a hotel on 20 December as being inconsistent with any suggestion that he was attempting to conceal his presence in Malta.

27.101 According to the applicant's precognitions if he had wanted to conceal his presence in Malta he could have travelled there without leaving any record rather than use a coded passport which could be traced back to him. In particular, he referred to an arrangement in place between Libya and Malta whereby Libyans could use an identification card to enter Malta, rather than a passport. Indeed, according to the applicant, he could travel to Malta without even using an identity card. In his first supplementary precognition he stated:

> *"... as a Libyan Arab Airlines employee and as someone well known, both at Tripoli airport and at the airport in Malta I could get away with not using a passport or an identification card at all, but simply by wearing my Libyan Arab Airlines uniform. This may sound ridiculous but it is true. If I wanted to do something clandestine in such a way that there would be absolutely no record at all of me going from Tripoli to Malta and back again, I could do it."*

27.102 He repeated this claim in his nineteenth supplementary precognition, in which he explained that, if he wanted to travel secretly, he could do so in his uniform or use an immigration pass which did not even have a photograph on it.

27.103 At interview with the Commission the applicant confirmed that in his capacity as a flight dispatcher he had an LAA uniform. This allowed him to travel with LAA crew and enter through arrival gates designated for crew without having to show a passport or complete immigration procedures and without the need for an

entry visa. According to the applicant, this was part of an international aviation agreement. However, when travelling by this means, a "general declaration", a document listing the aircraft and its crew, including the flight dispatcher's name, required to be provided to the destination airport upon arrival there. In that sense, there would still be a record of his entry into a country, although the applicant's understanding was that these records were only required to be held for six months and could then be destroyed. In addition, the name recorded on the declaration did not have to be a full name and could just be, for example, "Mohammed".

27.104 While at interview the applicant could not recall having worn his uniform to travel in this way in December 1988, he explained that he had travelled in this manner on many occasions. This included occasions when he travelled with a charter or VIP flight, or if he was doing a "route check", which he had to complete periodically to maintain his flight dispatcher's licence. He still had to carry some identification, either his passport or a flight dispatcher's identification booklet or an LAA identification card, which he could use to show that he was a member of the LAA crew.

27.105 The applicant's account at interview is consistent with the terms of his second supplementary precognition, in which he said that he often travelled with aircraft when he was doing route checks. He also mentioned in the same precognition travelling as a flight dispatcher to Senegal for the visit of a high level delegation. On the other hand, in his eighth supplementary precognition the applicant claimed never to have travelled with crew as a flight dispatcher. He then suggested, however, that the only occasion he had done so was when he flew with a delegation to Senegal.

27.106 As regards the identification card which allowed Libyans to travel to Malta without a passport, the applicant claimed at interview that he never possessed such a card. He understood that when they were used to travel to Malta the cards themselves were not stamped to record entry or exit, but that embarkation cards still required to be completed. According to the applicant this contrasted with the position when one flew as crew, when there was no requirement to complete embarkation cards.

27.107 Although the applicant considered that these alternative methods of entering Malta demonstrated that his use of the coded passport was not sinister, his former representatives informed the Commission that they believed such information was potentially detrimental to his defence. In particular, Mr Beckett expressed concern that if this evidence had been brought out at trial, it had the potential to remove the need for the Crown to prove that 7 December 1988 was the date on which the clothing was purchased from Gauci's shop.

27.108 In the Commission's view while such evidence might ultimately have proved unhelpful to the defence it also begs the question as to why the applicant would not have chosen to travel to Malta by this means on the crucial dates in December 1988, assuming these visits were connected to the bombing. In other words, if the applicant did indeed purchase the clothing on 7 December 1988 it is difficult to understand why he travelled to Malta using a passport in his own name when there was an alternative means available to him which would have minimised the possibility of his movements being discovered. Similarly, while the applicant's use of a coded passport on 20-21 December 1988 went some way to obscuring his presence in Malta during that visit, it still required him to complete embarkation cards, something which he could have avoided had he travelled in uniform.

Mr Fhimah's diary entries

27.109 The trial court's approach to this issue was that, having acquitted Mr Fhimah, the entries in his diary were inadmissible as evidence against the applicant. It is nevertheless worth noting the applicant's position in respect of these.

27.110 As explained, the applicant confirmed in his precognitions and at interview that he intended to travel through Malta on 15 December 1988 en route from Prague, and that the entry in Mr Fhimah's diary for that date, "Abdelbaset coming from Zurich", related to this.

27.111 As regards the other entries of interest in Mr Fhimah's diary ie, the entry "Take taggs from Air Malta OK" on the page for 15 December 1988, and "take tags from the airport (Abdulbaset/Abdussalam)" in the notes towards the end of the diary,

there is very little comment about this by the applicant in his defence precognitions. In the Salinger interview, when it was put to him that he or Mr Fhimah had unlawfully obtained Air Malta luggage tags at Luqa airport, the applicant replied that it would not be easy simply to obtain such tags, and that he was surprised by this allegation.

27.112 At interview with the Commission the applicant's position was that questions regarding the diary entries were for Mr Fhimah to answer. Asked if the entry in the diary "take tags from the airport (Abdulbaset/Abdussalam)" related to him, he claimed that he did not know and that Mr Fhimah would have to be asked. He added, however, that there was an Abdelbaset who worked at the "lost and found" department at Tripoli airport, and that a number of people named Abdelbaset and Abdussalam worked for LAA. He claimed to know nothing about the diary entries. Tags for various airlines, including Air Malta, were, he said, available at Tripoli airport, and were stored in a stationery cupboard in the lost and found department. According to the applicant certain witnesses on Mr Fhimah's list could speak to this. As LAA were the handling agents for a number of airlines at Tripoli airport, there would be no difficulty in obtaining tags for other airlines there. He said that various members of the lost and found department and check-in counter staff at Tripoli airport had access to the tags. It was suggested to the applicant that the evidence at trial indicated that baggage tags were stored securely at Luqa airport, but the applicant said that he was not familiar with the procedures there.

27.113 When referred to his comments at the Salinger interview on the subject, the applicant reiterated that it would not be easy for him to obtain tags from Luqa airport (which was what Mr Salinger had asked him about) but that it would be easy for him to obtain Air Malta tags from Tripoli airport.

27.114 The issue of the diary entries is revisited in the Commission's assessment of Mr Fhimah's accounts below.

<u>Applicant's Swiss bank account</u>

27.115 The various advantages and disadvantages of the applicant giving evidence are set out in a discussion paper dated 16 November 2000 prepared by the applicant's

trial representatives (see appendix to chapter 18). Among the factors listed is a comment that the applicant's finances "make other people's pale into insignificance". There is, however, little reference to this issue in the applicant's defence precognitions. At interview with the Commission the applicant explained that he had told his lawyers that there was no problem with his Swiss bank account and that he had consented to the Crown having access to the account records. The maximum amount held in the account was, he said, around $900,000.

27.116 At interview Mr Beckett, Mr Duff and Mr Taylor all expressed concern about the Swiss bank account and referred to the attempts made by the Crown to access it through proceedings in Switzerland. According to Mr Beckett and Mr Taylor the defence successfully challenged a motion by the Crown to postpone the commencement of the trial, as this would have given the Crown sufficient time to obtain and lodge the bank records under section 67 of the Act. According to Mr Taylor, the fact that the trial was not postponed was a matter of "great relief".

27.117 Following the interviews with the former representatives, the Commission obtained from Crown Office and D&G further details about the applicant's Swiss bank account. This included a full statement of the account from 12 January 1987 (when it was opened) to 31 August 1999, documentation relating to a number of transactions on the account, and a report dated 1 July 2000 by one of the depute fiscals involved in the case (see appendix). Thereafter the Commission obtained a statement from the applicant, the terms of which he later agreed (see appendix of Commission interviews). During the interview the applicant referred to a document he had written for his representatives at trial which he said explained a number of the transactions in his account. The Commission subsequently obtained this document from the applicant's present solicitor, along with a letter containing the applicant's translations of the document (see appendix).

27.118 It is apparent that a number of the payments on the account relate to business transactions which are vouched by documentary productions in the possession of the defence or by witnesses precognosced by the defence. For example, there are payments into the account from Toyota and Honda in early 1989, which clearly relate to the Paris to Dakar rally. There are also transactions in 1987 regarding a letter of

credit which, on the basis of defence productions and the applicant's statement to the Commission, relate to a deal for the purchase of a million gas lighters from an Italian company.

27.119 However, potentially the most significant transaction is a payment into the account of $972,532.50 on 13 October 1989 by the Libyan People's Office in Madrid ("the Madrid payment"). Immediately prior to that deposit, the balance on the account had been just under $22,000, and the largest balance it had ever held was less than $210,000 (most of which related to the letter of credit for the lighters deal in 1987). Following the Madrid payment, a number of large debits were made, as follows:

- on 14 December 1989 $90,000 was paid to Najeb Sawedeg;
- on 28 May 1990 $228,000 was paid by cheque to Al Huda Trading Co Ltd;
- on 9 July 1990 $336,000 was paid by cheque to Al Huda Trading Co Ltd;
- on 1 October 1991 $150,000 was paid by cheque to Mohamed A Akasha; and
- on 21 October 1991 $100,000 was paid by cheque to Mr Fauzi Abd Gashut.

27.120 At interview the applicant was asked to explain these transactions. He stated that the Madrid payment was made at the instruction of Hinshiri who was Minister of Justice at the time but who had previously been Minister of Transport. According to the applicant the money belonged to the Ministry of Transport and it related to a transaction to purchase fifty cars for the Libyan government. Initially it had been proposed that the government purchase fifty Spanish cars for nearly $1,000,000. However, Hinshiri had then been advised that Spanish cars had never before been used in Libya, so the applicant and Badri Hassan were asked to obtain offers for the sale of Peugeot cars instead. The applicant stated that he brokered a deal with a businessman named Mr Hejazi who offered to sell fifty Peugeot cars at a cost of $11,300 each. Mr Hejazi owned the Al Huda Trading Company, and the two cheques to Al Huda related to this deal, the first cheque being for the initial twenty Peugeot cars, the second for the remaining thirty.

27.121 The applicant's explanation for the payments to Al Huda reflects the contents of his sixteenth supplementary precognition, in which he described purchasing about fifty Peugeot cars for the Ministry of Transport and the Ministry of Justice through the "El Hoda" company. According to the precognition, he made this deal himself.

27.122 As regards the payment of $90,000 to Najeb Sawedeg, a director of the Swiss based company Metrovia, according to the depute fiscal's report Mr Sawedeg had informed Swiss officials that the sum was repayment of a personal loan he had made to the applicant to allow the applicant to build a house in Tripoli. A similar explanation was given by Mr Sawedeg in his defence precognition (see appendix). There he said that he had lent the applicant 100,000 dinars at the time the applicant was building his house, and that the applicant had repaid him in dollars outside Libya. If accurate, this would suggest that the applicant used money from the Madrid payment to settle a personal debt.

27.123 However, at interview the applicant refuted Mr Sawedeg's explanation. He stated that the money was to be paid to a British company that had been involved in a deal to supply spare parts for computers in the Libyan Ministry of Justice. The applicant stated that he wrote a letter of authority so that the money could be paid to Mr Sawedeg, who then transferred the money to the company in the UK. He stated that he could not arrange the transfer to the UK company himself as he was in Tripoli. He denied that Mr Sawedeg had ever lent him any money. He stated that he had once assisted Mr Sawedeg in obtaining permission from the immigration authorities for sixty labourers and that in return for this favour Mr Sawedeg bought him furniture for his house, but he said that there was never any suggestion that he should pay Mr Sawedeg back for this.

27.124 The applicant's explanation is reflected in the document he wrote for his representatives at trial. It is also of note that reference is made in Mr Sawedeg's defence precognition to a deal ABH did for spare parts for computers. Although he was unsure, Mr Sawedeg also thought the applicant had approached him about a possible deal for computer spare parts.

27.125 As regards the cheques for $150,000 and $100,000 paid in October 1991 to Mohamed Akasha and Fauzi Gashut respectively, the applicant told the Commission that both payments were made on the instructions of Hinshiri. The applicant knew Akasha, who he said was a neighbour of his and a relative of Hinshiri. He said that he was told the payment to Akasha was to allow Akasha to conduct business in Cairo. He had heard that Akasha had repaid the money, but he was not certain about these matters. He confirmed that Akasha worked at the Libyan Embassy in Brazil for some years, and that they had travelled to Brazil together on one occasion to speak to a Brazilian company about a proposal to build schools in Libya. However, the money paid to Akasha was not connected to the schools project. As regards Fauzi Gashut, he did not know this person and did not know what the payment was in connection with. He had simply paid the money as requested by Hinshiri.

27.126 A further transaction worthy of note, because of its proximity to the bombing and its connection to the applicant's movements, is the transfer of $50,018.47 to the account of Abdulmajid Arebi ("Arebi") in Prague on 19 October 1988. According to the depute fiscal's report, this coincided with the applicant's arrival in Zurich from Prague. This transfer followed a payment of $69,964.62 into applicant's account from the Libyan Arab Foreign Bank in Tripoli on 23 August 1988.

27.127 According to the applicant the payment in August 1988 from the bank in Tripoli was part of the commission payable to him, Badri Hassan, Arebi and Mohammed Dazza for their work in arranging the lighters deal mentioned above. The applicant explained that, as Arebi was setting up the Al Khadra business in Prague, they agreed that he should be paid his share of the commission from the dollars that had been credited to the applicant's account, hence the money transfer on 19 October 1988.

27.128 In his defence precognitions (see appendix) Arebi said the payment was in respect of a loan from the applicant to assist in the setting up of the Al Khadra business and that this was repaid in part in 1997 when Arebi bought the applicant a vehicle. This explanation was put to the applicant at interview and it was explained to him that in one of his own defence precognitions (the thirtieth supplementary precognition) he had agreed with it. The applicant's response at interview was first to

suggest that the money paid to Arebi might have been in part a loan and in part commission, and then to suggest that it was possible he might be mistaken and that the payment might in fact have been a loan.

Conclusions

The applicant's position on the Salinger interview

27.129 Before considering the significance of the applicant's various accounts, it is important first to set out his position on the Salinger interview, and his reasons for participating in it.

27.130 Detailed explanations for the applicant's participation in the interviews are contained in his thirty-fifth supplementary defence precognition and in the final, undated, precognition which follows it. According to these, by the time of the Salinger interview the applicant had not seen the indictment either in Arabic or in English and had only been given a summary of its contents by his lawyers. He claimed only to have found out that there was to be an interview on the morning that it took place and, as mentioned above, had been informed it would only be about himself and his family and would not touch upon the allegations against him. He understood that the interview had been set up through Ibrahim Bishari, who was the Foreign Minister at the time, and who apparently knew Salinger. He was informed that the Libyan judge who was investigating the case had agreed to the interview on the basis that it did not relate to the allegations, and the advice his lawyer gave was to avoid answering questions on the allegations.

27.131 The purpose of the interview, as he understood it, was to show the US that the suspects were still alive, as there had been rumours that that they had been executed. There was also concern that the US might try to bomb Libya again. Indeed, in his undated final precognition the applicant suggests that there was a "state of terror" in Libya as to the possibility that the US might be planning a military operation. He also refers to himself and Mr Fhimah being under "hard emotional pressure" in their relationships with others. The applicant's wife and family were present when Salinger and his entourage arrived, but although he had been expecting

a lawyer and a translator to attend the interview, nobody else turned up. The applicant requested that the interview be delayed but Salinger told him that this was not possible, that it would be straightforward and that he should just do it in English.

27.132 As mentioned above, the applicant claimed to have been "very surprised" when Salinger proceeded to ask him questions about the allegations, but there was nobody present to advise him or to tell Salinger not to ask such questions. He felt put on the spot. As Salinger was a guest in his house, it was socially and culturally difficult for the applicant simply to refuse to answer questions or to ask him to leave. The reason he gave for denying the allegations he knew to be true was to avoid people assuming that, if he admitted some of the charges, they must all be true. In his final, undated precognition the applicant also said that if he was to admit such matters, it would have put his country in a "difficult position".

27.133 The applicant also suggested that he felt at times during the interview that his English was not good enough to answer the questions properly. For example, he had wanted to say that he was "shocked" about the allegations but as he did not know the correct word he used the word "surprised", which, according to the precognition, was clearly a "ridiculous understatement". In his final, undated precognition the applicant said that he had answered questions "inappropriately", had done his best to provide answers "without broaching any topics directly or rejecting them in one way or another in accordance with my understanding of the word 'avoidance'" (referring to the lawyer's advice that he "avoid" discussing the allegations) and that he had a limited ability to express himself. Having to do so in a foreign language during a highly sensitive interview and under "hard emotional pressure" led him to give answers which may not have been "the truth of what [he] really wanted to say". However, according to the precognition, this did not mean that he was trying to deny or avoid some answers. When he was asked questions about matters he had been told he would not be asked about and should not discuss, he became "confused" and expressed his answers according to his "modest language and legal knowledge".

27.134 The applicant explained to the Commission that, as he understood it, the purpose of the interview had not been to afford him the opportunity to deny the charges, and that he was shocked when Salinger asked him about them. He repeated

that at the time of the interview he had received only a summary of the charges against him. At first he suggested that he had not been told specifically about the dates 7 and 21 December 1988, but he then said that he could not recall whether he was told about these dates.

27.135 The applicant also reiterated that his lawyer had told him to "avoid" talking about his job or his travels, and that the interview was only to be about his family. As indicated, the applicant relied on the terms of this advice as a means of explaining why he lied to Salinger. He was therefore asked what he understood by the word "avoid", in the context of his lawyer's advice, and whether he had interpreted this as lying about the issues. He said in response that he had perhaps misunderstood the advice. He repeated that he was ashamed to have lied, but said that he did not know how to avoid the questions. Later in the interview he said that by lying he had followed his lawyer's advice to avoid the questions, although he emphasised that none of his lawyers had ever advised him to lie. He also feared that if he had admitted any allegations further questions would have followed. When asked whether he considered stopping the interview he replied that this might have been viewed as escaping the questions and might have caused problems.

27.136 The applicant was also asked why he had shown Salinger his standard passport when he had received advice not to discuss his travels. According to the applicant the interview was already finished when he produced his passport.

27.137 The applicant accepted at interview that the Crown would have used the Salinger interviews to undermine his credibility if he had given evidence. He explained that his defence team had asked him what he would say when that happened, and he had told them that he could only apologise to everyone for lying and that he was ashamed to have done so.

Consideration

27.138 It is important to bear in mind in any assessment of the applicant's accounts that each of them was given in English rather than in his native tongue. It is obvious from the Salinger and Commission interviews, for example, that on occasions the

applicant had difficulty expressing himself clearly. Caution is therefore required in analysing his accounts, particularly his defence precognitions, where the words which appear are perhaps those of the precognoscer rather than his own. On the other hand, the applicant speaks English relatively well, having previously studied the subject in Cardiff, and he did not request the assistance of an interpreter at any stage in his interview with the Commission. In these circumstances the Commission does not consider the inconsistencies in his accounts are merely the result of communication difficulties.

27.139 It is also important to acknowledge the lengthy periods between the bombing (December 1988) and the first notification to the applicant of the allegations against him (November 1991), between that time and the period in which he was precognosced (1999-2000) and between then and his Commission interview (2004). In the Commission's view one would expect to encounter inconsistencies and uncertainties in any case in which detailed accounts had been taken over so many years. On the other hand, there is little expression of such uncertainty across the applicant's precognitions, particularly in respect of the accounts given as to his movements on crucial dates in December 1988. While it is possible that the precognoscer has failed to record the applicant's hesitancy about such matters, this seems unlikely given that the principal purpose of obtaining these accounts would have been to assess how well the applicant would be able to account for himself in evidence.

27.140 Dealing first with the Salinger interview, in the Commission's view the circumstances in which this took place are extraordinary. Not only are television interviews of named suspects rare, the grave nature of the charges against the applicant, the international attention which they attracted, and the potential implications, political and otherwise, of the applicant's actions and responses to questions, made the situation unique. In terms of the applicant's accounts, following the issuing of the indictments there was widespread fear in Libya as to the possibility of a further US military attack. If true, this suggests that the purpose of the interview was diplomatic rather than to provide the applicant with an opportunity to state freely his position on the allegations. It would also suggest that the impetus for the interviews may have come from persons other than the applicant and Mr Fhimah

themselves. Some support for this conclusion is provided by Salinger himself who in evidence (72/8857) suggests that Bishari (then Libya's Foreign Minister) was instrumental in the matter. Indeed, according to the applicant's precognitions he and Mr Fhimah were under "hard emotional pressure" in connection with the interviews, which would no doubt be true if there was a nationwide fear of military repercussions.

27.141 For these reasons, the Commission does not consider it appropriate to draw any adverse inferences from the applicant's false denials at the Salinger interview and from the sharp inconsistencies between this account and those which he gave to his representatives and to the Commission.

27.142 The same cannot, however, be said of the applicant's other accounts, all of which were given freely. While the Commission acknowledges that the defence might have been able to lead evidence in support of some aspects of the applicant's accounts, in its view the inconsistencies and other difficulties in his accounts provide firm support for the advice given by his representatives not to give evidence (see chapter 18). In particular, the Commission believes that there was a real risk that the trial court would have viewed his explanations for his movements on 20 and 21 December 1988, and his use of the Abdusamad passport on that occasion, as weak or unconvincing. In addition, his acceptance that he was seconded to the JSO at one stage and retained close links with that organisation and its senior figures was likely only to fortify the court's conclusions in this area. The same would apply to the applicant's admissions as to his links to MEBO and his involvement in what, on any view, was "military procurement" (see the trial court's judgment at paragraph 88). More generally, his background as a flight dispatcher, station manager and member of the Tripoli airport committee would undoubtedly have added weight to the conclusion that he had at least some familiarity with airport security. The Commission can also see the potential for further criminative inferences had the applicant been subjected to cross examination as to the movements of large sums of money in his personal Swiss bank account, particularly in light of the fact that nearly $1m was held and distributed by him on behalf of Hinshiri. Finally, an admission by the applicant in evidence that he could travel to Malta without leaving a trace of his movements might have rendered it unnecessary for the Crown to prove that the purchase of the clothing took place on 7 December 1988 (although see the earlier observations on this issue).

27.143 The effect of these conclusions upon the Commission's assessment of the interests of justice is addressed following the analysis of Mr Fhimah's accounts below.

(ii) Al Amin Khalifa Fhimah

General

27.144 The accounts of Mr Fhimah in relation to a number of areas of the Crown case are detailed in the following section. Notwithstanding his acquittal by the trial court, the explanations he offers remain relevant to the Commission's assessment of whether, overall, it is in the interests of justice for the Commission to refer the applicant's case to the High Court. Most obviously, Mr Fhimah accompanied the applicant on 20 December 1988, and there was evidence suggesting the applicant telephoned his apartment on the morning of 21 December. In addition, while the Commission acknowledges that the trial court, having acquitted Mr Fhimah, took the view that the entries in his diary were inadmissible against the applicant, the Commission believes Mr Fhimah's explanations for these entries remain relevant to its consideration of whether it is in the interests of justice that a reference is made.

27.145 As with the applicant, there are three main sources for the accounts given by Mr Fhimah.

27.146 The first is the interview by Pierre Salinger in November 1991 ("the Salinger interview"), the transcript of which formed Crown production 1728.

27.147 Secondly, MacKechnie and Associates provided the Commission with a copy of Mr Fhimah's defence precognition (see appendix). The precognition was compiled by Mr Fhimah's trial representatives, who had attempted to consolidate into one comprehensive precognition the accounts given by him at his various meetings with them. It is apparent from the terms of the document provided by MacKechnie and Associates, which is headed "Draft no.9", that it is not in final form. Subsequent to receiving it, the Commission obtained copies of electronic files from McGrigors,

which included a later draft of the precognition ("draft 10", dated 26 September 2000). Where appropriate, reference is also made to that version of the precognition, and the relevant pages are included in the appendix. Also contained in the McGrigors files were a number of separate notes on consultations with Mr Fhimah, reference to one of which is made below.

27.148 Lastly, members of the Commission's enquiry team conducted an interview of Mr Fhimah in Tripoli from 21 to 23 February 2005. The interview was not concluded at that stage owing to a member of Mr Fhimah's family falling ill, but was completed over two days on 15 and 16 May 2005. The interviews took place in the presence of Mr Fhimah's lawyer, Azza Maghur, and the Libyan Attorney General, Mohammed Al Maremi. The Chief Libyan Prosecutor, Dr Yousef Souf, was also present for some sections of the interviews. Mr Fhimah spoke Arabic during the interviews and his answers were translated by an interpreter employed by the Commission. The statements compiled by the Commission were approved and signed by Mr Fhimah, who read over them with his lawyer. Arabic versions of the statements were produced and Mr Fhimah also had access to these. Copies of the English versions of the statements are contained in the appendix of Commission interviews.

Mr Fhimah's accounts

Background and connections to the applicant

27.149 The following brief details are taken from Mr Fhimah's defence precognition and his first statement to the Commission.

27.150 Mr Fhimah joined LAA four years after the applicant and, like him, trained in the USA to become a flight dispatcher, obtaining the FAA qualification in 1977. He worked for LAA as a flight dispatcher and in other positions until 1982, when he was appointed station manager at Luqa airport. He knew the applicant as a colleague at LAA and in that capacity they were friendly. Mr Fhimah thought it possible that the applicant was on the committee which interviewed him for the position of station manager at Luqa, a post which he held until 1 November 1988. Towards the end of his time as station manager, there was an overlap period when he handed over

responsibility to his replacement, Mustapha Shebani. During his time at Luqa, Mr Fhimah saw little or nothing of the applicant, although the applicant may have visited Malta during that period. He came to know of the applicant's appointment to head of airline security while he was working in Malta.

27.151 On his return to Tripoli in November 1988, Mr Fhimah continued to work for LAA as a flight dispatcher, but applied for unpaid leave to pursue the setting up of Medtours tourist agency in Malta. In the period in which Mr Fhimah handed over as station manager at Luqa to Shebani, the applicant had come to know of Mr Fhimah's plans to establish Medtours, and the applicant agreed to tell his relative in ADWOC about the agency. The applicant also enlisted Mr Fhimah's help in obtaining items for his house from Malta, including a water pump and carpets (an arrangement which is relevant to Mr Fhimah's explanations for the trip to Malta on 20 December 1988, below). The applicant also suggested to Mr Fhimah that Medtours could become involved in organising the Paris-Dakar rally, and under that company's name, Mr Fhimah was involved in arranging the Libyan leg of the rally in 1989-1990, along with the applicant and others. He was also involved in organising the 1990-1991 rally, the profit from which he invested in a farm.

Salinger interview regarding movements in December 1988

27.152 In his interview with Pierre Salinger Mr Fhimah was asked about the applicant's movements in December 1988. He responded by referring to the fact that, immediately after he had ceased working in Malta, some time around November or December 1988, the applicant told him that he was building a house and required materials for it. Mr Fhimah referred specifically to the applicant having asked him to obtain a handrail for the stairs in the house. He confirmed to Salinger that he himself was in Malta for much of December. He referred to the need to commence paperwork for Medtours and to settle personal business there, such as paying utility bills. He was asked about the entry in his diary which referred to the applicant flying to Malta from Zurich and he stated that he did not remember accurately and that it would be better for him to see the diary for himself. Mr Fhimah was asked if he had seen the applicant at Luqa airport on 17 December and he responded that he had not, but that

the following day he received a message from the applicant through Mr Vassallo who passed on his regards.

27.153 Mr Fhimah was informed by Salinger that the indictment against him alleged that he travelled with the applicant to Malta on 20 December 1988 while the applicant was using a false passport in a false name, and that they were carrying a Samsonite suitcase. Mr Fhimah replied that he did not recall the incident in question and that all he remembered was that he had extended leave in Malta. He suggested that the Maltese authorities could confirm the information about the passport. He was asked about 21 December and he stated that he was in Malta preparing the paperwork for his company and that he was not at the airport or travelling on that day.

27.154 In his defence precognition and his Commission interview Mr Fhimah gave detailed accounts regarding his movements in December 1988 and his association with the applicant at that time.

Diary entry for 15 December 1988

27.155 As regards Mr Fhimah's diary entry recording the applicant's expected arrival in Malta on 15 December, in his defence precognition Mr Fhimah stated that he got a note of the applicant's expected arrival from the LAA office in Valetta. He stated that the applicant would have telexed the details or left a telephone message there for him (pp 122-3). He indicated that, until he received the message, he did not know that the applicant was in Zurich. The reason for the applicant leaving the message for him was, he said, that the applicant had asked him to buy a carpet for the applicant's new house, but he did not want to choose one on the applicant's behalf. He referred to the entries in his diary (under 28 November 1988 and at the end of the diary) which stated "contact the carpet salesman". He suggested that these related to the applicant's request and to his previous attempts to obtain a catalogue of carpets for the applicant to pick from (pp 118, 132).

27.156 Mr Fhimah stated a number of times in the precognition that he would not have met the applicant at the airport (pp 45, 123-4, 215). His position was that the note in his diary about 15 December was not to remind him to meet the applicant at

the airport but simply to remind him that the applicant was arriving. He referred to the fact that Shebani would be at the airport to meet the applicant. At interview with the Commission, on the other hand, Mr Fhimah suggested that the purpose in his being told of the applicant's arrival would have been so that he or Shebani would meet the applicant at the airport, despite the fact that he was no longer station manager there (p 33 of February statement). When asked why he might have wished to meet the applicant on 15 December he stated that it was possibly because the applicant was a friend, possibly because the applicant wanted his help to buy something or possibly because he wanted something from the applicant. He stated that he could provide a full explanation but that "it would take too much time" (p 34 of February statement).

17 December 1988

27.157 In relation to the applicant being in Malta on 17 December, Mr Fhimah confirmed in his precognition what he had said in the Salinger interview, namely that he did not know the applicant had been there until Mr Vassallo spoke to him the following day. However, contrary to what he said at the Salinger interview, he suggested that it was not the applicant but Shebani who asked Mr Vassallo to pass the applicant's message on to him (p 45). He described in the precognition Mr Vassallo asking him "Where were you last night?" before recounting the applicant's message. However, Mr Fhimah also described in his precognition having been in a meeting with Mr Vassallo and another individual, Sami, about Medtours on the night of 17 December. Accordingly it is not clear why Mr Vassallo only informed Mr Fhimah of the applicant's message on the following day, or why Mr Vassallo would question Mr Fhimah's whereabouts on the night of 17 December.

Events in Tripoli on 18-20 December 1988

27.158 Mr Fhimah gave a number of reasons in his precognition for flying to Libya on 18 December. He stated that he wanted to get away from Sami, who he had decided should not be allowed to become a partner in Medtours. He also suggested that he wanted to see his family. However, he stated that the main reason for travelling was to meet ADWOC and also to meet the applicant to discuss ADWOC

and the rally. He suggested that he telephoned both ADWOC and the applicant from his apartment on 18 December, in front of Mr Vassallo (pp 46-7, 127).

27.159 Mr Fhimah's account of contacting the applicant on 18 December is broadly reflected in his statement to the Commission in which he stated that his memory of this had been prompted by the entries in Mr Vassallo's diary and his own (pp 35-6 of February statement). He indicated that his trip to Libya was not connected in any way to his failure to meet the applicant on 17 December. He suggested that the entry in Mr Vassallo's diary for 18 December – "Lamin left for Tripoli. Talk with Mr Baset." (CP 531) – might have related to his desire to discuss with the applicant the applicant's contact at ADWOC or the carpets the applicant had asked him to buy (p 37 of February statement). He was asked why, if his main purpose in returning to Tripoli was to meet ADWOC, Mr Vassallo's diary recorded that it was to talk to the applicant. He said Mr Vassallo had made a mistake with this entry, and that Mr Vassallo had perhaps become confused because he overheard Mr Fhimah speaking to the applicant on the telephone when he was at Mr Fhimah's apartment on the morning of 18 December.

27.160 According to his defence precognition (pp 127-8) and his statement to the Commission (p 35 of February statement), Mr Fhimah flew back to Tripoli on the morning of 18 December on the ADWOC charter flight. He stated that he met with an individual named Abdussalam Alderbassi at the offices of ADWOC on the morning of 19 December (pp 47, 128) to discuss the possibility of Medtours and ADWOC doing business. Thereafter he telephoned the applicant and the applicant told him that it was too late for Medtours to become involved in the 1988/89 rally, and that he had not yet contacted his brother in law at ADWOC.

27.161 At page 47 of his defence precognition it is suggested that Mr Fhimah then had a meeting with the applicant and others about the rally when Mr Fhimah explained his plans for Medtours to ensure that he would be involved in the 1989/90 rally. However, at page 129 of the precognition there is no reference to such a meeting having taken place on this date, nor did Mr Fhimah mention such a meeting when interviewed by the Commission. Indeed, he specifically denied in his Commission interview that such a meeting took place, and when the passage from

page 47 of his precognition was put to him he reiterated that no such meeting had occurred in December 1988, although he said he had a meeting regarding the rally in April 1989.

27.162 Moreover, whilst both the applicant and Mr Fhimah stated that the agreement for them to travel together to Malta on 20 December was made while Mr Fhimah was in Tripoli, Mr Fhimah was inconsistent in his accounts regarding the reasons for the applicant travelling with him on that date.

27.163 At one stage in his precognition Mr Fhimah suggested that the visit by the applicant on 20 December was for the purpose of seeing Mr Fhimah's business and meeting Mr Vassallo (p 47), but elsewhere in his precognition (p 197), and at interview with the Commission (pp 42-3 of February statement), the purpose was said to be the buying of carpets. This is noteworthy as it reflects the pattern in the applicant's accounts, as described above, where initially the applicant also said the purpose of the trip was related to seeing Mr Fhimah's business, but in a later precognition stated the purpose to be the buying of carpets. This may be indicative of the fact that, as both the applicant and Mr Fhimah accepted, their accounts were influenced by their ongoing discussions with each other.

Flight to Malta on 20 December 1988

27.164 As regards 20 December, Mr Fhimah indicated at interview that his memory of the trip was good and that, because it was the first time he had travelled with the applicant, this assisted his memory of events (p 43; p 45 of February statement). Indeed, he stated that this made the trip "quite hard to forget" (p 39 of February statement). His position at precognition (pp 48, 129) and to the Commission (p 43 of February statement) was that he had arranged with the applicant over the telephone that if the applicant intended to travel with him to Malta, they should meet at Tripoli airport, which they had. His position was that as the arrangement to travel together on 20 December was only made at the airport, it was not a pre-planned trip (p 45 of February statement). He stated that he had planned to travel on the LAA flight but the applicant turned up in time for them to travel on the earlier Air Malta flight (p 130; p 45 of February statement).

27.165 In his precognition (p 130) and in his Commission interview (p 46 of February statement), Mr Fhimah stated that he did not himself check in any luggage on 20 December as he carried only hand luggage. He stated that he could not remember if the applicant carried any luggage (although in his precognition he is then recorded as stating specifically that the applicant did not check anything in or get anything tagged). He did not see the applicant's passport at this stage. They sat together on the flight but, unlike the applicant, he did not remember anything else about the journey.

27.166 Mr Fhimah's position was that, on arrival at Luqa, he and the applicant passed through the airport as normal. Contrary to the applicant's position at interview with the Commission, Mr Fhimah refuted the suggestion that in his position as former station manager he could have assisted the applicant through customs by lessening the chances of being stopped by officials. He also denied having his airport pass with him, stating that he kept it in Malta (pp 47-8 of February statement).

27.167 Mr Fhimah could not recall the applicant collecting anything from the luggage carousel on arrival and his position to the Commission was that he was certain the applicant did not have any luggage with him as their arrival through passport control was very fast. At this stage in the interview Mr Fhimah stated that they were "racing against time" at the airport as the applicant was on his way to buy carpets and if he had bags with him it would have caused a delay as he would have had to wait for his baggage to be searched (p 47 of February statement). However, when Mr Fhimah was questioned as to why he and the applicant visited Mr Vassallo's house if they were in such a hurry to get to the carpet seller, he stated that they were not in a rush as the carpet seller traded from a house and did not run a shop that opened only for set hours. He said that they never had it in their minds that they were in a hurry, as rushing was not going to affect the business they were in Malta to conduct (p 8 of May statement).

27.168 At precognition Mr Fhimah stated that he did not see Majid at Luqa airport and that he did not meet Mr Vassallo there (p 196). Moreover, he did not know Mohammed Abouagela Masud (p 159; p 8 of February statement, when he was shown

the photograph, allegedly of Masud, in CP 313) and had no dealings with him (p 226). He considered the name strange as it did not include a family name (p 159).

Visit to Mr Vassallo's house on 20 December 1988

27.169 Mr Fhimah was consistent in stating that he and the applicant went from Luqa airport to Mr Vassallo's house. Although initially in his precognition he suggested that they probably made their way there in his Hyundai car (p 48) he later suggested that it was highly likely they used Shebani's car because he would have been at the airport at the time of their arrival (and the applicant) would have sought him out. He was "pretty sure" Shebani offered them his car, which he and the applicant recalled was a white Volvo (pp 196, 202).

27.170 In the later draft of his precognition, Mr Fhimah is recorded as stating that he was "five million per cent certain" that he and the applicant met Shebani at the airport, and went on to state that Shebani offered them the use of his car, which again Mr Fhimah stated was the white Volvo (p 82-3 of the draft 10 precognition). However, in his interview with the Commission Mr Fhimah stated that he did not recall meeting anyone at the airport on 20 December, and that nobody was waiting for him there. He did not recall the applicant meeting Shebani at the airport (pp 48-9 of February statement).

27.171 The issue of the car he and the applicant took from the airport was another matter about which Mr Fhimah was markedly inconsistent. To cite one example, despite his final position in his defence precognition (above) being that he used Shebani's white Volvo, in his statement to the Commission he said he was "perfectly clear" that it was a Honda Civic that he drove on 20 December (pp 49-50 of February statement).

27.172 As regards the reasons for visiting Mr Vassallo on 20 December, as stated above, Mr Fhimah's initial position at precognition was that the applicant came with him to Malta to meet Mr Vassallo and to check out their business (pp 47-8). There are, however, also inconsistencies in Mr Fhimah's explanations of the reasons for the visit to Mr Vassallo, and as to whether or not it was a business visit. Although he

stated to the Commission that this was the purpose of the visit (pp 50-1 of February statement) he later said that the applicant's presence at Mr Vassallo's house was "incidental" (p 3 of May statement) and in a passage in his precognition he stated that there was no discussion of business at all (p 201).

27.173 On the other hand, Mr Fhimah, like the applicant, was consistent in describing the conversation that took place in Mr Vassallo's house about the applicant's need for a banister, and the applicant's admiration for the banister in Mr Vassallo's house. Fhimah confirmed that he subsequently visited the applicant's house in Tripoli with two Maltese carpenters to provide a quote for this work.

Events after leaving Mr Vassallo's house

27.174 At precognition Mr Fhimah stated that after leaving Mr Vassallo's house he and the applicant went to the Central Hotel which was close by, and he thought the applicant stayed in the car while he went into the hotel. He stated that en route from Mr Vassallo to the Central Hotel he pointed out to the applicant the offices he hoped to rent for Medtours (p 197). Later in the precognition he also suggested that after getting a key from the Central Hotel he went to get his own car, the blue Hyundai, while the applicant waited in the other car. They then transferred to the Hyundai, and Mr Fhimah drove them to the carpet seller (pp 202-3). He had clearly discussed this matter with the applicant, as he said his memory of events was based 75% on his own recollections and 25% on those of the applicant. He left Shebani's car (which, in the precognition, Mr Fhimah still described as the white Volvo) outside the Central Hotel, and left the key for it under a tyre.

27.175 Mr Fhimah's account to the Commission broadly reflects this version of events, except that he maintained it was the LAA's Honda Civic rather than the white Volvo which he drove. He said that Shebani had told him to leave the Honda in Mosta (where the Central Hotel was situated, p 10 of May statement) and that he had him this as soon as he arrived at Luqa airport. He was reminded that he had previously told the Commission he did not recall meeting anyone at the airport when he arrived, and that he did not recall the applicant meeting Shebani there. He responded that he must have met Shebani there in order to get the key for the car from

him, and that Shebani must have been at the airport as there was an LAA flight leaving (pp 18-19 of May statement). This reflects the applicant's position that although he could not recall meeting Shebani at the airport they must have done so in order to have use of his car (which the applicant said was the white Volvo).

27.176 It is of note that, in contrast to these accounts by both the applicant and Mr Fhimah, Shebani stated in a supplementary defence precognition (see appendix) that he would "definitely" remember meeting the applicant and Mr Fhimah if they arrived together off a flight in Malta. He stated that he did not meet them at the airport. He also said he "never" lent the white Volvo to Mr Fhimah.

27.177 Mr Fhimah indicated that he took the applicant to the carpenter's workshop en route to the carpet seller, but that it was closed (p 132 of precognition; p 5 of May statement). In his precognition he was consistent in describing visiting the carpet seller with the applicant after leaving Mr Vassallo's house, and he estimated they were there for around half an hour (pp 49, 132, 197-8, 203). The dealer displayed the carpets in his garage (p 197). At page 49 he stated that he thought the applicant bought a carpet but he could not be sure. However, in subsequent passages of the precognition he stated that there was not a good selection but that the applicant bought two carpets (pp 132, 198, 203). He maintained a similar account at interview with the Commission when he also stated that the carpet seller told them that he was waiting for another order of carpets to come in, and he gave the applicant a catalogue showing these carpets (pp 6-7 of May statement). Mr Fhimah could not recall how much the applicant paid for the carpets but he said that generally carpets of the size he thought the applicant bought (3x4 metres) were about 100 US dollars. He did not think the carpets the applicant bought were bulky as they were folded very professionally (p 9 of May statement).

Events at the Holiday Inn

27.178 Mr Fhimah was also consistent in his account to the Commission that after visiting the carpet seller he took the applicant to the Holiday Inn, where the applicant had chosen to stay in preference to the Central Hotel (p 48; p 9 of May statement).

27.179 In his precognition Mr Fhimah stated that the Holiday Inn employee at check-in was an ex-employee of LAA, and that he told the applicant to give her his LAA identification so he could obtain the airline discount. He recalled, however, that the applicant did not have his identification and the woman had to discuss with her manager whether to give the applicant the discount or not.

27.180 Mr Fhimah went on in his precognition to say that the applicant gave his passport to the woman and that Mr Fhimah saw that it was in a different name from the applicant's correct name. The precognition records that he thought this "odd". However, he said nothing about it to the applicant at the time, because he did not want to be involved in the applicant's business (p 49). Later in the precognition he suggested that although it was impossible to remember precisely who handled the passport he thought the woman passed the passport back to him first, and he noticed that it was "big and abnormal", like two passports stuck together, and he saw the name on it. He went on to state that by the time of precognition he appreciated the applicant's role in circumventing sanctions, and the applicant's need for a coded passport in that capacity. Mr Fhimah said that it would not have been uncommon to obtain such a passport but that he never done it, and it had never occurred to him that one could do it (p 72). He confirmed that he did not know the applicant had a passport in another name until he saw it at the Holiday Inn (p 159). In the subsequent draft of the precognition, Mr Fhimah confirmed that he was generally aware of the use of passports in false names and when he saw the applicant's passport he did not immediately jump to the conclusion that the applicant was an intelligence agent, but he thought it "rather strange" (p 87 of the draft 10 precognition).

27.181 At interview with the Commission Mr Fhimah gave a detailed account of events at check-in at the Holiday Inn. In relation to the applicant's passport, he stated that the woman handed the passport back to him rather than to the applicant who was further away. He noticed that the passport was thick; it felt like two or three passports together. He then opened it out of curiosity and saw the name on it before handing it to the applicant. He said that it did not arouse any suspicions in him that the name was different from the applicant's correct name. It was, he said, a personal matter for the applicant and he did not ask the applicant about it. He was asked if he was surprised about the passport not being in the applicant's own name and he said that he

was not, as so many people had been issued with coded passports. He said that the use of coded passports was known to him at the time, that everyone knew coded passports were used. He said he knew about them as station manager, particularly because they were used by foreigners (pp 13-15 of May statement). It was suggested to him that he had been recorded in his precognition as having thought the applicant having a passport in another name "odd", but he refuted this and said he knew about coded passports at the time and did not find it odd (p 17 of May statement).

27.182 Mr Fhimah went on to state to the Commission that he could not recall for certain if he went to the applicant's hotel room but it was possible. He stated that he perhaps stayed with the applicant at the Holiday Inn for an hour or less, that they "definitely" had drinks and that they were talking to each other as friends (p 16 of May statement). No such details were given in his precognition, in which he said he was "absolutely certain" that he stayed no longer than ten to fifteen minutes with the applicant, including the time it took to check in (pp 87-8 of the draft 10 precognition) and that, once he dropped the applicant off, it was like "getting rid of a burden" as, although he respected the applicant, they were not very alike (p 204).

27.183 At interview with the Commission Mr Fhimah stated that he did not know what the applicant did after they parted company at the Holiday Inn. The applicant was not waiting for anyone and he did not see anyone waiting for the applicant.

He stated that there was no arrangement for him to meet the applicant again that night or the following morning (p 19 of May statement). He said he went out drinking in Malta that night, although he was not consistent about precisely where he went.

Events on the morning of 21 December 1988

27.184 At page 50 of his precognition Mr Fhimah stated that when he left the applicant at the Holiday Inn it was agreed that the applicant would call him in the morning. After he went out drinking he stayed at the Central Hotel rather than his own apartment. He awoke at 9.30am, having slept in. After phoning the Holiday Inn and being advised that the applicant had checked out he telephoned Shebani at the airport. Shebani joked with him that he had "done it again". He spoke to the applicant, who was at the airport, and apologised. He told the applicant to leave a shopping list with Shebani and the applicant said he would be back in the New Year. The applicant had tried to phone his flat and someone had answered who was not Mr Fhimah, so it was either a wrong number or a crossed line.

27.185 However, this fairly precise account of the morning of 21 December was contradicted later in the precognition. At page 198 Mr Fhimah is recorded as stating that when he left the applicant at the Holiday Inn there was no arrangement for them to speak to each other the following day. He said that they agreed that if he found the carpet seller had new stock he would contact the applicant. He gave the applicant the telephone number for his apartment. He was asked at precognition why he gave the applicant the apartment number when he was staying at the Central Hotel and he stated that there was no point in giving the applicant the number for the Central Hotel as it "would not be the way to do things. If you give someone a number to a hotel it is almost like saying you don't really want him to call you." He went on to say that he thought the applicant would contact him if he did not get back to the applicant about the carpets and the staircase and if he gave the applicant the hotel number the applicant would have called there first. He stated that the applicant knew he could be contacted at the apartment or at the LAA office.

27.186 This account of events is clearly somewhat confused. It is followed by a note in the precognition, inserted by Mr Fhimah's representatives, stating that Mr Fhimah was "very vague" on this point and that his explanation for why he gave the applicant the apartment number, and why the applicant would phone the apartment when Mr Fhimah was checked into the Central Hotel, was "not at all convincing" and was "definitely a weakness".

27.187 At page 205 of the precognition Mr Fhimah indicated that although he had previously been relatively certain that he stayed at the Central Hotel on the night of 20 December, since "new things" had arisen he was no longer sure. It is not clear what the new matters were that caused him to doubt whether he stayed at the Central Hotel that night, but in the subsequent draft of the precognition he was said to be "almost 100% certain" that he stayed there (p 89 of draft 10 precognition) and his position to the Commission was that it was "most likely" that he stayed there (p 20 of May statement).

27.188 In relation to the telephone call the applicant made to Mr Fhimah's apartment on the morning of 21 December Mr Fhimah had said at page 50 of the precognition that there was an arrangement for the applicant to call him that morning. However, at page 198 he denied that there was such an arrangement. At page 208 he stated that there was an arrangement on 20 December that he would speak to the applicant about the carpets and the stairs "within a couple of days but not the next day". He suggested that the applicant might have telephoned the apartment to remind him about the staircase and to make sure he did not forget. He stated that the applicant was an early riser so 7am would not be early for him (p 200).

27.189 However, Mr Fhimah informed the Commission that he had asked the applicant about the phone call and why the applicant contacted the apartment when he knew Mr Fhimah was staying at the Central Hotel. According to Mr Fhimah, the applicant said he had tried both the apartment and the hotel, but there was no answer at the hotel. Mr Fhimah's explanation at precognition was put to him, namely that he did not give the applicant the hotel number as there would have been "no point" and "it would not be the way to do things", but he maintained that the applicant had all his telephone numbers. He went on to state that the reason he gave the applicant the apartment number was so that the applicant could contact him over the following months, not the following morning, and that by the time the applicant called him he might have moved back into his apartment (pp 21-23 of May statement).

27.190 Mr Fhimah was also asked at interview if he knew why the applicant was trying to contact him on the morning of 21 December. He stated that the applicant

had told him the reason was to obtain the telephone number for flight enquiries, as the applicant had wanted to find out about any delays to his flight. However, although the applicant was himself inconsistent as to the reasons for the call (as described above), at no time in any of his accounts did give this explanation.

27.191 Mr Fhimah was also asked at interview about who had answered the telephone at his flat when the applicant called if, as Mr Fhimah indicated, there was nobody staying there. The only explanation offered by Mr Fhimah in the precognition was that it was a wrong number or a crossed line (p 50), and at interview he repeated those explanations, although under reference to Crown productions 540 and 725 he accepted that the number dialled was the number for his apartment (pp 21-2 of May statement).

27.192 Mr Fhimah stated to the Commission that he had no idea who answered the telephone, but he referred to the fact that he would let friends and colleagues stay at the flat when they were in Malta. He also said that the owner of the flat had a key and that his neighbour knew he left a key on the ledge above the door in case of emergency. He seemed to recall an occasion or two when his neighbour said she had opened his door to answer his phone (pp 23-4 of May statement). It was put to him that he had not offered such explanations in his precognition. (In fact he did refer to the owner having a key and the neighbour knowing about the key on the ledge (p 155), but there was no suggestion that his neighbour had ever answered his telephone. Moreover, a consultation note dated 7 August 2000 (see appendix), indicates that he specifically stated that nobody stayed in the flat on 20 December and that it was not possible that it had been another Libyan who had answered the telephone.) He repeated to the Commission that, when asked by his representatives about this matter during the preparations for trial, he thought the number must have been mis-dialled or was a crossed line, and he said he himself had experienced crossed lines in Malta. He was informed of the applicant's position that, when he dialled the number, a man answered who he thought was drunk. Mr Fhimah was asked if he might have stayed in the flat but he said that he never did so on the first night back from Libya, and he would not use the flat when he was drunk (p 25 of May statement).

27.193 As to other events on 21 December, in contrast to his initial account of having telephoned the Holiday Inn and then Shebani at the airport and having spoken to the applicant (p 50 of precognition), Mr Fhimah stated later in his precognition that he did not recall anything about that day. Although there were entries in his diary about preliminary arrangements for the Medtours office, he did not know what he did that day. He stated that he had no wish to see the applicant and that he definitely did not go with him to the airport that morning (p 199).

27.194 Mr Fhimah told the Commission that he could not recall what he did on 21 December but he stated that, based on diary entries, he had a particular programme to follow. He said that he could not recall if he went to the airport on 21 December, but that he would have gone there only if he was travelling (p 26 of May statement). Later, he stated that he did not recall if he spoke to the applicant at any time that day. He was asked if he recalled speaking to Shebani and he said that he could not remember but that it was possible, and that he might have asked Shebani whether or not the applicant had left. The account in page 50 of his precognition was put to him but he did not recall any of the details recorded there (p 57 of May statement).

27.195 Again, it is noteworthy that the pattern of explanations offered by Mr Fhimah appears to some extent to mirror those of the applicant. The applicant's position in his initial precognition was that he arranged to meet Mr Fhimah on the morning of 21 December and that Mr Fhimah gave him the number for his apartment the night before, but when he called Mr Fhimah on the morning of 21 December a drunken person answered. He therefore decided to go back to Tripoli and, when he got to the airport, Shebani received a call from Mr Fhimah apologising and explaining that he had slept in at the hotel and had contacted the Holiday Inn and found that the applicant had checked out. This account closely reflects Mr Fhimah's version of events at page 50 of his precognition. However, as with Mr Fhimah, in subsequent precognitions of the applicant, and in his interview with the Commission, this somewhat precise recollection fell away.

Diary entries regarding tags

27.196 As well as his recollections of events in December 1988, the other aspect of Mr Fhimah's accounts which the Commission considers to be important in its review of the applicant's case concerns the entries in his diary which relate to tags. One entry, under 15 December 1988, was translated as "Take TAGGS from Air Malta OK" (CP 1614). This was the same date under which Mr Fhimah had recorded that the applicant was arriving from Zurich. The second, an entry at the end of the diary on page 59, was translated as "Take/collect tags from the airport (Abdulbaset/Abdussalam)". The Crown invited the trial court to infer that these entries related to Mr Fhimah obtaining tags from Luqa airport for the applicant.

27.197 Mr Fhimah was asked about entries in his diary during the Salinger interview. He responded that he had not seen his diary for a long time and could not remember what he had written in it. He suggested that he would have to see the diary to explain the entries. As regards the allegation that he had written a reminder to obtain Air Malta baggage tags, he responded that tags did not mean anything to airlines and could be easily accessible to anybody, that they were available on the counter. This included Libyan and Air Malta tags. He was asked if it could be the case that Abdelbaset was the man who asked him for tags and he responded that it was possible, but that he knew many people called Abdelbaset and that it was not significant. He also suggested that if the diary had been important he would not have left it to be found by the police.

27.198 In his precognition and his interview with the Commission Mr Fhimah offered further explanations for the diary entries. He denied that the entries related to the applicant. He stated to the Commission that the securing of a regular supply of luggage tags was an almost permanent problem for the LAA station at Luqa. The tags would be dispatched from the main store of the administration in Tripoli airport, but constant requests had to be made there to send more tags. He explained that there was an arrangement with Air Malta whereby Air Malta would supply tags for use on LAA flights if the stock of LAA tags at Luqa ran out (pp 44-5 of May statement).

27.199 Mr Fhimah went on to tell the Commission that the entries in his diary regarding tags had nothing to do with any conspiracy. He said that when he left his post as station manager he was aware that the station needed tags, so in order to try to resolve this problem for Shebani he tried to arrange for a large quantity of boxes of tags to be sent from Tripoli, and the entries in his diary were to remind him of this (pp 48-9 of May statement). He further stated that the entry for 15 December related to a request to an Air Malta supervisor for tags, again to help Shebani. The fact that it was entered under 15 December did not mean the request was made that day. He was referred to Shebani's defence precognition which suggested that Shebani himself spoke to Air Malta about the tags, and he was asked why, if Shebani was trying to resolve the issue, he was also involved in obtaining tags, given that he was no longer station manager. He stated that it was Shebani's request that he be involved, and he was simply assisting a colleague (pp 51-53 of May statement).

27.200 This explanation broadly mirrors the contents of his defence precognition. There Mr Fhimah stated that the entry under 15 December meant "get tags from Air Malta" and that the "OK" meant he had to do something and had done it. He explained that Shebani asked him to talk to an Air Malta official to ensure Air Malta would continue providing tags until the problem could be resolved of LAA not providing enough tags to the station in Malta. He stated that when he finished at Luqa he left some stationery for Shebani but the tags were running out. He felt obliged to solve this problem for Shebani. He said he was sure he would have made a phone call about this as there was no question of him taking the tags. He reiterated that it was simply a matter of ensuring that Air Malta would continue to allow LAA to use their tags. He said the person he would have spoken to at Air Malta would have been Mario Ghio. He thought that he would have made the call to Mr Ghio on 15 December, but if Mr Ghio was not there he would have spoken to somebody else (pp 118, 124-5).

27.201 As regards page 59 of the diary and the entry "Take/collect tags from the airport (Abdulbaset/Abdussalam)", Mr Fhimah stated to the Commission that Abdelbaset and Abdussalam were the names of two different people and the airport in question was Tripoli airport. He stated that these individuals were in charge of the lost and found property department at Tripoli airport ("the lost and found") and that

they dispatched labels and tags. He stated that the entry in the diary was to remind him that when he went to Tripoli he should speak to these people to arrange for them to load tags onto his flight when he was returning to Malta, so that he could pass the tags on to Shebani. He stated that he spoke to Abdussalam (i.e. Abdussalam El Ghawi) about this but was not sure if he spoke to Abdelbaset about it (pp 53-4 of May statement). He stated that the Abdelbaset in question was not the applicant and that there were never any circumstances whatsoever in which he might have obtained tags for the applicant (p 55 of May statement).

27.202 Mr Fhimah's explanations here broadly reflect parts of his precognition. There he stated that the diary entry related to taking tags from Tripoli airport. He thought that the list of entries on page 59 of the diary, of which the note about tags formed part, would have been written when he was just about to leave Malta for Tripoli, which he did on 29 December. He said it was a list of things requiring to be done, some in Malta and some in Libya. He said that the two individuals, Abdelbaset and Abdussalam, worked in the lost and found (pp 126, 134). However, he was inconsistent about whether, having obtained the tags from Tripoli airport, he subsequently accompanied the tags to Malta. At one stage in the precognition he said he could not recall whether he sent the tags or took them with him to Malta (p 134), but earlier he had stated that he did not take the tags from Libya to Malta (p 126). The indication he gave to the Commission was that he arranged for the tags to be returned on the flight with him (p 54 of May statement).

27.203 It is worth noting briefly the contents of defence precognitions of the two individuals, Abdussalam El Ghawi and Abdelbaset Shukri (see appendix), who were suggested to be the people to whom Mr Fhimah's diary entry referred.

27.204 El Ghawi confirmed in his first defence precognition that in 1988 he was a shift supervisor in the lost and found section at Tripoli airport. His recollection was that sometime in 1988, after Mr Fhimah had finished as station manager at Luqa, he received a telephone call from him requesting tags for Shebani. El Ghawi suggested that when the telephone call had first come in from Mr Fhimah to the lost and found, it had been Abdelbaset Shukri who had answered. He said in this precognition that Shukri worked in the lost and found. He described entering the lost and found office

and seeing the handset of the telephone lying off the hook, and when he picked it up Mr Fhimah was on the line. He said that he was sure Mr Fhimah was in Tripoli at the time, and that after Mr Fhimah had requested tags he had gone to the store and obtained three boxes of tags which he passed to Mr Fhimah at the airport later that day. He accompanied Mr Fhimah to a check in desk and saw him arranging to have the boxes of tags put on a flight to Malta. He assumed that Mr Fhimah also travelled on that flight to Malta.

27.205 Although El Ghawi suggested in this first precognition that Shukri worked in the lost and found, in supplementary precognitions he stated that Shukri worked in ramp control and did not work in the lost and found. Indeed, he stated that there was nobody named Abdelbaset working in the lost and found in 1988. He suggested that Shukri must have been passing the lost and found office by chance and picked up the telephone when Mr Fhimah called.

27.206 Shukri confirmed at precognition that he worked in ramp control at Tripoli airport in 1988 but that he never worked in the lost and found, although he said he was often in that department and if the phone rang there, he would have answered it. He did not rule out having received a call there from Mr Fhimah about tags, but he had no memory of it.

27.207 It was pointed out to Mr Fhimah during his interview with the Commission that although El Ghawi had provided a precognition supporting Mr Fhimah's explanation about obtaining tags, El Ghawi had also said there was nobody named Abdelbaset working at the lost and found at that time. Mr Fhimah was also informed that Shukri worked in ramp control, not the lost and found. Mr Fhimah's position was that El Ghawi was the important person to speak to about the tags, that he was the most senior person at the lost and found and that he was a member of staff whom Mr Fhimah knew well (pp 53-5 of May statement).

27.208 The difficulties that the precognitions of El Ghawi and Shukri caused to Mr Fhimah's explanation for the reference to Abdelbaset in his diary appear to be reflected in the later draft of his pre-trial precognition. There, although Mr Fhimah maintained that he spoke to El Ghawi about tags, he stated that the only explanation

he could provide about the name Abdelbaset was that he had spoken to someone in the lost and found by that name, whom he also told about the problem with tags, and that he wrote both names down to remind him to speak to one or other of these two people when he went to see them at Tripoli airport. He stated that he could not recall the second name of the Abdelbaset in question. When it was suggested to him that it might be Shukri, who worked in ramp control, who picked up the phone in the lost and found office and spoke to him, he said that this might have occurred but he could not be sure. He said that he was sure he spoke to someone named Abdelbaset there, because he wrote that name down (pp 143-4 of the draft 10 precognition).

Commission's consideration of Mr Fhimah's accounts

27.209 As with the applicant, the Commission acknowledges that in any assessment of Mr Fhimah's position allowance must be given for the lengthy periods between the dates on which he gave his accounts to Salinger, his representatives at trial and the Commission, and between those dates and the events he was being asked to recall. Again, however, whilst some uncertainties in his accounts must be expected, in the main Mr Fhimah's precognition did not record any hesitation on his part. Indeed, his position to the Commission was that he had a good memory of events on 20 December. As such, the demonstrable inconsistencies about matters such as the reasons for the applicant travelling with him on 20 December, the car/s he drove that night, the reasons for visiting Mr Vassallo's house and the matters discussed there cannot be convincingly explained by the passage of time.

27.210 Moreover, given that the applicant and Mr Fhimah both acknowledged that they had discussed these matters and had influenced each other's recollections, the inconsistencies that persist between their accounts must also have some bearing on the view to be taken of Mr Fhimah's accounts.

27.211 In considering what Mr Fhimah has said about the case the Commission has taken account of what his own representatives considered to be unconvincing explanations about the reasons for the telephone call the applicant made to his apartment on 21 December, and the fact that Mr Fhimah said he was not at the airport that day, or in the applicant's company after leaving him at the Holiday Inn on 20

December. In the circumstances, the Commission is of the view that Mr Fhimah's accounts in relation to the events on these dates, although generally supportive of the applicant's innocence, are not compellingly so.

27.212 Likewise, although the accounts Mr Fhimah gave of the entries in his diary are supported to some extent by the precognitions of other witnesses and exclude any connection to the applicant, there remain difficulties with his explanations. Not least is the indication that, contrary to Mr Fhimah's position, there was nobody named Abdelbaset working at the lost and found in Tripoli airport in 1988.

(iii) Conclusions regarding the interests of justice

27.213 The Commission has considered the versions of events offered by the applicant and Mr Fhimah. In particular, the Commission notes the unsatisfactory nature of aspects of their explanations and the various contradictions which are apparent both within and between their accounts. Although it is possible there are innocent reasons for these deficiencies, they do lead the Commission to have reservations about the credibility and reliability of both as witnesses.

27.214 It cannot be said, however, that the applicant's accounts amount to a confession of guilt.

27.215 The Commission's assessment of whether or not it is in the interests of justice to refer the applicant's case has not been restricted to a consideration of the accounts of the applicant and Mr Fhimah. For example, the Commission has considered the terms of the letter from Libya to the United Nations Security Council (see appendix), referred to in chapter 1. In the letter Libya stated that it "has facilitated the bringing to justice of the two suspects charged with the bombing of Pan AM 103, and accepts responsibility for the actions of its officials" and that it agreed to pay compensation to the relatives of the victims. Having taken into account both the wording of the letter (which simply mirrors the requests to Libya by the UK and USA included in UN resolution 731), and the political and diplomatic context in which it was submitted, the Commission does not consider it appropriate to regard the letter as amounting to confirmation by Libya of the applicant's guilt.

27.216 In accordance with the principles set out at the beginning of this chapter the Commission has also considered whether, notwithstanding its conclusion that a miscarriage of justice may have occurred, the entirety of the evidence considered by it points irrefutably to the applicant's guilt. The Commission's conclusion is that it does not.

27.217 In these circumstances the Commission believes not only that there may have been a miscarriage of justice in the applicant's case, but also that it is in the interests of justice to refer the case to the High Court. The Commission accordingly does so.