SUMMARY OF GROUNDS OF APPEAL 1 & 2

The following documents were lodged with the Court and are attached:

- Grounds of Appeal 1 and 2 (“The Grounds”)
- Appellant’s Written Submissions (“WS”) in support of Grounds 1 and 2

PREFACE:

Grounds of Appeal 1 and 2 were argued before the Court in full at a public hearing which took place between 28 April and 19 May 2009. This document summarises those grounds and the arguments made on the appellant’s behalf at that hearing.

On 7th July 2009 the Court indicated that one of its number, Lord Wheatley, had been hospitalised. It continued consideration of the grounds of appeal.

On 18th August 2009 the appellant, with leave of the court, abandoned his appeal. No judgement or opinion has therefore been handed down by the Court upon these submissions

The note of appeal contained a number of other grounds of appeal that are not covered by this summary. These other grounds can be grouped as follows:

(a) Grounds 3.1- 3.3 included some of the reasons why the SCCRC referred the case back to the Appeal Court, along with additional arguments. These grounds had been finalised and were due to be argued in a two-part hearing, beginning in November 2009. These grounds set out various ways in which the appellant argues that he was denied a fair trial. These include the way in which the identification evidence given by the witness Tony Gauci was obtained, and significant failures by the Crown to disclose material information about the identification evidence and about Tony Gauci.

(b) Ground of appeal 3.6 related to undisclosed information in respect of which the UK Government had claimed Public Interest Immunity, preventing disclosure. The SCCRC considered that failure to disclose this information, of

itself, may have resulted in a miscarriage of justice and this was one of the reasons for referring the case back to the Appeal Court. The appellant had been seeking disclosure of that information since October 2007 (shortly after the SCCRC referral) but the issue had not been resolved by the Court by the conclusion of the appeal in August 2009. It was argued – some might say self evidently – that to advance this ground of appeal the appellant required to view the document. Without that information, the appellant argues that he could not advance his right of appeal and was denied a fair hearing of his appeal in breach of statute and article 6 of the European Convention of Human Rights (ECHR).

(c) The remaining grounds of appeal were not finalised and/or were not part of the reasons for the SCCRC reference. In brief, the remaining grounds dealt with concerns about the forensic evidence and defective representation. It is not intended to publish these grounds at this juncture.

BASIS OF THE APPELLANT'S CONVICTION

In Grounds 1 and 2, the appellant challenged the basis of his conviction as set out by the Trial Court in its Judgment (or Opinion).The basis of the conviction is summarised in the Written Submission at sections 1.3 (WS pp.41-54) and 4.1.1 (WS pp.136-145).

The appellant was charged with taking part along with others in a common criminal plan to commit the crime. The only named "other" was the co-accused who was acquitted. The evidence against the appellant was wholly circumstantial. In order to prove guilt, the Crown had to satisfy the Court that the appellant was an active participant in the common criminal plan to commit the crime.

The Trial Court concluded that a "real and convincing pattern" of the appellant's involvement in the crime was formed by the following circumstances:

- Purchase of clothing in Malta;
- Presence of that clothing in the suitcase with the Improvised Explosive Device ("IED");
- Transmission of an unaccompanied item of baggage from Malta to London;
- Identification of the appellant "albeit not absolute" as the purchaser of the clothing;
- The appellant's movements in Malta under a false name at or around the time the IED must have been placed on a plane at Luqa Airport;
- "other background circumstances" such as the appellant's association with Bollier and members of the JSO or Libyan military who purchased MST-13 timers of the type used in the bombing.

See Trial Court Opinion ("TCO") [87]-[89].

The Trial Court did not convict the appellant as the principal perpetrator – there was no finding that he was responsible for introducing the IED into the airline baggage system and thus onto Pan Am 103. He was convicted as an accessory on the basis

that he assisted in carrying out part of the common criminal plan to commit the crime. The only act found to have been carried out by the appellant which could amount to participation in the crime was the purchase of clothing which was found to have been in the same suitcase as the IED.

GROUNDS 1 AND 2: UNREASONABLE VERDICT AND INSUFFICIENT EVIDENCE

The appellant's challenge was essentially that there was insufficient evidence to entitle the court to convict, and that, having regard both to the evidence and to the reasoning of the Trial Court, the verdict was one which no reasonable jury could have returned.

The appellant argued first of all that the circumstantial case as a whole was inherently weak. He went on to examine the inferences which had to be drawn by the Court on the way to determining the ultimate question of his guilt. He challenged a number of these crucial intermediate inferences on the basis that either they were not properly supported by the evidence, or they were arrived at by a process of defective reasoning.

The details of this challenge can be found within the Written Submission.

General Weakness of the Overall Picture:

Overall the case against the appellant was inherently weak. The circumstantial evidence relied upon by the Court to convict was made up of various strands which did not fit together sufficiently coherently and were not substantial enough to carry the weight of a guilty verdict.

The Trial Court rejected much of the Crown evidence against him. As a result there were yawning gaps in the picture painted by the Trial Court. These gaps included:

- No evidence to entitle a finding as to who shared the common criminal purpose;

- No evidence to entitle a finding, in particular, that the purchasers of MST-13 timers shared the common criminal purpose;
- No evidence to entitle finding as to when the common criminal purpose was formed;
- No evidence of any specific act carried out in furtherance of the common criminal purpose, except for the appellant's purchase of the clothing;
- No evidence of the intention and motive on the part of the appellant or generally regarding the purposes of the Libyan Intelligence Services (JSO);
- No evidence of any connection at any time between the appellant and explosives or terrorist activity;
- No evidence to entitle the finding that anyone who shared the common criminal purpose had the necessary skills to construct this IED;
- No evidence as to when or where the IED was constructed;
- No evidence as to how the IED was introduced to Malta, or whether it originated in Malta;
- No evidence of what happened to the MST-13 timers supplied to Libya in 1985-1986;
- No evidence of any connection between the appellant and the timers;
- No evidence as to the source of the Samsonite suitcase which housed the IED.

The only conduct by the appellant which could be characterised as an act of assistance in the commission of the crime was the purchase of the clothing found within the IED suitcase. This depended upon him being identified as the purchaser.

Neither his general association with the JSO and with the purchasers of MST-13 timers, nor the circumstances of his visit to Malta on 20-21 December 1988, provided evidence of the appellant carrying out any other act which helped in the commission of the crime.

Inferences Upon Inferences

Part of the overall weakness of the case resulted from the fact that the verdict relied upon inferences drawn from other inferences. The case did not simply rely on a combination of circumstances which when taken together pointed to guilt, but rather it depended on a series of inferences drawn from the circumstantial evidence from which further inferences were then drawn. The inference of guilt was ultimately drawn from a second or third layer of inferences. Often different inferences relied upon the same circumstances. The case was not so much wholly circumstantial but wholly inferential. The Trial Court's conclusion rested upon a complex and erroneous process of inferential reasoning. This can be found in detail in WS pp.154 -156.

There was no direct connection between the basic facts proved and the conclusion of guilt. The nature of the case was that the facts proved were too remote from proof that the appellant was a participant in the crime. In a circumstantial case, the law requires that the individual circumstances relied upon are sufficiently related – in legal terms, they must have 'aptitude and coherence' – in order to compel the Court to conclude that the accused is guilty. This aptitude and coherence was missing. The circumstances relied upon did not come together to form a coherent pattern.

In addition in a circumstantial case, the inference of guilt must be the only reasonable inference which can be drawn from the combined circumstances. If the evidence does not support that inference, it cannot be a reasonable one. Equally, if another reasonable inference is available on the evidence which is not consistent with guilt, then there is insufficient evidence to convict beyond a reasonable doubt. This applies not only to the ultimate inference of guilt. All crucial inferences on which the ultimate conclusion of guilt is based must be tested in this way. The appellant argued that a number of these crucial inferences, when tested in this way, fell far short of what was required.

The Challenge to Specific Inferences:

The crucial inferences relied upon to convict - such as the identification of the appellant as the purchaser - were not supported by the actual evidence and as such were not reasonable inferences.

The crucial inferences which the Court had to make in order ultimately to convict the appellant were scrutinised in two ways. First and foremost, the reasonableness of those inferences was examined having regard to the evidence underpinning them and the reasoning process of the Trial Court. Second, because these inferences were crucial steps to reaching the verdict, the appellant challenged whether it could properly be said that they were the only reasonable inference which could be drawn from the facts found.

The crucial inferences which appellant challenged included:

1. that the appellant was the purchaser of the clothing;
2. that the date of purchase was 7 December 1988;
3. that the suitcase containing the IED was ingested into the airline baggage system at Malta.

1. The Identification of the Appellant as the Purchaser:
[SCCRC Ground of Referral]
Grounds 2.1.1 at p.11; 2.2.1 at p.31
WS pp.165-192; 227-232

It was not disputed that the inference that the appellant was the purchaser was pivotal to the conviction – without this conclusion the circumstantial case unravelled and he would have to be acquitted.

Background to the identification evidence:

The Crown relied on evidence from the witness Tony Gauci (the Maltese shopkeeper who sold clothing found to have been in the suitcase with the IED). In its judgement, the Trial Court relied on three identification procedures involving Gauci and the appellant:

(1) On 15th February 1991 the appellant's photograph was included in a spread of 12 photos shown to Tony Gauci. Initially Gauci rejected all the photographs because they showed men who were younger than the purchaser. He was then asked to discount age and to look again. Then he selected the photograph of the appellant saying it was "similar" but "younger".

(2) An identification Parade on 13th April 1999 was held at Kamp Zeist in the Netherlands. The defence made a number of objections that the parade was unfair. These were noted. The parade went ahead. Mr Gauci selected the appellant and said "Not exactly the man I saw in the shop. Ten years ago I saw him, but the man who looked a little bit like exactly is the number 5".

(3) In court at the trial, having been shown a press photograph of the appellant which identified him as the bomber, the witness was then asked if he saw the purchaser in court and he pointed to the appellant and stated "He is the man in this side. He resembles him a lot....That is the man I see resembles the man who came."

The Trial Court's view was that the identification of the appellant as the purchaser was reliable and a highly important element in the case (TCO para.69].

1(a) The Appellant's Challenge to the Trial Court's conclusion

It was strongly argued on the part of the appellant that the evidence relied upon was insufficient to entitle any reasonable trier of fact to conclude that the appellant was the purchaser, for the following reasons:

1. There was no positive identification of the appellant;

2. The selection of the appellant made by the witness Tony Gauci at the various identification procedures was on the basis only of a resemblance and was so qualified as to be meaningless. This was not evidence that the appellant resembled the purchaser for specific reasons but rather that he resembled the purchaser in some specific respects but not in others. At best this was evidence that certain features of the appellant matched the purchaser but others did not. There was nothing about Gauci's evidence which pointed to the appellant as the purchaser as against countless possible others;

3. In any event the evidence was so poor that no reasonable jury could rely on it. There were significant factors present which were liable to produce a wrong identification and which undermined the reliability of that evidence. These included that:

- the amount of time which had passed between the purchase and the identification procedures was wholly exceptional (27 months to the photo-show; 12 years to trial);

- the purchaser was a stranger to Gauci;

- the initial description given by Gauci was wholly inconsistent with the appellant and the Trial Court said it constituted a 'substantial discrepancy';

- there was extensive prejudicial publicity prior to the identification parade and the trial - such that the witness knew who the suspect was and whom he was expected to identify;

- the 15th February 1991 photo-show, the ID parade and the dock identification were conducted irregularly and those irregularities were liable to undermine the reliability of any selections made. By way of example, at the 15th February photoshow, the appellant's photograph stood out from all the others; following Gauci's response that these photographs were all 'too young', he was prompted by the senior investigating officer to disregard age and 'look again' at the photos. At the identification parade, the composition of the line-up was

unfair; police officers involved in the investigation were present, contrary to the guidelines. And at trial, when Gauci was in the witness box, he was shown a photograph of the appellant before being asked to point the purchaser out in court. See WS section 4.2.6.

It was argued that both individually and taken together, these factors rendered reliance upon the so-called identification unreasonable.

4. Finally, there were no other facts or circumstances which could enhance or support the purported identification. In particular the fact that the appellant was staying in a hotel near to the Gauci's shop on the date of the purchase may have made it *possible*, but did not make it any more *likely* that he was the purchaser and could not support the purported identification evidence. See WS p214-219.

On this basis, it was argued the inference drawn that the appellant was the purchaser was unreasonable.

1b. Defects in Reasoning Regarding the Identification Evidence

Ground 2.1.1 (2) at p11

WS p219-227

In addition to arguing that it was unreasonable to infer that the appellant was the purchaser of the clothing, the appellant argued that there were defects in the approach taken by the Trial Court in their assessment of the purported identification evidence. See TCO [69]. These include:

(a) The judges relied on their view that the witness was 'careful'. This view was predicated on the fact that the witness had expressed reservations and at the numerous identification procedures and that he 'would not commit himself to an absolutely positive identification'. But this may not be an indicator of a careful witness - it could equally indicate an uncertain witness who could not make an identification. He was as likely to be uncertain or hesitant as

circumspect. Indeed, his failure to make positive identifications at the parade and in court, where he knew who the suspect was, is arguably more indicative of a hesitant and uncertain witness.

(b) Having decided that Gauci was a careful witness, the judges viewed his expressed reservations about his selection as indicating more than they do. They viewed Gauci's evidence as a positive identification made by a circumspect witness. Whereas, at best, the evidence is and can only be taken as a qualified resemblance.

(c) A significant factor relied on by the judges was their conclusion that the witness himself 'felt' or believed that he was correct. It is common sense and indeed well established in relation to identification evidence that the self-belief or confidence of a witness, expressed long after the event, is not a reliable indicator of the accuracy of his evidence.

(d) No apparent consideration was given by the Trial Court to significant factors relevant to any assessment of identification evidence. These are the kind of factors which a jury would be directed to consider. They include here, the circumstances of the purchase including the fact that the purchaser was a stranger; the extraordinary passage of time during which the witness was exposed to prejudicial publicity; and the suggestive and irregular conduct of the identification procedures.

2. The Date of Purchase

[SCCRC Ground of Referral]

Grounds 2.1.2 at p.13; 2.2.2 at p.32

WS pp.193-213

The inference drawn by the Trial Court that the purchase took place on 7th December 1988 was an indispensable step towards the conclusion that the appellant was the

purchaser because the presence of the appellant on Malta on that date was later relied upon to support Gauci's purported identification. As such the date of purchase was an inference that was crucial to conviction and if that was unreasonable, then the verdict is materially undermined.

It was clear on the evidence that the purchase had to have taken place after the 18th November and before 21 December 1988. Gauci consistently said that he could not give the date of purchase. The Trial Court decided that his evidence pointed toward the purchase as being midweek or on a Wednesday.

Various and unrelated pieces of evidence and circumstances were looked at in order to conclude that the date of purchase was Wednesday 7th December 1988 – this included evidence about football matches, Christmas lights and the weather. The Trial Court relied on dates of football matches watched by Tony Gauci's brother, Paul, at the time - but it was not properly established that he was in fact watching football at the time. Paul Gauci did not give evidence. The evidence about whether the Christmas lights were up or on at the time was hopelessly confused and no reasonable jury could draw conclusions from this evidence. Finally, evidence about the weather did not support the date as 7th December - indeed if anything it undermined that date.

Essentially the appellant argued that none of these circumstances - even when taken together - justified the choice of 7th December above other competing dates (for which there was no evidence that the appellant was in Malta, and thus no support for Gauci's purported identification). Overall the evidence here was so vague and confused it was unreasonable to rely upon it and there was no clear independent support for this date over others.

The Trial Court unreasonably selected 7th December from other competing possibilities available on the evidence. In so doing they misunderstood the evidence and ignored the burden of proof which ought to have meant that the Crown had to establish that there were no other dates which could reasonably be the date of purchase.

4. Ingestion at Malta

Grounds 2.1.3 at p.14; 2.2.3 at p.33 and 2.2.6 at p.39

WS pp. 239-271

The appellant challenged the inference that ingestion of the suitcase containing the IED was at Luqa - on the basis of both the evidence and defects in reasoning by the trial court.

There were significant problems with the evidence. First, there were opportunities for a bag to be ingested at Frankfurt and Heathrow and there were other unaccompanied bags travelling on PA103A between Frankfurt and Heathrow. Secondly, there was an absence of evidence of infiltration at Luqa and an absence even of evidence as to how infiltration might be possible in light of the elaborate security and baggage reconciliation system which existed at Luqa Airport (see WS pp.244-250). Finally, there was an inconsistency in the evidence about whether there was an unaccompanied bag on the flight from Luqa to Frankfurt. While there were computer records from Frankfurt which could be interpreted as suggesting that an unaccompanied bag was loaded at Luqa, there was unchallenged evidence from records and witnesses from Luqa which suggested that this did not happen. Both cannot be correct.

It is not at all clear how the Trial Court reached its conclusion – how they reconciled the evidence or overcame the inconsistency or the basis upon which they considered and rejected the other possible sites of ingestion. Where there are clear inconsistent facts which require to be addressed before an important inference can reasonably be drawn, this ought to be addressed in the judgement. This was not done.

In order to overcome the inconsistency presented by the evidence from Luqa – which suggested that there were no unaccompanied bags on the flight to Frankfurt – there would have to have been evidence, accepted by the Court, which made it reasonable to conclude that the bag went into the system at Luqa, in spite of what the records and witnesses from Luqa said. It was acknowledged by the Crown that the evidence of the Frankfurt records was not itself sufficient and the Crown relied for support on the evidence that the clothing came from Malta and that there were links

between Luqa Airport, Libya and the JSO. On any view, such ‘connections’ are not sufficient. For example, there is a gap in time between the purchase of the clothing and ingestion and there was no evidence about how or where the clothing came to be united with the IED; and there are links between the JSO and many other airports, including Frankfurt. There was no evidence which would properly allow the conclusion that ingestion was or must have been made at Luqa.