SCOTTISH CRIMINAL CASES REVIEW COMMISSION

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

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

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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