CHAPTER 8
THE TIMER FRAGMENT PT/35(b)

Introduction

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

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

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

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

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

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

Ground 1: memorandum of 15 September 1989

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

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

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

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

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

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

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

Consideration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consideration

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

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

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

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

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

Ground 3: expert report by Major Owen Lewis

The applicant's submissions

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

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

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

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

Consideration

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

(1) Major Lewis's report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Inconclusive and contradictory findings of scientific enquiries

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

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

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

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

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

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

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

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

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

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

(d) The route of the IED

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

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

Conclusion regarding Major Lewis's report

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

(2) Counter-terrorism database

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

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

Ground 4: previous cases involving Allen Feraday

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

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

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

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

Summaries of the cases and submissions

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

R v McNamee

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

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

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

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

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

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

R v Berry

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

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

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

R v Assali

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

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

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

Gibraltar inquest

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

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

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

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

Summary of submissions

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

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

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

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

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

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

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

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

Mr Feraday's position at interview

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

Consideration

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

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

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

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

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

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

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

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

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

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

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

Conclusion in relation to ground 4

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

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

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

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

(1) The timers recovered in Togo and Senegal

Introduction

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

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

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

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

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

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

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

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

The formal statement of Jean Collin

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

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

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

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

Further comments allegedly made by Jean Collin

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

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

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

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

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

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

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

The Commission's enquiries

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

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

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

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

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

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

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

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

The significance of Jean Collin's comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The connection between the Togo timer and MEBO

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.152 A member of the Commission's enquiry team examined protectively marked materials relevant to this issue at Dumfries police station. The notes taken of these items are currently in the possession of the Security Service. The Commission's request for consent to disclose the relevant documents was not granted. However, the documents reflect the fact that there were certain difficulties between the UK and US. One document for which consent to disclose was granted is fax 1268 (see appendix of protectively marked materials). This consists of a letter from Mr Henderson to the deputy Crown Agent in which Mr Henderson referred to a meeting of 9 October 1990 at FBI headquarters and stated that "There is no doubt in my mind that the meeting was a success. It brought the agencies much closer together and helped all concerned to appreciate each others problems and restrictions… I am confident that any unfounded suspicions and doubts which may have lurked in the minds of some of the participants now appear to be eradicated."

Consideration

8.153 In the Commission's view the findings above are of assistance in clarifying when and how PT/35(b) was linked to MEBO. As indicated, the Commission considers it surprising that despite prior knowledge of a connection between MEBO and the Togo timer the FBI did not instigate enquiries directly with MEBO and instead investigated not only the components attached to the timer but also the possibility that the markings on it read M580. On the other hand, that approach explains why enquiries in Switzerland only commenced over two months after the link was made between the fragment and the Togo timer. It is clear that the Scottish

police believed the US authorities had been attempting to pre-empt enquiries in order to claim credit for breakthroughs in the case, which if true might explain the apparent failure of Mr Thurman to mention the link to MEBO at the meeting on 22 June 1990. It is possible that a desire to retain that information might also have contributed to the somewhat oblique way in which the FBI first approached its investigations into the timer's manufacturer.

8.154 In any event the Commission does not believe that the crucial evidence against the applicant is undermined by these issues, or that they may have led to a miscarriage of justice in his case. In particular, the Commission does not consider that doubt can be cast upon the evidence relating to the recovery of PT/35(b), the assessment of it as having been intimately involved in the explosion, its identification as part of an MST-13 timer produced by MEBO, or the supply of such timers to Libya.

(4) Enquiries at MEBO and the accounts of Messrs Bollier, Meister and Lumpert

8.155 The final aspect of the Commission's review of chapter 10 of the Crown case was to examine the materials relating to the enquiries at MEBO. This included a review of all the accounts given by Messrs Bollier, Meister and Lumpert with particular reference to their opinions as to whether or not PT/35(b) had originally formed part of an MST-13 timer and their accounts regarding the supply of these timers by MEBO to Libya and elsewhere. The Commission also examined all the evidence at trial in relation to the MEBO enquiries, and materials relating to the supply to MEBO of the components used in the MST-13 timers.

8.156 As before, it is unnecessary to spell out in detail all the Commission's findings. Indeed, given that all the relevant information reviewed by the Commission in relation to MEBO was available to the defence at trial, the Commission considers it sufficient simply to note that it found nothing in its review of these materials that caused it to believe that a miscarriage of justice may have occurred in the applicant's case. This conclusion is unaffected by the submissions the Commission received from Mr Bollier, which are addressed below.

Submissions by Edwin Bollier

8.157 As explained in chapter 4, Mr Bollier made a large number of submissions to the Commission. For the reasons given in that chapter, not least Mr Bollier's obvious self-interest in undermining any connection between MST-13 timers and the destruction of PA103, the Commission has considerable doubts about his credibility. However, the Commission took the view that his unique position of knowledge in relation to the production and supply of the timers justified consideration of the matters he raised in relation to PT/35(b). Having reviewed those submissions, as described below, the Commission is satisfied that they do not disclose a possible miscarriage of justice in the applicant's case. In light of this conclusion, the Commission has not included Mr Bollier's submissions or the translations of them in the appendix.

Summary of Mr Bollier's submissions

8.158 Broadly, Mr Bollier's allegation is that the evidence regarding PT/35(b) was fabricated. He alleges that no such fragment was recovered from PI/995 in May 1989, contrary to the handwritten notes of Dr Hayes. He submits that at a meeting in June 1989, when Peter Fluckiger, a Commissioner of the Swiss federal police, visited MEBO's premises, Ulrich Lumpert, the technician at MEBO responsible for designing the MST-13 timer, gave Mr Fluckiger a brown coloured prototype MST-13 circuit board**.** Mr Bollier alleges that Mr Lumpert later lied when he stated that he had discarded the circuit board in question because it was broken. Mr Bollier also refers to a post-trial "affidavit" of Mr Lumpert in which Mr Lumpert said he had been confused at trial and that in fact the timers which were supplied to East Germany by Mr Bollier contained brown prototype boards, rather than the green Thuring machine-made boards Mr Lumpert had suggested at trial.

8.159 According to Mr Bollier, the brown prototype circuit board obtained by Mr Fluckiger from Mr Lumpert in June 1989 was then passed to the authorities investigating PA103 and was subjected to an explosion during the US test explosions (see chapter 11 below). A fragment from it was then introduced into the evidence as PT/35(b). Mr Bollier asserts that photograph 117 of the RARDE report (CP 181) was

taken in September 1989 and depicts this prototype fragment. He states that Mr Lumpert confirmed this and said that he had been responsible for scratches visible on the fragment in this photograph, which were caused when he removed excess solder from the prototype boards, there being no excess solder on the green machine-made Thuring boards. The curve on the fragment in the photograph is said by Mr Bollier to be irregular, as it was cut by a fretsaw, whereas the green machine-made Thuring boards were milled smoothly at the corner.

8.160 Mr Bollier suggests that in December 1989 the investigating authorities realised that the brown prototype fragment did not provide the desired link to Libya because only timers with the green coloured machine-made Thuring boards were supplied to Libya. Therefore, a new green coloured fragment was procured to replace the brown prototype fragment. According to one of his reports, this fragment was obtained from the MST-13 timer which had been recovered by the US authorities in Togo.

8.161 Mr Bollier further alleges that this green circuit board was then taken to various private companies (the details of which are contained in the Commission's working document in the appendix) as part of the attempt to cover up the introduction of the fragment into evidence. He states that a strip was cut from the green fragment because the Thuring machine-made boards were slightly larger than the prototype boards. He states that DP/31, the corner section of the green fragment, was also removed and that it was realised that the original brown prototype fragment depicted in photograph 117 had a unique burn mark on the area corresponding to DP/31. Therefore that area was cut from the brown prototype fragment and was exchanged with DP/31 in order that when Mr Bollier examined the fragments during his Crown precognition he would observe the unique burn mark as present on the corner section, just as it was in photograph 117. However, at precognition Mr Bollier also noticed that the corner section was from a brown prototype board whereas the main portion was from a green Thuring board. He alleges that when he was then shown the fragments in evidence the corner section had been obliterated by fire so that it could no longer be discerned that it had come from a prototype board rather than a green machine made board. He also noticed at precognition that the main portion of the

fragment had not had any components soldered to it and therefore it could not have come from a functioning timer.

8.162 In support of his claims Mr Bollier refers to various alleged inconsistencies and anomalies in the records relating to the fragment, including the changes to the page numbers in Dr Hayes' notes, the change to the date on the label attached to the "lads and lassies" memorandum, the fact that at different stages the fragment was given different designations e.g. PT-35, PT/35(B), PT35/b and the fact that the fragment was never tested for explosives residue. He also refers to "pyrotechnic tests" he conducted on sample fragments which were subjected to flames of 600 degrees centigrade. According to the results of his tests, after two seconds the solder mask had melted off and owing to the size of the fragment it was not possible for three of the four edges to be burnt but for the fourth, curved, edge to remain clean. He suggests that the results of his tests indicate that PT/35(b) was not damaged in the explosion but was subjected to deliberate manipulation, as the green solder mask remains on the fragment and the curved edge is not charred.

8.163 Lastly, Mr Bollier also alleges that there was a conspiracy not only to plant the timer fragment, but also to implicate him in the bombing of PA103. He suggests that Mr Lumpert and Badri Hassan were somehow involved in this plot, and that intelligence services from the US were behind it, with the connivance of Swiss intelligence. He refers to the order for further timers placed by Badri Hassan in December 1988 and his own subsequent trip to Libya, the return journey for which originally coincided with the flight of the applicant and co-accused to Malta on 20 December 1988. It is suggested that all these circumstances were contrived to put Mr Bollier in the frame for the bombing along with the applicant, and in particular that he was not informed of a direct flight from Tripoli to Zurich on 20 December 1988 so that he would have to travel via Malta on the applicant's flight. However, he discovered that the direct flight had been available when he arrived at Tripoli airport so did not travel via Malta.

Consideration

8.164 As indicated, the enquiries conducted by the Commission have satisfied it as to the provenance of PT/35(b). In any event Mr Bollier's credibility was already so suspect that he would have had to produce compelling submissions supported by evidence in order to persuade the Commission of his view that this chapter of evidence might be open to doubt. On the contrary, however, his grounds of review are by their nature inherently implausible and where any evidence is relied upon in support of them that evidence is often tenuous at best. In these circumstances, the Commission does not consider it necessary to address in detail each of the many points raised by him. A number of the matters which he raises, such as in relation to Dr Hayes' notes, the lads and lassies memo, the date on which photograph 117 was taken and the evidence about the removal of samples from PT/35(b) have been addressed in previous chapters of the statement of reasons and in the working document contained in the appendix**,** and it is unnecessary to repeat those findings here. In the following paragraphs some of his other allegations are addressed. Although not exhaustive, in the Commission's view its consideration of these matters is sufficient to reject all his submissions as lacking in credibility.

8.165 Much is made in Mr Bollier's submissions of the "affidavit" purportedly sworn by Mr Lumpert in which he retracted his evidence that the timers supplied to the Stasi contained green Thuring circuit boards and stated instead that they contained brown prototype boards. However, the Commission is not persuaded that, even if genuine, the affidavit is of any significance. The questioning of Mr Lumpert at trial in relation to the supply of timers to the Stasi appears straightforward so there is little scope for any confusion. Accordingly, the affidavit would be unlikely to meet the test in section 106(3C) of the Act, which requires a reasonable explanation for a change of evidence, supported by independent evidence. The trial court noted the difference of opinion between the MEBO witnesses as to the colour of circuit boards in the timers supplied to the Stasi but did not choose one account over another. Therefore the affidavit would not alter the basis for the court's verdict. If anything, it would have been detrimental to the defence, as it would have countered the suggestion that the timer which caused the explosion on PA103 had been one of those supplied to the Stasi. In any event, the affidavit does not contain any support for Mr Bollier's

suggestion that Mr Lumpert provided a prototype circuit board to Mr Fluckiger in June 1989. In fact Mr Lumpert consistently maintained that he discarded one prototype board because it was broken. Nor does the affidavit support the contention that Mr Lumpert was part of a conspiracy to implicate Mr Bollier in the bombing.

8.166 As regards the appearance of PT/35(b) in photograph 117, this allegation overlaps to some extent with the matters raised in the section above dealing with Major Lewis's report. As explained, the experts instructed by the defence were content that the item photographed in the RARDE report was the same one examined by them, a position which does not support Mr Bollier's contention that what is depicted in photograph 117 is a fragment from a prototype board. Mr Bollier's observation that the curve on the fragment was irregular as it had been made by hand using a fretsaw (as opposed to having been milled like the green machine-made Thuring boards) was a matter he raised when interviewed for the Dispatches documentary referred to above. The point was addressed in a subsequent report by Mr Feraday (CP 185).

8.167 As regards the marks visible on the fragment in photograph 117, Mr Bollier suggests that these marks were made by Mr Lumpert when he scratched off excess solder. According to him this supports the contention that the fragment was from a prototype. However, there is no mention of this matter in the purported affidavit of Mr Lumpert and there is no other evidence to confirm his view of the marks. A member of the Commission's enquiry team examined the fragment at Dumfries Police Station and had photographs taken of it, but the marks referred to by Mr Bollier were not visible during that examination. However, in the Commission's view the same marks may be visible on the fragment in photograph 334 of the RARDE report, which even Mr Bollier accepts is a photograph of a fragment from a green machine-made Thuring board. It is also worth noting that Mr Feraday was asked about the marks at interview. He considered it possible that they were dirt or scratches which had been incurred during the explosion but his view was that simply enlarging the digital image of the fragment as it appeared in photograph 117 (as Mr Bollier had done) was not "good science".

8.168 As regards the "pyrotechnic" tests which Mr Bollier conducted, even if these were comparable to the effects of the detonation of high explosive, Mr Bollier accepted in his submissions that the conclusions he reached about the burning of the fragment do not apply to full size circuit boards but only to fragments of a similar size to PT/35(b). This fails to take account of the fact that the MST-13 timer it was established had initiated the explosion on PA103 would have contained a full-size circuit board and not simply a fragment of the size tested by Mr Bollier. If further proof were needed that Mr Bollier's conclusions are invalid, one could note the condition of the Toshiba circuit board fragments comprising AG/145, which retained their green solder mask despite their proximity to the explosion. The experts instructed on behalf of the defence, and even to some extent Major Lewis, accepted that PT/35(b) was consistent with having been in close proximity to an explosion, and a number of experts who examined the item during 1990 were similarly of the view that it had been subjected to an extreme event (as described in the working document contained in the appendix).

8.169 Mr Bollier asserts that in December 1989 a green fragment from the Togo timer replaced the brown prototype fragment in the chain of evidence. In fact both Togo timers were recovered and were Crown label productions at trial. There was no evidence that any fragment had been removed from either timer, which in any event were of the un-housed variety, unlike PT/35(b).

8.170 As regards Mr Bollier's allegation that the fragment he was shown at Crown precognition comprised a main portion from a green machine-made Thuring board and a small part (DP/31) which originated from a brown prototype board, this issue was addressed in what the Commission considers to be a convincing manner by two expert reports commissioned by the Crown (CP 1585 and CP 1816). The conclusions that can be taken from these reports are that DP/31 came from the same physical circuit board as the main portion of PT/35(b) and that DP/31 had been cut from PT/35(b). In fact Mr Bollier's belief that DP/31 came from a brown prototype board, based on its colour and thickness when examined by him at Crown precognition, can be explained easily by reference to the scientific examination conducted on DP/31 by Ferranti International in May 1990, when the green solder mask was removed from it (as described in the working document contained in the appendix). As the report by

experts at Dundee University (CP 1816) indicates, that process would account for the difference in colour as between DP/31 and the remainder of the fragment (which is depicted vividly in CP 1756, photograph 5), and it would also account for the difference in the thickness of the two parts of the fragment.

8.171 As regards Mr Bollier's submission that the main fragment he was shown at trial (i.e. PT/35(b)) had been treated with fire, and that the smaller fragment (i.e. DP/31) had become a carbonised block from which its colour and the number of layers of which it was comprised could no longer be discerned, the Commission has found no evidence to suggest that any form of destructive testing or treatment was applied to these fragments after Mr Bollier's Crown precognition. A member of the enquiry team examined them at Dumfries Police Station and had photographs taken of the items. The appearance of the fragments during these examinations does not accord with Mr Bollier's description of what he was shown in evidence.

8.172 Lastly, the suggestion by Mr Bollier that there was a conspiracy involving Mr Lumpert, Badri Hassan, the Swiss and the US authorities with the aim of incriminating him in the bombing of PA103 is fantastic and, like the majority of his submissions, is unsupported by evidence.

Conclusions regarding Mr Bollier's submissions

8.173 For the reasons stated above, the Commission does not believe that any of the matters raised by Mr Bollier are evidence of a possible miscarriage of justice in the applicant's case.

Overall conclusion in relation to PT/35(b)

8.174 In conclusion, the Commission has examined for itself all aspects of the chapter of evidence relating to PT/35(b), and has considered in detail the various allegations raised about the fragment. Even when these matters are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 9
THE TOSHIBA MANUAL

Introduction

9.1 Detailed submissions were made to the Commission regarding the provenance of the fragments of paper which the RARDE report (CP 181, section 6.2.2) concluded had formed part of a manual for a Toshiba RT-SF16 radio cassette recorder ("RCR") which itself was contained within the primary suitcase. The manual was particularly important as it was relied upon by RARDE and by the trial court to establish the precise model of cassette recorder used in the improvised explosive device ("IED"). Evidence that one of the incriminees, Marwan Khreesat, never converted twin speaker RCRs (such as the Toshiba RT-SF16) into explosive devices was relied upon by the Crown, and by the court (at paragraph 74 of its judgment), as a factor in undermining the incrimination defence.

9.2 In volume A it is suggested that the Golfer (see chapter 5 above) had information to the effect that there had been "interference" with PK/689, the main fragment of the Toshiba manual recovered from the crash site. The application also refers to the evidence of the finder of this item, Mrs Gwendolyn Horton, and to more recent precognitions obtained from her and her husband, Robert, in support of the suggestion that when the manual was originally found, it was intact rather than fragmented.

9.3 On 21 June 2004 MacKechnie and Associates lodged with the Commission substantial further submissions regarding the fragments of Toshiba manual. These submissions expanded upon the allegations made in volume A, and introduced new grounds regarding the provenance of PK/689 and the other fragments of manual found. Copies of these submissions are contained in the appendix of submissions.

9.4 The central assertion in the submissions is that what was found at the crash site was an intact and complete Toshiba manual, rather than the explosion damaged item described in the RARDE report; and that the change in its condition was the

result of intervention by the police and/or forensic scientists. The reason for this alleged interference, it is submitted, was to make it appear that the manual had suffered blast damage because it had been in the primary suitcase and so to bolster the link between the PA103 bombing and the Autumn Leaves terrorist cell. Evidence to support this is said to come from three main sources: (1) the Golfer; (2) the Hortons; and (3) a police officer named Brian Walton.

9.5 This central allegation is addressed in ground 1, below. Other issues raised in the submissions in support of this central allegation, or more generally to cast doubt on the provenance of the manual fragments, are addressed later under ground 2.

Ground 1: possible interference with PK/689

(1) The Golfer

9.6 According to the submissions, the Golfer knew that certain evidence had been "engineered" by the Scottish police in order to persuade the German authorities to permit access to materials relating to the Autumn Leaves operation. In relation to PK/689, the Golfer's position was said to be that the fragments presented at trial bore no resemblance to the manual originally found. It is alleged that when he was an officer engaged in the original investigation the Golfer came across the Toshiba manual in the Dexstar store after his attention had been drawn to a rare golf club stored next to it. According to the submissions, the Golfer alleged that the manual comprised several pages, was rectangular and was only slightly singed in one corner. It is alleged in the submissions that the Golfer thereafter attended a meeting of "senior" police officers at which an agreement was reached to "engineer" evidence to convince the German authorities of a connection between the Autumn Leaves terrorist cell and the Lockerbie bombing. The Golfer allegedly informed the officers of the Toshiba manual he had seen, and a plan was put in place to "introduce" this into the evidence.

9.7 The submissions also refer to two police memoranda (see appendix), dated 14 July and 4 August 1989 respectively, in which the similarities between the Lockerbie and Autumn Leaves incidents are highlighted. In particular, reference is

made in the memoranda to the use of "Bombeat" radios in both incidents. The submissions suggest that these memoranda reflect the Golfer's allegation that the police were trying to convince the German authorities of a link between the PA103 bombing and the Autumn Leaves cell.

(2) The Hortons

9.8 The submissions seek to support the allegation of interference with PK/689 by reference to the accounts given by the finder of the item, Mrs Gwendolyn Horton, a Crown witness at trial. Asked in evidence if she recognised PK/689, Mrs Horton responded, "Well, not in its present state. I'm sure when I handed it in, it was in one piece". She also estimated the size of the item to have been around eight inches square (6/965). It is suggested in the submissions that the Crown "side-stepped" this issue, and the submissions point out that Mrs Horton was not cross examined about it, and that her husband, Robert, who was also present when the item was found, was not called to give evidence.

9.9 It is also submitted that when Mrs Horton was interviewed by MacKechnie and Associates in September 2003 she stood by her evidence; and that Mr Horton thought the item his wife had found was almost A4 sized. Both are said to have recalled the manual as having been rectangular and un-fragmented, but to have noticed during a number of visits by police over the subsequent years that it had become smaller and more fragmented. It is alleged in the submissions that the Hortons' daughter, Fiona Johnstone, claimed also to have seen the item her parents had found and that she too recalled that it was intact at that time. Mrs Johnstone is also reported as saying that Mrs Horton had voiced concerns over the years at the apparent changes to the appearance of the item.

(3) Brian Walton

9.10 Reference is also made in the submissions to the accounts given by Brian Walton, the police officer who received PK/689 from Mrs Horton at Alnwick Police Station. In particular, it is suggested that at trial the Crown avoided questioning Mr

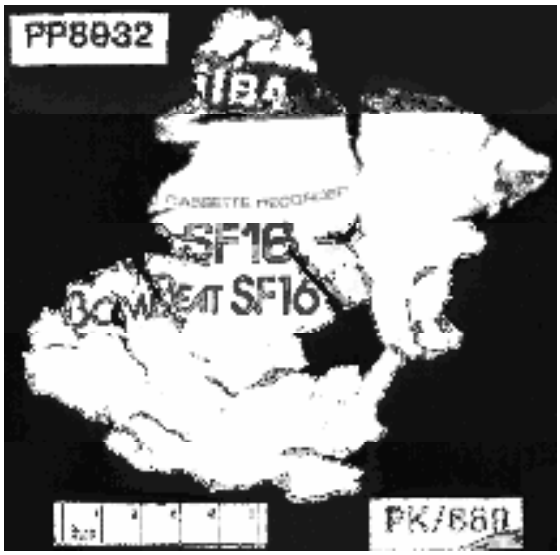
Walton as to the condition of the item when he received it from Mrs Horton, despite the contents of his Crown precognition in which he raised doubts about this.

Consideration of ground 1

9.11 The RARDE report records that, when first submitted by the police for forensic examination, PK/689 was:

> *"apparently an irregularly shaped single fragment of paper, shown in photograph 266, which measured approximately 135mm x 125mm. Detailed examination revealed the fragment to consist of two overlaid sheets lightly adhering together having the same irregular shape… The sheets appeared to have been violently impacted and disrupted and bore localised areas of blackening and scorching consistent with their close explosives involvement."*

9.12 A close-up of photograph 266 is reproduced below.



Close up from photograph 266 of RARDE report

9.13 The question raised by the submissions is whether the item recovered from the crash site by Mrs Horton was indeed in the condition depicted above, or whether what was originally found was a complete and intact Toshiba manual with a small amount of singeing, as alleged by the Golfer and, seemingly, the Hortons.

9.14 During the course of the police investigation, a control sample manual for a Toshiba RT-SF16 RCR was obtained, and was designated PT/1. This item is described in the RARDE report in the following terms:

> *"a white paper booklet measuring 26cm x 19cm and incorporating three complete sheets of paper which are folded and stapled together in the centre to produce a booklet of twelve sides of paper. The booklet contains user instructions and diagrams in several different languages. The front cover of the booklet bears the title 'OWNER'S MANUAL TOSHIBA STEREO RADIO CASSETTE RECORDER RT-SF16 BOMBEAT SF-16'."*

(1) The Golfer

9.15 The Golfer maintained during the interviews with the Commission that he had seen a Toshiba manual next to a rare golf club in the Dexstar store, that the manual was three quarters the size of A4 or smaller and that it comprised a number of pages. It also had what looked like singeing to one of the corners but was otherwise intact. The Golfer also alleged that during a discussion about the need for evidence to connect the Lockerbie disaster to the Autumn Leaves suspects he had informed senior officers of the manual's existence. On being shown photograph 266 of the RARDE report he confirmed that this was not the same as the item he had seen, which had no holes in it and was rectangular in shape and on which the word "Toshiba" was intact. He added that if PK/689 had come from any part of the manual he had seen then "there must have been some jiggery pokery". Given its condition, he found it difficult to believe that the item he had seen had been within the primary suitcase. The Golfer's statements are contained in the appendix of Commission interviews.

9.16 It should be noted that, according to D&G, there is no record of any Toshiba manuals other than item PK/689 having been recovered during the searches. It follows that, assuming one accepts his account, the manual which the Golfer alleges he saw in the Dexstar store must have been PK/689.

9.17 For the reasons stated in chapter 5 the Commission does not consider the Golfer to be a witness capable of being believed by a reasonable jury or court, and

accordingly is not prepared to accept what he has to say. Like many of his other allegations, the Golfer's descriptions of the circumstances in which he encountered the manual contain inconsistencies of detail. In his second statement, for example, the Golfer asserts that he did not touch the manual although he could see clearly that it was a manual when he returned the club to its position. In his third statement, however, he said that he first had to move the manual in order to look at the golf club.

9.18 The Golfer's account of seeing the manual is also not supported by other evidence. Specifically, if the manual was indeed stored next to a golf club, one would expect reference to be made to a golf club in the sector K production logs, yet there is no such entry there. More significantly, when the Golfer was asked at interview whether he had attended a meeting of senior officers at which it was agreed that evidence would be "engineered", he denied that such a meeting had occurred or that he had told MacKechnie and Associates that it had.

9.19 Moreover, the Commission considers the allegation that the manual was deliberately fragmented to provide a connection to the Autumn Leaves terrorists to be inherently improbable. As demonstrated in the police memoranda referred to in the submissions, the manual was merely one of a range of factors relied upon to suggest such a link. There was also the forensic evidence of blast-damaged circuit board fragments, which indicated that the RCR was one of only six possible models, five of which were made by Toshiba. Further, there was the airport evidence and forensic evidence which suggested the bomb was contained in baggage which had been interlined at Frankfurt airport; there was the use of Semtex H or a similar explosive; and there was the similarity between the Lockerbie bombing and the modus operandi of previous PFLP-GC attacks. To suggest that the police, in collusion with the forensic scientists, co-ordinated a sophisticated conspiracy to add further detail to the evidence incriminating the terrorist cell in Germany is, in the Commission's view, difficult to believe.

9.20 Despite its rejection of the Golfer's allegations, the Commission considered that the issues raised in the statements of the Hortons and of Brian Walton warranted further enquiries, particularly in light of the importance of PK/689 to the case against the applicant.

(2) The Hortons

9.21 The precognitions obtained from Mr and Mrs Horton by MacKechnie and Associates in 2003 ("the 2003 precognitions") are contained in the appendix. According to these, both witnesses recalled that Mrs Horton, in the presence of Mr Horton, found what could have been a manual for an electrical item in the field opposite their house. Both believed that the item comprised only one sheet, although Mr Horton said it might have consisted of two. Although neither witness could remember the word "Toshiba", Mrs Horton recalled that the item related to a cassette recorder. Both recalled the presence of some kind of electrical diagram on the item, which they described as "intact" and not torn. Neither could recall seeing any burning or charring on the item.

9.22 Mr and Mrs Horton went on in their 2003 precognitions to describe the police visiting them some time after the find and bringing with them what both accepted could have been a photocopy of the item they had found. The Hortons were satisfied that what they were shown by the police at that stage was consistent with what they had found. Both considered what the police showed them on this occasion to be around the size of PT/1, the control sample Toshiba RT-SF16 manual (a scale mock-up of which was shown to them by MacKechnie and Associates). They described the police as having pointed out a small area of charring at one of the corners of the item. Both witnesses maintained that they did not recall any charring on what they had found, but accepted that there might have been some present.

9.23 The 2003 precognitions go on to record a second visit from the police, during which both witnesses noticed that the condition of the item had changed. Mr Horton is recorded as stating that he could not tell that what the police showed to him on this visit was the same as the item his wife had found because "it had become little bits." Mrs Horton similarly described being shown something that was in pieces, and when asked by the police to identify this replied that she could not, as the sheet that she recalled finding had become "little bits". Both witnesses recalled in their precognitions that the explanation offered by the police was that the item had been subjected to forensic testing which must have caused it to disintegrate. The witnesses

were concerned by the changes. Mrs Horton said that in evidence she had explained that what she had found was in one piece, and that she simply could not recognise what she was shown in court as it was in bits. She had assumed, however, that it must be the same thing and that what she had been told about the forensic testing having changed the appearance of the item was the truth.

9.24 MacKechnie and Associates showed both witnesses photographs of PK/689 obtained from the Crown productions. Mrs Horton said that what was depicted was not what she had found, and that it had "changed from being at least an intact piece or pieces of paper into being bits of paper not joined together at all. There are ragged edges. There were no ragged edges that I can recall. I am sure of this."

9.25 In her 2003 precognition (see appendix), Fiona Johnstone recalled seeing the instruction manual after it had been found, and that it was "more whole" than other items found and was "intact". She did not think it was very big and she supposed it was rectangular in shape.

9.26 Aspects of the descriptions recorded in these precognitions, such as the absence of tears, ragged edges or scorching, and the recollection that what was found was intact and was closer in size to the control sample instruction manual, would appear to support the proposition that what the Hortons found was a complete manual. On the other hand, the recollection that the item found comprised only one or perhaps two sheets, is more consistent with the item found having been PK/689 as depicted in photograph 266 of the RARDE report.

9.27 In order to address the concerns raised by the Hortons about the apparent changes to the appearance of the manual, the Commission reviewed all the previous accounts given by them, copies of which are contained in the appendix.

9.28 In their initial police statements, obtained by DCs Carr and Barclay on 10 May 1989, Mr and Mrs Horton (S4345 and S4344, respectively) consistently describe the item they found as a "piece" of radio cassette manual, but provide no further details as to its appearance. The statements confirm that during this visit by police the Hortons were shown only a photocopy of the item. (Note that certain issues raised in

the submissions about these police statements are addressed under ground 2. In the submissions, the Commission is urged to obtain the photocopy in question, as the Hortons maintained that it depicted the item in the condition in which they had found it. In the event, D&G informed the Commission that it could not be located.)

9.29 The second police visit took place on 8 July 1991 when DC Gillan showed Mr and Mrs Horton the item itself. Again, the description in their statements (S4345A and S4344A, respectively) is that the item is a "piece" of a radio cassette instruction manual. There is no record in either statement, or in the statement of DC Gillan (S2727BM, see appendix), of any concerns on the part of Mr and Mrs Horton as to the condition of the manual, albeit the statements are generally lacking in detail. However, the description of the item in question throughout the police statements as being a "piece" of instruction manual is not consistent with the proposition that what the Hortons found was a full and intact manual, whereas it is consistent with PK/689 as depicted in photograph 266 of the RARDE report.

9.30 Chronologically, the next recorded account by the Hortons is in their Crown precognitions, taken on 28 July 1999. In her Crown precognition Mrs Horton is recorded as stating:

> *"I have looked carefully at the item which is now labelled PK689. I can recall finding this item down by the Raeburn. I can recall that it was more intact when I found it than what it is now. I see that it is a piece of paper not cardboard as I remember. Despite this, I can confirm that it is the item that I found…"*

9.31 Mr Horton's precognition includes the following passage:

> *"I have looked carefully at the item which is now labelled PK689 I can recall finding this item near to the Raeburn following the Lockerbie Air Disaster in 1988. My memory recalls that it was in one piece when I found it, but it had the appearance of having been partially shredded. The item now labelled PK689 is in several pieces and has deteriorated through the passage of time. Notwithstanding this, I can confirm that this is the item that I found."*

9.32 The Hortons' Crown precognitions are therefore the first recorded accounts of any concerns on their part as to the condition of PK/689, Mrs Horton stating that the item was "more intact" when she found it and Mr Horton stating that the item when found was "in one piece". However, it is not possible to take from these descriptions that what the Hortons recalled finding was a full and complete instruction manual. Moreover, it is clear that, even by that stage, neither witness's memories of the item were perfect: both, for example, acknowledged in their Crown precognitions that they had wrongly recalled that the item was cardboard rather than paper, and notes attached to the precognitions by the Crown precognoscer described the witnesses' memories as "vague".

9.33 On 9 August 1999, shortly after they had given their Crown precognitions, the Hortons were precognosced by the defence ("the pre-trial precognitions"). Despite the fact that all other accounts given by both witnesses were lodged with the Commission in connection with the Toshiba manual submissions, MacKechnie and Associates omitted to include the pre-trial precognitions. In the event, they were handed over to the Commission by MacKechnie and Associates following a specific request to do so. Their contents are clearly of assistance in assessing the Hortons' perceptions of the appearance of PK/689 at the time of its discovery.

9.34 Mrs Horton's pre-trial precognition includes the following passages:

> *"There was one particular piece of paper I remember that I found… When I picked it up I saw it had writing on it, something to do with cassettes or a cassette recorder.*
>
> *The paper measured about 5 inches square, I think the edges were uneven. It wasn't like a page, there were ragged edges. I found it strange and obviously remembered it…*
>
> *I cannot remember a single word on that piece of paper except "cassette" and that it was instructions of some sort. I don't remember any serrations or something like that…*

I can't remember any diagram, but I remember the word "cassette" and smaller writing giving instructions."

9.35 Despite the fact that it was given over ten years after its discovery, this is the first account by Mrs Horton in which she describes the fragment in any detail. Not only is her description entirely inconsistent with a complete and intact manual, her recollection of its dimensions (which, converted to inches, are 4.9 x 5.3 inches) and its uneven, ragged edges reflects PK/689's appearance as depicted in photograph 266 of the RARDE report.

9.36 Mrs Horton also recalls in her pre-trial precognition that when she was precognosced by the Crown she had been shown the item itself. At that time she noticed that it was in two pieces and she had informed the Crown precognoscer that the item she had lifted consisted of one piece of paper. According to her defence precognition, the Crown precognoscer had explained to her that the paper had split as a result of testing. The defence precognition continues: "I have been asked if the paper had changed in any way. It was originally white, but I think it had yellowed with age." Thus, Mrs Horton's only concerns about changes to the appearance of the manual are, first, that it was in two pieces when she was shown it at Crown precognition; and, secondly, that its colour had changed. As to the former, this could be explained by the passage in the RARDE report in which PK/689 is described as initially appearing to be one piece of paper, but being in fact two pieces of paper lightly adhering together which were teased apart during the examination.

9.37 In the Commission's view, the contents of Mrs Horton's defence precognition cast significant doubt upon the reliability of her more recent descriptions, and upon the submission that what she found was a complete, intact manual.

9.38 Likewise, Mr Horton's pre-trial defence precognition is not consistent with his more recent descriptions of the item. There, he described the item as being:

"a piece of paper measuring 7 inches by 4 inches…

The paper was strange, because the centre of it had been scored, like it had been through a shredder that had not worked…

I have been asked to describe the edge of the paper. I would describe it as a jagged piece of paper, or it could have been torn off something."

9.39 Again, such a description is consistent with PK/689 as depicted in photograph 266 of the RARDE report, rather than with a complete and intact manual. According to Mr Horton's pre-trial defence precognition, he too had been shown the item during Crown precognition and, after he had commented to the precognoscer that it was in a number of bits, he had been told that it had disintegrated because of forensic testing.

9.40 It appears therefore that at that time the principal concern of the witnesses as to the condition of the manual was that while they recalled picking up one single piece of paper, the item they were shown at Crown precognition (and which Mrs Horton was shown in evidence) consisted of more than one piece. During a visit to D&G on 17 March 2005, members of the Commission's enquiry team examined PK/689 and arranged for it to be photographed by a scenes of crime officer. As is demonstrated by the following photographs, PK/689 has considerably fragmented since it was photographed at RARDE, and is now in ten or more separate pieces.

Close ups of PK/689 from photographs taken at Dumfries Police Station on 17 March 2005: on the left, still in its production bag and, on the right, spread out over a sheet of A4 paper.

9.41 In the Commission's view, it is little wonder that when the witnesses who found PK/689 were faced with the bag of fragments on the left above, they questioned whether it was the same item they had found.

9.42 Mr and Mrs Horton were interviewed separately by members of the Commission's enquiry team (see appendix of Commission interviews) and the issues concerning PK/689 were discussed with them in detail. It was apparent from this exercise that the passage of time had rendered their memories somewhat unreliable, a fact which they themselves acknowledged on several occasions. Both emphasised that they could not be certain of their recollections and that what they said nearer the time was more likely to be accurate.

9.43 Both witnesses believed that the item they had found was larger and possibly more rectangular than PK/689 as it appears in photograph 266 of the RARDE report, and that it perhaps had more writing on it. However, in various ways their descriptions were not consistent with that of an intact manual. For instance, as in their police statements, both witnesses considered the item to have been a "piece" of manual, rather than a complete one. Moreover, they both maintained that the item consisted of a single sheet of paper, a feature of their description in which they have been relatively consistent throughout their accounts, and which does not support the proposition that what they found was a complete, multi-paged manual. While at interview both witnesses seemed certain that the item bore signs of charring or blackening, this is inconsistent with their previous accounts in which they were unable to recall any charring.

9.44 As regards Mrs Horton, at interview she described the edges of the item she found as having been "tatty", by which she meant ragged. When her pre-trial defence precognition was read to her, she agreed with its contents. In contrast, she disputed the contents of her 2003 precognition, in which she is recorded as recalling no ragged edges. Mrs Horton's principal concern remained that what had been a single item at the time of its discovery had subsequently deteriorated into several fragments, and she referred to the item she had been asked to identify at trial as a plastic bag containing "a heap of rubbish". Ultimately, when it was put to her that the evidence suggested

she had found PK/689 as it appears in photograph 266 of the RARDE report, that forensic scientists had, upon examination, split this into two separate sheets and that these sheets had deteriorated into a number of fragments, Mrs Horton accepted that this might account for her concerns about the item. Although she maintained that she thought there had been more to what she had found than what was depicted in photograph 266, she was not certain of this.

9.45 As regards Mr Horton, when his previous accounts were read to him he accepted that the item could have been jagged or dog-eared round the edges, although he did not remember the item having appeared "shredded". Although initially he indicated that the item was more similar to the front page of PT/1, the control sample Toshiba manual, his final position was that he believed that it might have been the same shape and condition as PK/689 as depicted in photograph 266, only larger in size.

9.46 The Hortons' daughter, Fiona Johnstone, was also interviewed (see appendix of Commission interviews). She too recalled only one sheet of paper having been found, which she believed was a piece of manual rather than a complete one. While she was more insistent than her parents that the item was rectangular in shape, and more similar to the control sample Toshiba manual than to PK/689, she also believed that her mother was best placed to remember this. Contrary to what is recorded in her 2003 precognition, Mrs Johnstone said that she had seen the item in the field, rather than in the kitchen of her house. Like her parents, she emphasised that she could not be certain of her memory after the passage of time.

9.47 It is clear that the accounts obtained from the Hortons over the years as to their recollection of the appearance of the item they found are often different and conflicting. Given the passage of time, coupled with the fact that each of them saw the item only fleetingly, this is hardly surprising, particularly as at the time of its discovery they were not to know the significance that would later be attached to the item. Moreover, on any view, the item has in fact altered from its condition as found.

9.48 In the Commission's view, while it is beyond doubt that the Hortons and Mrs Johnstone were being entirely honest and credible in all their accounts, it is

impossible to select one particular account over another in determining the condition of the item at the time of its discovery. While it is true that some of their recorded accounts are not wholly consistent with PK/689 as depicted in photograph 266 of the RARDE report, others (the earlier ones) clearly are. Assuming that each account obtained from them has been accurately recorded, it is difficult to avoid the conclusion that neither witness could be regarded by a reasonable jury as reliable in his or her various recollections of the item found.

9.49 In these circumstances, the Commission is not persuaded that the item discovered by the Hortons was different in appearance from PK/689 as depicted in photograph 266. In the Commission's view, its conclusion is this respect gains support from the contents of the following section.

(3) Brian Walton

9.50 As explained, Mr Walton was the police officer who received PK/689 from Mrs Horton. According to the submissions, when Mr Walton gave evidence at trial the Crown avoided asking him about the condition of PK/689, despite the fact that in his Crown precognition he had expressed doubts about its condition.

9.51 In evidence, Mr Walton was shown PK/689 which he confirmed had been handed to him by Mrs Horton at Alnwick police station. Asked by the Crown what struck him about the item, Mr Walton referred to it as having "tiny bits of singeing on some of the edges of the pieces" (6/969). Contrary to the suggestion in the submissions, it is not clear from the transcript whether, in making this comment, Mr Walton was referring to the item as it appeared to him in court or at the time it was handed to him by Mrs Horton.

9.52 As to his Crown precognition (see appendix), what Mr Walton is recorded as saying is this:

> *"I can remember that one particular item* [handed in to him at Alnwick police station] *was a piece of Toshiba Radio Instruction Manual.*

This item was a piece of paper, which had different languages on it, and was singed at the edges. It was quite distinctive. That's why I can remember it…

[On being shown PK/689] *I have looked carefully at the item which is labelled PK689. The item is in a worse condition than what I remember, it is in several pieces, as opposed to being more intact when I received the item. Despite this fact, I can say without contradiction that this is the piece of Toshiba Instruction Manual I received at Alnwick Police Station in December 1988. I can also see that the edges are singed, consistent with my memory."*

9.53 Mr Walton's recollection, in his Crown precognition and in evidence, that there was singeing at the edges of the item which was handed in to him is consistent with PK/689 as depicted in photograph 266 of the RARDE report. His sole concern was that it was in several pieces whereas, when he received it, it was more intact. In the Commission's view there is no evidence to suggest that this fragmentation was caused by anything other than its forensic examination coupled with its subsequent deterioration into ten pieces.

9.54 The Commission has examined all the accounts given by Mr Walton over the years (see appendix). The first of these is the entry inserted in an extract from the "Property Other than Found Property" ("POFP") register for Alnwick police station, which the Commission obtained from D&G. This register is used to record any property which is not simply lost property (such as suspected stolen property, or property recovered from a fatal accident), and the extract recovered by the Commission includes details of the items handed in by Mrs Horton. Mr Walton confirmed at interview with the Commission (see below) that the entry in the extract was completed by him upon receipt of the items from Mrs Horton on 23 December 1988, and that he signed and dated it. The third item listed in the entry is: "Piece of cassette recorder instruction manual". Mr Walton's handwritten police statement (S1319B), which he wrote and signed on the date of receipt of the item, also describes the item in those words. In his pre-trial defence precognition he described the item as having been "a Toshiba Cassette Radio handbook which was approximately 6" x 4" and it was all singed around the edges." Again, these descriptions do not support the submission that the item was a complete and intact manual. In the Commission's

view the POFP register entry is particularly significant as it is the first written description of the item.

9.55 Mr Walton was also interviewed by members of the Commission's enquiry team (see appendix of Commission interviews). He specifically recalled noticing when he first received the item at Alnwick that it was brittle and appeared to have been near a source of heat. It was singed and uneven, or jagged, around the edges, and was around three and a half to four inches square. It was not a complete manual but was recognisably from a manual. Mr Walton also recalled the word "Bombeat".

9.56 These descriptions are clearly consistent with PK/689 as depicted in photograph 266 of the RARDE report. However, when shown a scale mock-up of PK/689 as depicted in photograph 266, Mr Walton's recollection was that there was more to what had been handed in, and that it was perhaps two thirds the size of the control sample manual (although this would be inconsistent with the dimensions he previously estimated). He also remembered the word "Toshiba", and that the item had comprised more than just one sheet of paper. It was, he recalled, more recognisably from an instruction manual than was represented by the mock-up of PK/689. Despite this, after it was explained to him that the evidence suggested that photograph 266 depicted what the forensic scientists received, and that it had been two sheets stuck together, he conceded that his own memory might be inaccurate and he accepted the scientists' accounts.

9.57 In the Commission's view, while Mr Walton's accounts generally appear more consistent than those of Mr and Mrs Horton, caution is still required in relying on the contents of his recent interview. This is not only because of the lapse of time but also Mr Walton's acceptance that his memory might not be accurate and that his accounts nearer the time are more likely to be correct. Nevertheless, his recollections at interview were that he received a charred portion of manual, rather than one which was complete and intact. In these circumstances, and given that his previous accounts also point away from the item having been a complete and intact manual, the Commission does not consider that Mr Walton offers any support for the allegations set out in the submissions.

Conclusions regarding ground 1

9.58 The submissions rest on the allegation that an intact Toshiba manual was found by Mrs Horton and was subsequently fragmented by the authorities to assist in proving a connection to the Autumn Leaves terrorist cell. In respect of the first aspect of that allegation, the Commission is satisfied that the accounts given by the Hortons, Mrs Johnstone and Mr Walton provide no reliable support for the assertion that the item discovered by the Hortons was a complete and intact Toshiba manual. It might be said that aspects of the more recent descriptions offered by these witnesses coincide with the Golfer's description of the item he claimed to have seen in the Dexstar store. However, in the Commission's view when these apparent similarities are viewed in the context of the varying accounts given by the witnesses, the Golfer's inherent lack of credibility and the evidence which contradicts his account of seeing the manual, the consistencies, such as they are, do not constitute persuasive evidence in support of the assertion in the submissions. Indeed, the description in the signed and dated entry in the POFP register for the day the item was handed in provides strong evidence to refute that assertion (as do a number of the records referred to in ground 2, below).

9.59 According to MacKechnie and Associates the allegation that an intact manual was fragmented by the investigating authorities and somehow deployed in the evidence to provide a link to the Autumn Leaves suspects is based upon information provided to them by the Golfer. The Commission has already set out its conclusions in respect of the credibility and reliability of this witness. In any event, while at interview the Golfer faintly suggested that the authorities had interfered with the manual, he provided no basis for this and specifically denied the allegation attributed to him in the submissions, namely that he had attended a meeting of senior officers when such a matter was discussed.

9.60 Looking at the allegation of tampering in isolation, if it were true there would require to have been a coordinated and sophisticated conspiracy among several police officers and forensic scientists which involved the latter deliberately fragmenting PK/689 and either inserting these fragments into other items connected to the primary suitcase, or else fabricating their examination notes to convey the same impression. If

the submissions are to be believed, the motive behind such a conspiracy was not to fabricate evidence against a particular suspect, but simply to persuade the BKA to allow access to the materials they held in respect of the Autumn Leaves operation. In the Commission's view, not only is such a scenario implausible, there is no credible evidence to suggest that it occurred.

Ground 2: other issues regarding the provenance of the manual fragments

9.61 The submissions raise a number of other issues regarding the provenance of PK/689, and in relation to the other fragments of Toshiba manual. These issues are said to provide further support for the central proposition addressed under ground 1, or more generally to raise doubts about the provenance of the fragments. Given the Commission's conclusions in ground 1, these further points lose much of their force. Nevertheless, the following section summarises a number of the issues raised, and the Commission's responses to them.

Issues regarding the Hortons' police statements

9.62 The submissions refer to photocopies of the handwritten police statements of Mr and Mrs Horton (S4344 and S4345, see appendix), obtained by DC Carr in respect of his visit to them on 10 May 1989, when a photocopy of the item they had found was shown to them. The submissions suggest that the statement of Mr Horton is simply Mrs Horton's statement with a number of key words substituted, to give the appearance of it being an independent statement. The submissions refer to the Crown precognitions of both witnesses, which it is suggested disclose that the Crown intended to use the Hortons' handwritten statements to reinforce the suggestion that their memories had faded but that the statements made at the time were the truth.

9.63 The Commission has examined the statements in question and accepts that Mr Horton's statement appears simply to be a photocopy of Mrs Horton's statement with a number of words changed to make it read as if it were a statement by Mr Horton. The Commission's conclusions as to the Hortons' memories, and the condition of the item they found, are explained in detail under ground 1. The only aspect of their police statements that relates to the appearance of the item is its

description as a "piece" of cassette recorder instruction manual, a description that matches the handwritten statement of Brian Walton, which he completed on 23 December 1988, and the POFP register entry completed the same day, when the item was first handed in by Mrs Horton. The description is also consistent with the accounts of the witnesses in their Crown and pre-trial defence precognitions, and with their position at interview with the Commission. The Commission is therefore not persuaded that the method of completing the statements can be taken as evidence of any conspiracy to manipulate or misrepresent the true recollections of the witnesses, particularly when they were afforded the opportunity at Crown precognition to approve the contents of the statements. The most likely explanation for the matter raised in the submissions is that when he submitted the statements for typing into the HOLMES system, DC Carr copied and amended a few words in Mrs Horton's statement to avoid the need to write out in full a near identical statement for Mr Horton.

9.64 The submissions also refer to the fact that according to their first statements the Hortons signed a police label for PK/689 on 10 May 1989, but that according to their subsequent statements of 8 July 1991 (S4344A and S4345A), when they were shown the item itself, they again signed a label. The submissions suggest that the original police label should be obtained. The Commission is satisfied that, in fact, the label now attached to PK/689 is the same label as was signed by the Hortons on 10 May 1989. During a visit to the Forensic Explosives Laboratory ("FEL") in Kent members of the enquiry team recovered a photograph of PK/689 which is similar in appearance to photograph 266 of the RARDE report but in which the police label is also pictured (see appendix). The label is the same as that which is presently attached to PK/689, and the signatures of Mr and Mrs Horton are visible on the label in the photograph, as are the signatures of DCs Carr and Barclay. The negative number on the back of the photograph is F7384. According to the photograph log book number 2, also recovered from FEL, the photograph was returned from developing on 12 May 1989 (see appendix to chapter 6), and therefore the signatures must have been inserted in the label before then. This is consistent with the witnesses having signed the label on 10 May 1989, and suggests that the passages in the statements of 8 July 1991, which indicate that the witnesses signed labels on that date, are in error.

9.65 The typed HOLMES versions of the Hortons' first statements (see appendix) also include a note inserted by the police which assists in explaining the reasons for the second visit to the Hortons on 8 July 1991. The note states that due to the fragile condition of the manual it was retained for forensic examination and conveyed directly to RARDE on 11 May 1989. The note then states: "It is proposed to have the Instruction Manual (Label No. PK689) shown to this witness on its release from RARDE."

Police records of PK/689

9.66 The submissions narrate the chain of handling of PK/689, and highlight a number of issues in this regard.

9.67 The first matter raised is that although PK/689 was processed at Hexham, it was not flagged up as being an item of potential interest, despite there being a procedure whereby officers at Hexham would identify such items. It is suggested that this is surprising given the significance subsequently attached to the item. The Commission has considered this issue and is not persuaded that it is of any moment in light of the conclusions in respect of ground 1. In any event, the situation was by no means unique to PK/689: a number of items subsequently identified as being blast damaged and of significance to the police enquiry were not identified as of interest during the initial sifts of debris at Hexham including, for example, PK/1376, a burnt fragment of Abanderado T-shirt, and PK/339, a charred fragment of grey Slalom shirt.

9.68 The submissions also refer to the Dexstar log entry for PK/689. The only issue specifically raised about this is that in the description section the original wording, "Paper Debris", has had added to it in different ink and handwriting a much more detailed description of PK/689: "Remains of Toshiba BomBeat SF 16 Instruction Manual. Charred at edges & in crevices. Appears to have been in IED case." Given that there has been no attempt to hide the fact that this description has been an addition to the Dexstar entry, the Commission is satisfied that nothing sinister can be read into it. Indeed, the practice of adding information to the descriptions of items found to be of significance is not unusual, and can be seen in other Dexstar entries including, for example, those for PD/761, PI/403 and PK/722.

9.69 The submissions also refer to LPS form 394, the form that accompanied PK/689 to RARDE, which records that it was uplifted from Lockerbie on 10 May 1989 and delivered to DS Goulding at RARDE the following day. The submissions point to the fact that the item was transported by DCS Stuart Henderson and DCI Henry Bell, and question why such senior officers chose to carry out such a menial task. In response, it might be speculated that the seniority of the officers reflected a belief that the item they were transporting was potentially of great evidential significance, given that by that stage it was known that a Toshiba radio cassette recorder formed part of the IED. In any event, given the conclusions reached under ground 1, the Commission's view is that it is impossible to read any sinister connotation into the mere fact that senior officers were involved in transporting the item.

RARDE records of PK/689

9.70 The submissions go on to examine the RARDE records relating to PK/689. Reference is made to page 61 of Dr Hayes' notes, dated 16 May 1989, which records his examination of this item. In particular, the submissions refer to handwritten entries at the top of that page which record that PK/689 was received at RARDE on 11 May 1989, that it was "Passed to D/C Jordan on the same date for non-destructive fingerprints", and then "Returned to RARDE on 16/5/89" and "Passed to D/C Jordan on 16/5/89 for chemical treatment after photography." The submissions refer to the evidence of Dr Hayes (17/2687 et seq) and Mr Feraday (18/3030 et seq) about these entries, and to the inconsistency between the entries and the RARDE report (CP 181, section 6, p107) which indicated that the fragments of manual that assisted in identifying the radio cassette recorder (i.e. PK/689) were not received at RARDE until 30 June 1989. Mr Feraday's testimony was that the RARDE report contained an error, which arose from his misreading of records of the fragment's movements, 30 June 1989 being a subsequent date on which PK/689 was submitted to RARDE rather than the first date. The submissions point out that there are no LPS forms corresponding to a submission of the item on 30 June 1989, and suggest that the records referred to by Mr Feraday be obtained.

9.71 During a visit to FEL, members of the Commission's enquiry team obtained what Mr Feraday subsequently confirmed at interview were the movement records to which he had referred in his evidence. There is, as Mr Feraday had suggested in evidence, an entry recording PK/689's return to RARDE on 30 June 1989 (see appendix). Other records uncovered at FEL confirm that PK/689 was returned from fingerprinting on that date, and this corresponds with the police statement of DC Jordan (S5410, see appendix). The movement records also note the receipt of the item at RARDE on 11 May and its despatch to DC Jordan the same day, but they do not record the return of the fragment to RARDE on 16 May or its further despatch to DC Jordan that day. DC Jordan's statement likewise does not refer to his having returned the fragment to RARDE on 16 May, but refers only to his receiving it on 11 May and returning it to RARDE on 30 June 1989. In short, there are inconsistencies in the records at RARDE of exactly what happened to the fragment after its receipt on 11 May 1989. It is clear from other papers recovered by members of the enquiry team from files held at FEL that the precise timing and circumstances of PK/689's submission for fingerprinting was a source of some confusion. However, there is no doubt that fingerprint testing was carried out on the item, a fact confirmed in various papers, including DC Jordan's statement and also the statement of DC John Irving (S4587, see appendix) which states that PK/689 was processed for finger and palm marks with a negative result.

9.72 During the Commission's enquiries, one further issue arose regarding Dr Hayes' notes detailing his examination of PK/689. Page 61 of his notes records an examination of the fragment on 16 May 1989. As explained in chapter 6, ESDA traces of various pages of Dr Hayes' notes were made by the forensic document examiner John McCrae. One of the pages examined was page 42(a) (see the Yorkie trousers submissions at chapter 10). Page 42(a) is dated 4 July 1989. However, the trace of this page showed indentations that appear to correspond to parts of the examination of PK/689 on page 61 (although this fact is not specifically referred to in Mr McCrae's report). All other things being equal, one would expect there to have been over forty sheets of examination paper between page 61 of Dr Hayes' notes, dated 16 May 1989, and the notes he made on 4 July 1989. The fact that a trace of the former appears on the latter is therefore difficult to explain. Dr Hayes was questioned in detail about this issue at interview, but was unable to offer any explanation for it.

He resisted the suggestion that he might have used more that one pad of examination paper.

9.73 Although the preceding paragraphs highlight a number of difficulties in the RARDE records relating to PK/689, as explained in chapter 6 above, in themselves they provide no support for the allegation that the investigating authorities conspired to fabricate evidence. For the reasons stated under ground 1, the Commission is satisfied that there was no such conspiracy in relation to the Toshiba manual. In addition, the police records that precede RARDE's involvement with the item support the view that the item submitted for forensic examination was not, as the submissions would have it, an intact manual. For example, LPS form 394, which was completed prior to PK/689's submission to RARDE, contains the following description of PK/689: "Torn remains of what appears to be multi-lingual instruction manual of a Toshiba BomBeat SF16 radio/cassette player. White with black print. English instructions on reverse. ? Arabic on inside. Slight charring around edges & in some crevices."

9.74 Moreover, the photographs and photograph log books obtained from FEL record that a photograph of PK/689 was taken on or before 12 May 1989 (referred to above, see appendix), which would correspond with the item's arrival on 11 May. The Commission's enquiry team recovered this photograph at FEL. The photographic records (see appendix to chapter 6) also reveal that photographs 266 to 268 of the RARDE report, which depict the item first in its original form and then in two pieces after the pages had been teased apart by the scientists, were taken on or before 17 May 1989. This corresponds with the item having been returned to RARDE on 16 May 1989 and having being examined by Dr Hayes on that date, in spite of the evidence of the ESDA trace and the gaps in the RARDE movement records.

The number of pages comprising PK/689

9.75 As explained above, the RARDE report described PK/689 as having initially appeared to be one sheet of paper which was subsequently found to be two sheets stuck together. The submissions refer to certain sources which it is suggested contradict that position. Reference is made to a description of the item in DC Carr's

defence precognition in which he gave an account of finding the item in the Dexstar store and stated that it was "like several pages that had been compressed together" (see appendix). The submissions also refer to the RARDE report describing PK/689 as "some explosively damaged paper fragments" (CP 181, section 6, p 107). Reference is also made to a memorandum of 8 May 1989 by FBI Special Agent Harold Hendershot, a copy of which is included in the appendix, in which he described the item as having two outside sheets of paper and further pages sandwiched in between.

9.76 The Commission is satisfied that the issues raised here do not affect its conclusions under ground 1. It should be noted that although the RARDE report recorded PK/689 as being two pieces of paper adhering together, these sheets were both double sided, comprising four pages of information (as depicted in photographs 267 and 268 of the RARDE report). More significantly, the references in the submissions in this regard are extremely selective. DC Carr's description of the item in his defence precognition also referred to the item being *part* of a manual, with scorch marks. SA Hendershot's memorandum describes PK/689 as "a section of an instruction sheet for a Toshiba Radio Model Bombeat SF16… approximately 4 inches square, and exhibits blast damage around the edges." This part of SA Hendershot's description of the item could hardly have better corresponded to PK/689 as depicted in photograph 266 of the RARDE report. In the Commission's view the accounts of SA Hendershot and DC Carr, read as a whole, cannot be regarded as supporting the allegations in the submission.

Other fragments of manual

9.77 According to the RARDE report, fragments of the Toshiba manual were extracted from a number of blast damaged fragments of clothing. The presence of manual fragments within such items was one of the factors relied upon by the forensic scientists to conclude that the clothing fragments had originally been in the primary suitcase. The submissions raise issues about three of these groups of manual fragments, namely PT/2, PT/34(c) and PT/31(a).

9.78 PT/2, the submissions point out, was alleged to have been recovered from PI/995. The submissions raise the issue that, contrary to his normal practice, Dr Hayes chose to designate the items recovered from PI/995 as PT/35(a), (b) and (c), but referred to the fragments of paper from the manual as PT/2, rather than PT/35(d).

9.79 Matters regarding the provenance of PI/995, the timing of its examination by Dr Hayes, and the extraction of material from it, are addressed at chapter 7, above. It is of significance that the FEL photographic records confirm that by 22 May 1989 PT/2 had been photographed alongside PI/995 and the items comprising PT/35. This assists in dispelling any doubts about the provenance of PT/2 and the other fragments, despite the supposed anomaly in the PT numbering.

9.80 The forensic scientists were asked about the allocation of PT numbers during interview with members of the Commission's enquiry team. As regards PT/2, Mr Feraday suggested that these paper fragments might have been allocated the reference PT/2 in order to associate them with the control sample Toshiba manual, which was designated PT/1. Dr Hayes suggested at first that the PT numbers had been allocated in sequence, and therefore that PT/35 might have been extracted from PI/995 at a later date than PT/2, but this explanation is inconsistent with the photographic records mentioned above. Generally, it is clear that the sequence of PT numbering for many items does not correspond to the date order in Dr Hayes' notes. In the Commission's view it is not possible to draw any sinister inference from this.

9.81 The submissions also refer to PT/34(c), recorded at page 58 of Dr Hayes' notes as having been extracted from PI/221 (a fragment of the brown check Yorkie trousers), and described as a very small fragment of paper consisting of two sheets. The submissions point out that page 23 of Mr Feraday's handwritten notes (CP 1498) contains a description of PT/34(c) as being four fragments of paper, as opposed to the two fragments Dr Hayes described.

9.82 The Commission notes that the RARDE report (CP 181, section 6.2.2) also refers to PT/34(c) as four fragments of paper. A member of the Commission's enquiry team examined PT/34(c) during a visit to Dumfries Police Station and established that it comprises four individual fragments of paper and, indeed, that there

appears to be a minute fifth fragment. It is possible that, as with PK/689, PT/34(c) fragmented during the course of examination or handling, and that this might explain the difference between Dr Hayes' notes and those of Mr Feraday. In any event, given that the Commission is satisfied with the provenance of PK/689, and of PI/221 (as described in chapter 10) from which PT/34(c) was extracted, the Commission can see no significance in the differences between Dr Hayes' notes and those of Mr Feraday.

9.83 As regards PT/31(a), the submissions refer to page 84 of Dr Hayes' notes in which is recorded the extraction, *inter alia*, of three overlaid pieces of paper from PK/2209 (a fragment of the blue babygro, see chapter 11), and the submissions point out that at page 22 of Mr Feraday's notes reference is made to *ten* pieces of paper being extracted from PK/2209. It is suggested that this might be an example of page changing and insertion in which the scientists have been caught out.

9.84 The Commission observes that in Dr Hayes' notes he refers to the three fragments of paper as PT/31(a), but that he also refers to a quantity of paper adhering to the surface of a separate piece of debris, PT/31(b), also recovered from PK/2209. No further details are given by Dr Hayes about this other fragment of paper. In Mr Feraday's description of PT/31(b) he does not mention the paper adhering to it. Photograph 146 of the RARDE report is a collective shot of PT/31. It includes the three fragments described by Dr Hayes, and also the other quantity of paper. In the Commission's view, it is possible that this other quantity of paper might comprise a further seven small fragments of paper adhering together, which would explain Mr Feraday's note that there were ten fragments. If that is correct, the only confusion that arises is that Mr Feraday's note refers to all ten fragments as being PT/31(a), whereas in fact some of the fragments had first to be extracted from PT/31(b). In any event, given that the Commission is satisfied with the provenance of PK/689, and of PK/2209 (as described in chapter 11), the Commission can see no significance in the differences between Dr Hayes' notes and those of Mr Feraday. In particular, it is difficult to see how this could ever be used as evidence to support an allegation that the notes had been altered retrospectively, or how it could have furthered any conspiracy.

Defence forensic examination of manual fragments

9.85 The submissions suggest that the defence at trial failed to instruct a forensic examination of the alleged fragmentation of the Toshiba manual. Although MacKechnie and Associates had attempted to instruct such an examination, according to the submissions this was hampered by lack of access to the original productions.

9.86 The defence commissioned a forensic report from the Forensic Science Agency of Northern Ireland ("FSANI") (DP 21) prior to trial, but it contains no mention of the Toshiba manual. However, the Commission obtained from MacKechnie and Associates a number of papers concerning the defence enquiries in this area, included in which was an earlier draft of the FSANI report, dated 7 April 2000 (see appendix). Appended to this version of the report is a section headed "Further information" which includes the following passage: "Examination of the original photographs of the BomBeat SF16 manual indicate their explosives involvement due to blackened and shattered edges and a compressed, wrinkled surface." In light of this very clear conclusion, the defence could hardly be criticised for any decision not to conduct further enquiries in this area. In any event, given the results of the Commission's enquiries in respect of the manual, any such further enquiries were likely to be fruitless.

Comparisons between PK/689 and other fragments/control samples

9.87 It is observed in the submissions that no comparison was made between PK/689 and the other recovered fragments of manual (PT/2, PT/31, PT/34(c) and PT/40(c)); and that no comparison was made with the other types of Toshiba owner's manuals.

9.88 The Commission notes that it was reported in the appendix of further information attached to the draft FSANI report of 7 April 2000 mentioned above that it would be possible to make comparisons between the fragments of paper to test whether they came from different sources or could have come from the same source, although it was emphasised that it would never be possible conclusively to establish that the fragments all came from the same piece of paper. However, given that the

Commission has no reason to doubt the provenance of any of the paper fragments, or of the items from which they were extracted, such a forensic comparison was, in its view, unnecessary. For the same reasons, the Commission does not believe it to be necessary to compare the fragments with the other control sample manuals. In any event, it is clear from the photographs in the RARDE report (293, 296, 297, 299 and 302) that PK/689 does not match the front page of any of the other manuals. Even if the smaller fragments could be shown to match parts of any of the control samples, this would not detract from the conclusion that they also match the control sample RT-SF16 manual.

Commission's conclusions regarding ground 2

9.89 As indicated, by raising these disparate issues MacKechnie and Associates sought to provide support for the central assertion referred to in ground 1, namely that the Hortons found an intact Toshiba manual which was then fragmented by the police and/or forensic scientists in order to provide a link between PA103 and the Autumn Leaves cell. In the Commission's view, however, once that central assertion is rejected, these other allegations are at worst unfounded and at best amount simply to irregularities in record-keeping which in themselves do not support allegations of malfeasance on the part of the investigating authorities. Viewed separately or cumulatively, they do not persuade the Commission that the provenance of the manual fragments is in any doubt.

Overall conclusion

9.90 For the reasons given, even when all the matters raised are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 10
THE YORKIE TROUSERS

Introduction

10.1 On 29 July 2004 MacKechnie and Associates lodged with the Commission a substantial submission regarding fragments of clothing which the RARDE report (CP 181, section 5.1.2) concluded had formed part of a pair of brown "tartan" Yorkie brand trousers contained within the primary suitcase.

10.2 This garment was of significance for three reasons. First, as acknowledged by the trial court at paragraph 12 of its judgment, the marks of identification found on one of the fragments led the police to the Yorkie Clothing manufacturers in Malta on 1 September 1989, and from there to Mary's House and the witness Anthony Gauci. Secondly, the evidence of the order number on one of the fragments provided a direct connection between the clothing sold at Mary's House and the contents of the primary suitcase. Lastly, the order number also linked the garment to a specific delivery of trousers made to Mary's House on 18 November 1988. This assisted in narrowing the range of possible dates on which the purchase of clothing spoken to by Mr Gauci in evidence could have taken place.

10.3 The submissions raise a wide range of issues about the evidence surrounding the fragments of Yorkie trousers. In particular, doubts are raised about the suggestion that Mr Gauci was first identified as a witness from the enquiries conducted by the police at the Yorkie Clothing factory. The allegation underlying much of what is submitted is that the police in fact knew of Mr Gauci and his connection with PA103 before 1 September 1989, and that the alleged link to Mr Gauci through the Yorkie enquiries was "engineered" by the police.

10.4 The Commission has divided the submissions into the following three broad grounds:

(1) allegations by the Golfer of surveillance in Malta prior to 1 September 1989;

(2) alleged doubts about the sequence of events leading to the first visit by police to Mary's House; and

(3) various alleged irregularities regarding the identification marks said to have been found on two of the fragments of trousers.

10.5 The Commission's consideration of a fourth ground, which covers a number of diverse issues concerning the provenance of the fragments, is contained in the appendix.

Ground 1: alleged surveillance in Malta before 1 September 1989

10.6 The Golfer's allegations about surveillance in Malta, as contained in the submissions, are twofold. First, the submissions allege that the Golfer was informed by [redacted] that there had been a surveillance operation of a Palestinian terrorist cell in Malta before the bombing of PA103, and that an individual associated with that cell was seen making a purchase of clothing from Mr Gauci's shop. Secondly, the submissions claim the Golfer was informed that surveillance was conducted on the shop before the first visit there by the police and that this was done to ensure that it was not being used as a terrorist base, and was safe for officers to enter.

10.7 The submissions recognise that these allegations are "extraordinary", but suggest that there is evidence which raises doubts about the sequence of events which led the police from Yorkie Clothing to Mr Gauci's shop. The Commission has addressed that evidence in ground 2, below. At interview the Golfer raised doubts about the provenance of the order number on the fragment of Yorkie trousers, and these are addressed under ground 3 below (as well as in chapter 5), along with other matters relating to the identifying marks on the fragments.

Consideration of ground 1

Surveillance prior to the disaster

10.8 The Commission's conclusions in respect of the Golfer's credibility are outlined at chapter 5. In relation to alleged surveillance in Malta, although no reference is made to this in volume A, the Golfer is recorded in the defence memorandum of 23 February 2003 (see appendix to chapter 5) as referring to a "second witness" (i.e. apart from Anthony Gauci) to the sale of clothing at Mr Gauci's shop and to the fact that that witness saw two people involved in the purchase, one who bought the clothes and a second who drove the purchaser to the shop. The Golfer is recorded in the memorandum as suggesting that the witness to these events would be able to identify both men, as he had seen them coming and going from a nearby Libyan Consulate. According to the memorandum, the Golfer was adamant that there was a statement for this witness.

10.9 It is unclear whether the witness described by the Golfer in the memorandum was supposed to be Paul Gauci (which would be consistent with the Golfer's later claim that Paul Gauci was present in the shop when the purchase took place), or someone who had been carrying out surveillance. Either way, the allegation in the memorandum is clearly at odds both with the contents of the Yorkie trousers submissions and with the Golfer's statements to the Commission (as described below), particularly in the suggestion that the individuals observed were connected to the Libyan Consulate.

10.10 Summaries of the Golfer's three statements to the Commission are included in chapter 5, and the statements themselves are contained in the appendix of Commission interviews. As regards his allegation that surveillance was carried out on Palestinian terrorists in Malta prior to the bombing, there are a number of inconsistencies. In particular, in his first statement, the Golfer positively alleged that "certain suspects from Autumn Leaves were followed to Mr Gauci's shop at some juncture". However, at the third interview, the Golfer seemed to retract this allegation and, in particular, denied informing MacKechnie and Associates that he had been told a member of the Palestinian cell had been followed to Mr Gauci's shop and observed

purchasing clothing. Although he accepted that he had told MacKechnie and Associates about surveillance, the Golfer claimed that he had not specified Mr Gauci's shop, or that clothing was purchased. According to the Golfer, he did not know of Mr Gauci's shop at the time his discussions with [redacted]

10.11 Moreover, the sum of the allegation made by the Golfer is vague. It amounts to [redacted] having suggested that, at some time before the bombing of PA103, either before or after the arrest of the Autumn Leaves suspects in Germany, there was surveillance of some description, possibly by the German authorities, on one or more unnamed Palestinian terrorists in Malta. In terms of the allegation these individuals were apparently part of the Autumn Leaves gang. There was also some mention of a shop, which it seems the Golfer assumed was Mr Gauci's shop.

10.12 Given that the initial focus of the police enquiry was on the Autumn Leaves suspects, any surveillance of them in Malta in such obviously incriminating circumstances would doubtless have been the subject of much police attention. However, in response to a request by the Commission, D&G stated that there was no information in its records to suggest that any surveillance of Palestinians had been carried out in Malta between September 1988 and the date of the disaster. The Commission also had access to protectively marked materials held by D&G but found nothing in the materials examined by it that would support the allegation. Nor did it find any support for the allegations as a result of its other enquiries.

Surveillance prior to 1 September 1989

10.13 As regards the alleged surveillance of Mr Gauci's shop prior to the visit there by Mr Bell on 1 September 1989, the Golfer's accounts to the Commission were broadly consistent and reflected the terms of the submissions. His position at the second and third interviews was that [redacted] had informed him of this surveillance operation, although again the details the Golfer gave were vague. He did not know the nature of the surveillance, who had carried it out or how it had been done, although he doubted that it simply amounted to the interviewing officers watching the shop before they entered. In his third statement, the Golfer's position was that he did not think [redacted]

had mentioned Mr Gauci's shop by name, only that it had been on "a shop where the clothes were bought". The Golfer indicated that this conversation took place before 1 September 1989.

10.14 The Commission has found no evidence to support the Golfer's allegation in this regard. D&G confirmed to the Commission that it had no information relating to surveillance carried out on Mary's House at any time between the date of the disaster and 1 September 1989. The Commission also had access to protectively marked materials held by D&G but found nothing in the materials examined by it that would support the allegation. Nor did it find any support for the allegations as a result of its other enquiries. As stated in chapter 5, at interview Mr Bell recalled being informed by Mr Scicluna on 1 September 1989, en route to Mary's House, that it posed no risk to their safety.

10.15 The Golfer also suggested at interview that the police officers involved in the initial enquiries in Malta (in July 1989), when the suppliers of the babygro were identified, were instructed to curtail their investigations and return home, so that "preparatory work" could be done prior to the enquiries undertaken by Mr Bell. For the reasons stated in chapter 11 the Commission is satisfied that there is no substance in that suggestion.

Conclusions regarding ground 1

10.16 In light of the above, and bearing in mind its conclusions about the Golfer's credibility in chapter 5, the Commission is satisfied that there is no merit in the Golfer's allegations on the issue of surveillance.

10.17 Despite this finding, the Commission considered that the issues raised in the remainder of the submissions warranted further enquiries. This seemed particularly important given the suggestions of official malpractice (and even criminality) which underlie the submissions, as well as the overall significance of the evidence relating to the Yorkie trousers fragments.

Ground 2: Doubts about the sequence of events leading to the first visit by police to Mary's House

10.18 The submissions point to a number of matters which, it is suggested, cast doubt on the evidence that the police first became aware of Mr Gauci after conducting enquiries at Yorkie Clothing on 1 September 1989.

George Grech

10.19 The submissions refer to a precognition from George Grech, Deputy Police Commissioner in Malta at the time of the Lockerbie investigation, which was obtained by MacKechnie and Associates in May 2004. In the precognition Mr Grech is noted as saying that he was aware as early as the beginning of July 1989, that the Scottish police had traced a link between Mr Gauci's shop and two items of clothing, namely a babygro and a pair of Yorkie trousers. The submissions also refer to Mr Grech's pre-trial defence precognition, dated 11 October 1999, in which he indicated that the police had possession of a babygro and "something else" in July 1989, and that they managed to trace these to Mary's House at that time.

Alexander Calleja

10.20 Reference is also made in the submissions to a precognition from Alexander Calleja of Yorkie Clothing. According to the precognition, Mr Calleja was adamant that the first contact he had with police was at around 11.30am on Saturday, 2 September 1989, when he was about to finish work for the day. The precognition also records that when his original police statement was read to him, Mr Calleja refuted any part of it which suggested that he had first been visited by officers on 1 September 1989. Copies of the statement and the precognition are included in the appendix.

Dates of seizure of Yorkie Clothing productions

10.21 The submissions also refer to three productions obtained by the police from Mr Calleja, and seek to raise doubts about the dates on which these were recovered.

The productions in question consist of the delivery note (CP 424, police reference DC/55) which records the delivery of order 1705 to Mr Gauci, a certified copy of the control delivery book (CP 492, police reference DC/56) which shows a breakdown of Mr Gauci's order, and a certified copy of the cutting control book (CP 491, police reference DC/57) which interprets the colour codes mentioned in the delivery book as having been ordered by Mr Gauci. The submissions highlight inconsistencies in the accounts of when these items were seized by the police, and also point to evidence indicating that the date on the police label attached to the cutting control book has been altered. The submissions suggest that, given the seriousness of the crime, particular care should have been taken to record the dates on which productions were seized accurately, and allege that either this was not done here, or there was a degree of "reverse engineering" of the evidence.

Consideration of ground 2

George Grech

10.22 The suggestion in the submissions is that according to Mr Grech a link to Mary's House was established in July 1989 (and not on 1 September of that year as Mr Gauci's initial police statement indicates). According to the submissions, Mr Grech was "very vague" in his 2004 precognition about what he had been referring to in his pre-trial defence precognition when he had suggested that the police had a babygro and "something else" in July 1989, although he thought the other item was a pair of Yorkie-make trousers.

10.23 The Commission notes that, although Mr Grech is recorded in both precognitions as saying that the items in possession of the Scottish police could be traced to Mary's House, it is not expressly stated in either precognition that the link was actually made to Mary's House in July 1989. Even assuming that Mr Grech's memory was that the link was made in July 1989, the fact that he was "very vague" about one of the items instantly raises questions about his reliability. Having reviewed all his accounts, and having interviewed him, the Commission believes such doubts about his reliability to be justified. Copies of these accounts are included in the appendix.

10.24 Mr Grech's only HOLMES statement on the matter (S5571) refers to the initial visit by DI Brown and DC Graham on 5 July 1989, and generally to subsequent enquiries in Malta, but gives no details or dates, other than mentioning his attendance at the international case conference in Meckenheim on 14 September 1989. In his Crown precognition, taken on 26 July 1999, Mr Grech is noted as saying that his recollection of some details, and of the chronology of events, might not be accurate, although he could recollect some events clearly. He stated that his first recollection of a Maltese connection with the Lockerbie enquiry came as a result of a briefing by Paul Newell (then Deputy Chief Constable of D&G) some time in 1989, and that he attended the international conference at Meckenheim at about the same time. He made no reference to the enquiries by DI Brown in July 1989, or to those conducted by Mr Bell at the start of September of that year. It appears from records recovered by D&G that the briefing by DCC Newell took place in Malta some time shortly before 9 September 1989, although the Commission has not established its precise date.

10.25 In his pre-trial defence precognition of 11 October 1999 (which in fact takes the form of a file note of the interview), Mr Grech indicated that his involvement in the case started on 12 July 1989 when he received an Interpol request to assist the Scottish police who had discovered Maltese clothing and wanted to investigate this. It is here that Mr Grech is recorded as saying that the Scottish police had "a babygro and something else which they managed to trace to Mary's House". He then made reference to a request for assistance by DCC Newell, which presumably relates to the presentation mentioned in Mr Grech's Crown precognition, and to the international conference he attended in Germany which he thought probably took place in July 1989. Later in his precognition of 11 October 1999 he stated that at the time of the Meckenheim conference the police had just established that the bomb-damaged clothing had been purchased in Malta.

10.26 Given that it is known that the Meckenheim conference took place on 14 September 1989, over two months after the initial enquiries in Malta by Scottish police, the impression given by Mr Grech's precognition of 11 October 1999 is that he

recalled events in the early stages of the Maltese enquiries having been much closer together in time than in fact was the case.

10.27 Mr Grech made scant reference to the chronology of events in his evidence at the trial. He testified that, following a visit to Malta by DI Brown, DCC Newell came to Malta and gave a "demonstration" of events at Lockerbie, after which Mr Grech attended the Meckenheim conference (54/7369 et seq).

10.28 Mr Grech's post-trial defence precognition, obtained by MacKechnie and Associates, indicates that his first involvement in the enquiry was at the conference in Germany, and that shortly thereafter there was an "exhibition" by DCC Newell in Malta. Mr Grech also suggests in the precognition that it was after this presentation by DCC Newell that Mr Bell came to Malta. He is noted as stating:

> *"I agree that George Brown and one other officer came to Malta following an approach by Interpol but I cannot now remember the exact dates. I remember that when George Brown came to the Island they were in Possession of a Babygro and one other article of clothing which could be traced to Mr Gauci's shop. I think the other item of clothing was the Yorkie Trousers.*"

10.29 This precognition demonstrates Mr Grech's uncertainty as to the dates, and also his confusion as to the chronology of events, such as his belief that the German conference took place before the presentation by DCC Newell.

10.30 Members of the Commission's enquiry team interviewed Mr Grech and questioned him in some detail about the sequence of events (see appendix of Commission interviews). His account was somewhat confused which, given the passage of time, is not surprising. In brief, he recalled that DI Brown came to Malta without informing the Maltese police (which contradicts his own earlier accounts and the statements of other officers confirming that a formal request for assistance was made in advance of the visit through Interpol and that Mr Scicluna had in fact assisted DI Brown). When asked whether DI Brown brought items with him to Malta, Mr Grech replied:

"They must have brought with them I think labels [by which he meant labelled items or exhibits] or what have you. And there was a Yorkie and Mary's House… I think [Brown is] the name. Unless I'm mixing up. Some time has elapsed… I'm just talking from my memory now."

10.31 When asked about the outcome of DI Brown's investigations, Mr Grech said:

"As far as I recall is that they said that Mr Gauci from Mary's House remembered having sold a baby suit or whatever it was similar to, to an Arab speaking person."

10.32 However, he explained that he did not learn this from DI Brown and that he was only informed about the link to Mary's House later on, by DCC Newell and then by Mr Bell.

10.33 Mr Grech also recalled that Mr Bell only became involved in the enquiries in Malta after the German conference. On any view, this recollection is inaccurate. When asked if he disputed that it was Mr Bell and Mr Scicluna who visited Yorkie Clothing, Mr Grech said that he could not dispute anything as he had no access to any of the records. The statements given at the time, he said, should be preferred, as his memory was fresher then and the records would speak for themselves. Although Mr Grech thought Mr Bell was only involved in Malta after the Meckenheim conference, and appeared to conflate the babygro enquiries with those at Yorkie Clothing, his recollection seemed to be that the connection to Mary's House was made through enquiries at Yorkie Clothing.

10.34 It is clear from the above accounts that Mr Grech is not a reliable witness as to the sequence of events that led the police to Mary's House. In these circumstances, and given the vagueness of his descriptions of events, the Commission does not believe that the contents of his 1999 and 2004 precognitions are capable of supporting the allegation that the police identified Mary's House prior to 1 September 1989 and their enquiries at Yorkie Clothing.

Alexander Calleja

10.35 The submissions indicate that Mr Calleja was "passionate in the belief that Saturday 2nd September, 1989 was the first day that he was visited by the Police". This is reflected in the precognition obtained by MacKechnie and Associates, where in response to the question whether the police might have visited his premises on Friday 1 September Mr Calleja is noted as saying:

> *"Listen to me, this all happened a long time ago and some of what happened is a bit unclear, but I am absolutely positive that these officers came to my factory for the first time on the Saturday."*

10.36 Given that Mr Gauci's initial police statement is dated 1 September 1989, if Mr Calleja's memory was to prove accurate it would cast serious doubt on the sequence of events as recorded by the police in witness statements and as presented by the Crown at trial.

10.37 Mr Calleja only gave one police statement, which bears to have been taken by DS William Armstrong at 9.30am on 2 September 1989, and is signed. It records that on 1 September Mr Bell and DS Armstrong, along with Mr Scicluna, called at the Yorkie Clothing factory where they showed Mr Calleja a photograph of a piece of material with a Yorkie label attached. They also informed him that the garment had on it the number "1705" in ink. Mr Calleja was able to say that the item had been manufactured at his factory. The number, 1705, represented the order number. The statement goes on to record that Mr Calleja identified from his order book that the order in question was made by Mr Gauci in October 1988. He also explained to the officers the details of the garments ordered. In particular, according to the statement the trousers made of the brown check fabric shown to Mr Calleja by the police were made into five pairs, all of which were supplied to Mr Gauci. According to the statement, no other trousers of that material would have been made with the order number 1705. Mr Calleja also stated that according to his delivery book the order was delivered to Mary's House on 18 November 1988. The relevant page from the delivery book was provided to the police.

10.38 The statement goes on to record that on 2 September the same police officers returned to Mr Calleja's factory and showed him three pairs of trousers, each of which Mr Calleja confirmed had formed part of the order delivered to Mary's House. In terms of other statements, the police had obtained these pairs of trousers from Mr Gauci at Mary's House the previous day.

10.39 According to the precognition obtained by MacKechnie and Associates after the trial, Mr Calleja was shown a copy of the handwritten version of his police statement, which he confirmed had been signed by him on each sheet. Mr Calleja maintained, however, that, contrary to what was recorded in the statement, he had first been visited at 11.30am on Saturday 2 September. Mr Calleja explained that he must just have signed the statement where he was asked to, and that if he had known its contents he would have refused to do so. Copies of the statement and the post-trial defence precognition are contained in the appendix.

10.40 In order to assess Mr Calleja's reliability, the Commission sought to review all the other accounts he had given. It was found, however, that neither the Crown nor the defence had precognosced him prior to the trial. Although a file note in the electronic files obtained from McGrigors suggested that Mr MacKechnie himself had met Mr Calleja on 18 August 1999, there was no precognition contained within those files. In a letter to the Commission dated 28 April 2005, Mr MacKechnie indicated that although he recalled interviewing Mr Calleja and believed that a precognition had been taken, none could be found. Mr MacKechnie added in the letter that he had "no clear recollection of what [Mr Calleja] said at the time."

10.41 As regards the Crown, a print of Mr Calleja's HOLMES statement was relied upon in place of a precognition. However, added to this was the following note by one of the procurators fiscal involved in the case (see appendix):

> *"This witness was seen on several occasions in March/April 1999 with a view to precognition. At first he was openly hostile and said that he would not assist in any way. DCS Bell persuaded him to consider the matter further and the witness said he would take legal advice. As he became more amenable it became apparent that he had concerns for his business because of the volume of trade*

with Libya. He refused to make any direct comment on his potential evidence but, on having his statement read to him declined the opportunity to disagree with its contents. He appears to be genuinely concerned for his welfare but eventually said that he would honour his obligations if asked to come to court…"

10.42 It is clearly of some significance that when his police statement was read to him in 1999 Mr Calleja did not give any indication that he disagreed with its contents. He did not give evidence at the trial.

10.43 A member of the Commission's enquiry team interviewed Mr Calleja in Malta on 26 May 2005 (see appendix of Commission interviews). He had initially refused to co-operate with the Commission's investigations but was persuaded to do so after contact was made with his solicitor. At interview, Mr Calleja remained certain that the officers had come to see him for the first time on a Saturday. He referred to the fact that he normally worked between 7am and 12pm on Saturdays, and he recalled the police arriving at about 11.30am when he was planning to go home. His recollection was that there were only two officers, one of whom was Maltese (whose name, after prompting, he agreed was Scicluna) and the other "English" (whose name he recalled was "Harry" and whose surname he agreed, again after prompting, was Bell). Mr Calleja could not, offhand, remember the month in which the first visit had taken place. He recalled, though, that the officers had come back to the factory on the following Monday, at which time they had spoken to his father.

10.44 Mr Calleja was referred to the terms of his signed police statement of 2 September 1989. He did not recall signing the statement but confirmed that the signatures on each page were his own. Although he indicated that his ability to read English was better than his ability to read Maltese, he stated that he had probably just signed the statement without realising the significance of its contents. He remained firm that the first visit by the police had taken place on a Saturday.

10.45 While Mr Calleja's belief that the police first came to see him on a Saturday appears genuine, in the Commission's view his reasons for ruling out the possibility that the visit took place on a Friday (the day on which 1 September fell in 1989) are not particularly convincing. Mr Calleja explained that in 1989 his father had been in

overall charge of Yorkie Clothing and it followed, to his mind, that if the police had first visited his premises on a Friday they would have spoken to his father, not to him. In other words, the fact that the police had first spoken to him rather than to his father suggested that it was a Saturday, when his father would not have been at the factory. While at some points in the interview Mr Calleja stated that it was "impossible" that the police had visited him on the Friday, at other points he said only that he could not remember the police visiting him on that day. He stated that, because of the pattern of work on a Friday, if the police had come on that day it would have been in the morning. This would be consistent with Mr Gauci's first police statement, CP 452, S4677, which is noted as having been taken at 12.45pm on the Friday, after the visit to the factory. Mr Calleja also recalled being in the office on his own. He was asked whether it was possible that his father was out of the office on that particular Friday, and that the police might therefore have spoken to him instead. In response, Mr Calleja said that his father "goes in and out" but that he "can't really think to be honest with you". He suggested, however, that Friday was the day on which his father was least likely to have been absent from the office. He reiterated that he had a very clear recollection that the police came to see him on a Saturday. Ultimately, however, he suggested that there was a 10% chance that he was present at the factory when his father and elder brother were not there, and that he would have met the police in those circumstances.

10.46 Accordingly, even in terms of his recollection 16 years after the events themselves, Mr Calleja considers it possible that he first met with the police on Friday 1 September 1989. Regardless of his current memory of events, the fact remains that on 2 September 1989 he signed a statement indicating quite clearly that he was visited by the police the previous day. As indicated, this statement was read over to him during the Crown's preparations for trial, at which time he did not dispute its contents. Moreover, there is no dispute that the police came to see Mr Calleja on the Saturday morning; the only issue is whether that was the first occasion on which they came to see him.

10.47 It is worth noting that at interview Mr Calleja maintained a similar air of certainty in respect of other recollections which are at odds with the version of events detailed in his police statement, and in those of the police officers involved. For

example, he recalled that only two officers, Mr Scicluna and Mr Bell, came to his factory, and he refuted the suggestion that there had also been a third officer. However, there appears to be no doubt that DS Armstrong was also present; indeed, it is he who is recorded as having noted Mr Calleja's statement. Similarly, Mr Calleja was adamant that what he had been shown by police was actual blast-damaged fragments of clothing, as opposed to merely photographs of such items, when the statements of the officers involved and the movement records of the fragments in question clearly suggest otherwise. Despite this, Mr Calleja resisted the suggestion that his recollection might be confused and maintained that he would not have been able to identify the fragments from photographs.

10.48 In the Commission's view, even assuming that there was some conspiracy to conceal the true sequence of events, it is difficult to envisage why the police would wish to portray DS Armstrong as present at Yorkie Clothing when he was not; or why they would pretend to have shown only photographs to Mr Calleja when in fact they had shown him the original fragments. Perhaps more significantly, it is very hard to envisage a situation where the police would risk presenting Mr Calleja with a detailed handwritten statement which they knew to contain a number of falsehoods, when there was every chance that Mr Calleja would read the statement and query its contents.

10.49 More broadly, the sequence of events whereby enquiries at Yorkie Clothing led the police to Mary's House was clearly and consistently described in the statements and precognitions of officers Armstrong, Bell and Scicluna, was confirmed in evidence by DS Armstrong (14/2194) and Mr Bell (32/4840) and was reiterated by Mr Scicluna and Mr Bell at interview with members of the Commission's enquiry team (see appendix of Commission interviews). Even Mr Calleja confirmed at interview that it was the information he provided which led the officers to Mr Gauci.

10.50 It is also of note that, at interview with members of the Commission's enquiry team, Mr Bell recalled meeting both Mr Calleja and his father during the initial visit to the Yorkie factory. Indeed, Mr Bell specifically recalled asking Mr Calleja's father where the name "Yorkie" came from, and being told by Mr Calleja's father that he got the name from his army days. Given Mr Calleja's insistence that his

father would have dealt with the police if they had arrived on a Friday, Mr Bell's memory of having met Mr Calleja's father on the initial visit to the factory adds further weight to the view that Mr Calleja may simply have forgotten about the first visit of police on 1 September, and has confused aspects of this with their subsequent visit the following day.

10.51 In conclusion, although there is no reason to doubt Mr Calleja's credibility, standing the weight of evidence against his current recollections, the absence of evidence to support them, his own acceptance that his memory of events may be wrong, and the inherent improbability that the police would have sought to invent details of a visit to Yorkie Clothing on 1 September 1989, the Commission does not consider Mr Calleja's accounts to be of sufficient significance to cast doubt upon the version of events presented by the Crown at trial. Accordingly, in the Commission's view, there is nothing in his accounts to suggest that a miscarriage of justice may have occurred in this connection.

Dates of seizure of Yorkie Clothing productions

10.52 The submissions refer to Mr Calleja's handwritten police statement (which MacKechnie and Associates appear to have extracted from papers given to the defence by the Maltese police prior to the trial), to a copy of the equivalent HOLMES version of this statement (which has an added passage of text not reflected in the signed handwritten version) and to the accounts of officers Bell, Armstrong and Scicluna. Based on these sources the submissions point to a number of inconsistencies in the dates on which the three Yorkie productions (the delivery note, the control delivery book and the cutting control book) were obtained by the police.

10.53 In brief, Mr Calleja's handwritten police statement indicates that the delivery note was provided to the police on 1 September, but makes no mention of the control delivery book and the cutting control book. However, in the additional text contained in the HOLMES version of the statement it suggests that these two documents were seized on 4 September. On the other hand, the HOLMES statements of the three police officers suggest that all three documents were obtained from Mr Calleja on 1 September 1989, as does DS Armstrong's defence precognition. A further version of

events is given in a "summary of assistance" document attributed to Mr Scicluna, but apparently written by Mr Bell. It is suggested there that while the delivery note was obtained on 1 September, the control delivery book was not obtained until 2 September. No reference is made in the summary of assistance document to the cutting control book.

10.54 The submissions also highlight inconsistencies in the dates written on the productions themselves or on the police labels attached to them. In particular, reference is made to a photocopy of the cutting control book and its label (see appendix). This photocopy was found by MacKechnie and Associates in the BKA papers which had been obtained by the defence prior to trial. In the photocopy the police label is shown as signed only by Mr Bell, and the date on the label is "1st September 1989". However, in the label attached to the production as it appeared at trial there are a further five signatures on the label, including DS Armstrong's, and the date has been changed to "4th September 1989".

10.55 The submissions also point to the signatures on the production itself. Two entries in the document have been signed by Mr Bell and dated 2 September 1989, whereas the same two entries have been signed by DS Armstrong and dated 4 September 1989. The document has been signed again by Mr Bell at the margin, and this signature is dated 4 September 1989. It has also been signed by Mr Calleja, who certified it as a true copy of the original, and his signature is also dated 4 September 1989. The submissions suggest that those dates that read 4 September might have been altered and that they might originally have read 1 September.

10.56 The Commission notes that as the photocopy of the document from the BKA papers clearly depicts the date of Mr Bell's signature in the margin as 4 September (the other dates are less clear), any change to that date must have occurred before the photocopy was made. On the other hand, the change to the label must have occurred after the photocopy was made.

10.57 The Commission obtained from D&G copies of the original handwritten statements of the various individuals involved (see appendix). It is worth noting that the handwritten statement of Mr Calleja provided by D&G has two further pages

which are not included in the copy of that statement submitted by MacKechnie and Associates. These two extra pages are not signed by Mr Calleja, but reflect the additional text which appears in the HOLMES version of his statement. It appears that this text has been added to the statement after Mr Calleja signed the first six pages and after the Maltese police were given a copy of the statement.

10.58 In general, the Commission is satisfied that the inconsistencies highlighted in the submissions are reflected in the handwritten statements. The Commission also accepts that the date on the production label attached to the cutting control book label was changed from 1 to 4 September 1989.

10.59 At interview with members of the Commission's enquiry team Mr Bell explained that the handwriting in which the change to the label had been made was not his and that he thought it was DS Armstrong's. He accepted that production labels should not be amended in this manner, but believed that there must be an explanation for it. Although he himself was unable to provide any explanation, he was confident that if DS Armstrong was responsible for the change there was no sinister reason for it. He confirmed that he had visited Mary's House after the first visit to Yorkie Clothing on 1 September, and had returned to Yorkie Clothing the next day. When asked if he had returned to Yorkie Clothing again on 4 September (a visit which is recorded only in the additional text of Mr Calleja's statement and in the dates inserted on the productions), he recalled that Mr Calleja would not provide the original cutting book and that eventually he was given a photocopy of the relevant page from the book together with the original pieces of material that had been attached to the page. Mr Bell suggested that the amendment to the label might have had something to do with them "going backwards and forwards to try to obtain the original book, or as near to it as possible".

10.60 A similar account is given by Mr Bell in his defence precognition (see appendix), in which he describes returning to see Mr Calleja over the weekend and Mr Calleja being reluctant to provide the cutting control book. It is also consistent with Mr Calleja's own recollections when interviewed as part of the Commission's enquiries. He recalled the police returning to his factory on the Monday (i.e. 4 September), at which time he signed the papers. He suggested that his father would

have met the police during that meeting, as he would not have released the papers without his father's permission.

10.61 In evidence, DS Armstrong spoke to the visit to Yorkie Clothing and confirmed that he seized the delivery note on 2 September and that the label for the cutting control book was dated 4 September (14/2198).

10.62 The dates on the police labels for the delivery note and the control delivery book are 2 and 4 September respectively, consistent with the police having returned to Yorkie Clothing on those dates. There is no suggestion that those labels have been altered.

10.63 It is clear from the above that, despite the contents of their statements, the police officers concerned made subsequent visits to Yorkie Clothing on Saturday, 2 September and Monday, 4 September. The question to be addressed is whether the inconsistencies in the dates and the change to the label are evidence of a conspiracy to cover up the true sequence or nature of events, or whether they simply reflect a level of confusion over precisely when certain items were obtained.

10.64 In the Commission's view the second of these propositions is the only plausible one. Regardless of the dates, there is no dispute that the documents in question were obtained by the police from Mr Calleja. In these circumstances, the Commission does not believe that the evidential value of the productions themselves is diminished by the issues highlighted in the submissions. Moreover, it is difficult to envisage any suspicious reason for the change to the production label attached to the cutting control book, even if similar changes were also made to the dates on the document itself. It might have been different had the date been changed from 4 September to 1 September, as this might have supported the allegation that the police had not visited Yorkie Clothing on 1 September, but that is not the case.

10.65 It should be added that the Commission's conclusions in this respect are not to be taken as condoning the unacknowledged amendment of police labels or of dates or signatures inserted onto productions themselves. However, in the absence of evidence of a deliberate plot by police officers to obscure the true sequence of events

the Commission can see nothing in the various inconsistencies which gives rise to the possibility that a miscarriage of justice may have occurred. In so far as the submissions seek to argue that the irregularities themselves constitute evidence of such a conspiracy, for the reasons given in chapter 4 the Commission is unable to accept such a proposition.

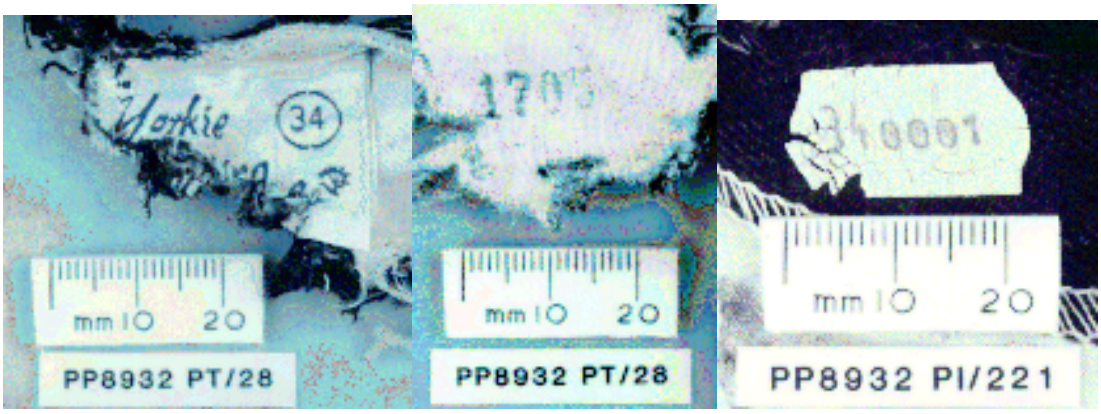
Conclusions regarding ground 2

10.66 For the reasons given the Commission does not believe that there is any reasonable basis for doubting the evidence relating to the police investigations at Yorkie Clothing, or that the enquiries there led the police to Mary's House on 1 September 1989.

Ground 3: doubts about the identifying marks on the fragments

10.67 The submissions seek to raise a number of doubts about the provenance of identifying marks said to have been found on two of the fragments of the brown check Yorkie trousers.

10.68 The evidence at trial was that one of the fragments, PT/28 (which had been given the "PT" number after it was extracted from a bag of items designated PK/323), had on it part of a Yorkie brand label showing the size of the garment as 34. Printed in black ink on the remains of a pocket on this fragment was the order number 1705. A second fragment, PI/221, had attached to it an adhesive label (called a "meta" label) on which the number 340001 was printed. These three identifying marks are pictured below. The other two fragments, PK/1504 and PK/1794, consisted partly of portions of brown tartan material that matched PT/28 and PI/221, but they did not have any specific identifying marks.



Close-ups from photographs 111, 110 and 108 of the RARDE report, respectively

10.69 As explained, the label on the left led police to the Yorkie Clothing factory, where the order number 1705 was identified as relating to an order for trousers delivered to Mary's House on 18 November 1988.

Submissions relating to order number 1705

10.70 The submissions refer to statements by Mr Bell and DS Armstrong in which it is recorded that, contrary to the position described above, the Yorkie label was on one fragment but the order number was located on the other fragment along with the meta label. The submissions argue that the concurrence of the two statements suggests that the description of the order number as being on the fragment with the meta label rather than on the fragment with the Yorkie label is not simply a typographical error. In support of this the submissions refer to DC John Crawford's defence precognition in which he quotes a report on the blast-damaged fragments. According to the precognition the report also suggests that the order number was located on the fragment with the meta label and that the Yorkie label was on the other fragment.

10.71 The submissions also point out that the photographs purportedly taken to Malta by Mr Bell (CP 435) on his first visit there do not include a photograph of the order number. The submissions reiterate the allegations addressed above, namely that the police had prior knowledge of Mr Gauci's shop, and suggest that the police might have visited Mr Gauci's shop *before* they visited Yorkie Clothing. According to the submissions, on realising the significance of the order number the police might have

begun the process of "reverse-engineering" evidence to convey the impression that they had reached Mary's House through enquiries at Yorkie Clothing. The submissions also make the point that, contrary to the way in which the evidence may have appeared at trial, trousers with the order number 1705 were not sold exclusively to Mary's House, and that in fact a number were sold by Yorkie Clothing to other parties.

10.72 Finally, the Golfer made certain allegations about the order number 1705 in his statements to the Commission.

Submissions relating to the Yorkie label

10.73 The submissions also refer to DC Calum Enwistle's defence precognition in which he is recorded as having viewed PT/28 and PI/221 at RARDE on 21 March 1989 in the presence of Dr Hayes. According to the precognition, while DC Entwistle observed the order number on PT/28 and the meta label on PI/221, "[t]here were no other apparent marks of identification visible on either piece at this time." It is also noted that DC Entwistle then obtained a sample of the brown check material (PT/70) and conducted enquiries into the origin of the garment, but without success. The submissions suggest that this indicates that there was no Yorkie label in existence on the fragments at that time.

Submissions relating to the meta label

10.74 The submissions also refer to certain issues raised by Mr Calleja in the precognition obtained from him by MacKechnie and Associates. Mr Calleja is noted as saying that, as meta labels were attached to garments in sequential order, he would have expected the number on the meta label of the fragment PI/221 to be close in sequence to the number of the meta label on the control sample brown check trousers, DC/44. According to the precognition this was because they were both from the same batch of five pairs of brown check trousers made under the order number 1705, which would have been cut one after the other. However, the number on the meta label attached to the control sample is 44, whereas the number on the label attached to

PI/221 is 1. Mr Calleja also doubted that the meta label would have survived the explosion.

10.75 The submissions seek to add to the alleged doubts regarding the meta label by referring to the "summary of assistance" document (see above), in which the number on the meta label is described in terms different from what is depicted in the RARDE report.

Consideration of ground 3

10.76 The submissions in relation to each of the identifying marks are addressed here in turn.

Submissions regarding order number 1705

10.77 In the version of Mr Bell's HOLMES statement, S2632C, included with the submissions to the Commission (see appendix), reference is made to two fragments of check trousers, one bearing the Yorkie label, the other bearing the order number 1705 and the meta label. The police reference numbers (PI/221 and PT/28) are not mentioned. The same description appears in the version of DS Armstrong's HOLMES statement (S2667H) that was provided with the submissions, and it is also repeated in his defence precognition (although, as the submissions acknowledge, this is likely to have resulted from DS Armstrong simply reading out his police statements at precognition). Clearly, this description is inconsistent with the evidence at trial, in which the Yorkie label and order number were said to have been attached to one fragment, PT/28, and the meta label to the other fragment, PI/221. The Commission obtained the original handwritten versions of these statements from D&G (see appendix) and they reflect the terms of the HOLMES statements.

10.78 The Commission also obtained from D&G a copy of the report quoted by DC Crawford in his defence precognition. In fact the report is contained in a police statement by DS Byrne (S312F) and is said to have been based on an examination of the fragments at RARDE by DC Crawford and DS Byrne on 10 and 11 August 1989.

As suggested in the submissions, the report indicates that the Yorkie label was attached to PT/28, whereas the order number and meta label were on PI/221.

10.79 The Commission also obtained a statement by DI George Brown (S4458G). Again, this indicates that the order number and meta label were on the same fragment, albeit in the statement it is suggested that this was PT/28 rather than PI/221.

10.80 The Commission is not persuaded that the inconsistency between the accounts of the various police officers and the contents of the RARDE report can be considered suspicious or in any way indicative of a conspiracy to manufacture evidence. The likely explanation is simply that there was a misunderstanding by the police about the precise positioning of the identifying marks. Contrary to what is suggested in the submissions the error could easily have been replicated across a number of statements if, for example, the statements were based on information contained in the report by DS Byrne and DC Crawford. This is perhaps all the more likely given that none of the other officers appear to have had access to the fragments themselves.

10.81 That the contents of the officers' statements are unreliable in this respect is confirmed by the results of the Commission's enquiries in this area. During a visit to the Forensic Explosives Laboratory ("FEL"), members of the enquiry team recovered a photograph of PI/221 and PT/28 (then still referred to as PK/323) bearing negative number FC3441, which the photographic records indicate was taken on or before 5 April 1989. This photograph is not included in the albums appended to the RARDE report. It clearly depicts the order number on PT/28, and the meta label on PI/221. A copy of the photograph is included in the appendix. Further, a statement by DC Entwistle (S450U) confirms that he visited RARDE on 21 March 1989 and saw the order number on PT/28. At interview with the Commission (see appendix of Commission interviews) DC Entwistle specifically remembered this incident, as he recalled that it was he who had suggested to Dr Hayes that the pocket material be peeled apart, as a result of which the order number was revealed. Assuming DC Entwistle's memory is accurate, his account provides further support for the conclusion that the passages in the statements by his fellow officers are wrong.

10.82 The photograph recovered by the Commission at FEL also serves to undermine any sinister inference sought to be drawn from the fact that Mr Bell did not take a photograph of the order number on PT28 with him on his initial visit to Malta. The submissions seek to link the absence of such a photograph to the suggestion that the police had prior knowledge of Mary's House. However, that suggestion has been rejected by the Commission see under ground 2 above.

10.83 With regard to the Golfer's allegations concerning the order number, it is perhaps surprising that no reference is made to these in the submissions. As described in chapter 5 at his first interview with the Commission the Golfer indicated that the order number had been an "addition" to the fragment. At his second interview, however, while the Golfer referred to the fact that the photographs taken to Malta by the police did not include a photograph of the order number, he refused to give any further information. At his third interview, the Golfer eventually revealed the source of his allegation to be DS Sandy Gay who, he said, had raised doubts about the order number and had pointed out, in particular, that it had only appeared on the fragment after the police enquiries in Malta.

10.84 The Commission's approach to the Golfer's accounts generally, and to his allegations about DS Gay, is explained in chapter 5. Beyond this, however, the photograph depicting the order number taken on or before 5 April 1989 provides a compelling rebuttal of the Golfer's claims. Moreover, there are various accounts, including the report by DS Byrne and DC Crawford, which pre-date Mr Bell's visit to Malta and which refer to the existence of the order number (albeit some refer to it on the wrong fragment). In short, not only are there serious doubts as to the Golfer's credibility, the available evidence positively refutes his allegation that the order number was somehow "added" to PT/28 following Mr Bell's initial enquiries in Malta.

10.85 Lastly, as regards the submission that not all the Yorkie trousers made with order number 1705 were sold to Mr Gauci, the most important fact, which is acknowledged in the submissions, is that all five pairs of the brown check trousers produced with that order number were delivered to Mary's House. It is therefore of no evidential significance that only 113 of the 136 other pairs of trousers made under

order 1705 were delivered to Mr Gauci, the remainder having been sold by Yorkie Clothing as surplus stock.

Submissions regarding the Yorkie label

10.86 The terms of DC Entwistle's defence precognition, in which he described seeing the order number on PT/28 and the meta label on PI/221 during his visit to RARDE on 21 March 1989, are reflected both in the HOLMES and the manuscript versions of his statement, S450U (see appendix). In particular, the statement confirms DC Entwistle's conclusion that "[t]here were no other apparent marks of identification visible on either piece at this time".

10.87 Given the evidence that the Yorkie label was also found on PT/28, the Commission considered the terms of DC Entwistle's statement surprising. They were all the more surprising when an examination of PT/28 by members of the Commission's enquiry team disclosed that the Yorkie label was in relatively close proximity to the order number. In the circumstances, it was considered that the matter warranted further investigation.

10.88 Chronologically, the first reference to the Yorkie label on PT/28 would appear to be at the foot of page 42 of Dr Hayes' notes (CP 1497), dated 14 March 1989: "N.B. (d) Fragment of damaged "Yorkie" brand label sewn into a seam, also the number "1705" printed in black ink on underside of hip pocket lining."

10.89 The date of Dr Hayes' note would suggest that the Yorkie label had been identified at RARDE prior to DC Entwistle's visit on 21 March, despite the latter's statement suggesting the contrary. However, as alleged in the submissions, the positioning and wording of the reference to the Yorkie label in Dr Hayes' notes indicates that it might have been added to page 42 at a date later than the other notes on that page. Page 43 of Dr Hayes' notes is also dated 14 March 1989. However, the page that follows page 42 is in fact page 42(a), dated 4 July 1989, which records an examination of PI/221, and which was presumably slotted in behind page 42 because PI/221 and PT/28 were of common origin.

10.90 The Commission instructed Mr McCrae, the forensic document examiner, to obtain ESDA traces of page 42(a). His report is in the appendix to chapter 6. In the event, Mr McCrae recovered an indented impression of the reference to the Yorkie label and order number on page 42(a). This suggests that the wording was written on page 42 after page 42(a) was inserted behind it. The inference is that the references to the Yorkie label and the order number were added to page 42 on or after 4 July 1989, when page 42(a) was written.

10.91 The next reference to PT/28 in Dr Hayes' notes is on page 57, dated 16 May 1989, when the item was still referred to as PK/323. However, the entry on that page, which has been scored through by a single line and has been cross-referred to page 42, bears no reference to the Yorkie label at all (although there is reference to the order number which, on the basis of Mr McCrae's conclusions about the ESDA traces, appears to have been written contemporaneously with the remainder of that page).

10.92 Assuming that the inferences drawn from the ESDA tracings are correct, the first reference to the Yorkie label in Dr Hayes' notes was in fact made on or after 4 July 1989. Such a conclusion is supported by other evidence suggesting that the Yorkie label on PT/28 was not identified before that date. In particular, there is no sign of the Yorkie label in the photograph of PT/28 recovered by the Commission from FEL which was produced on or before 5 April 1989. During their enquiries at FEL, members of the Commission's enquiry team also recovered a handwritten note by DCI Baird relating to a visit he made to RARDE on 26 and 27 April 1989 (see appendix). While the note makes reference to PT/28 and PI/221 and describes the order number and meta label, again there is no reference to the Yorkie label.

10.93 According to DC Entwistle's statement, on 30 March 1989 he and DI George Brown conducted enquiries to try to trace the source of PT/28 and PI/221. They visited several textile outlets, including the Scottish Textile and Technical Centre at Galashiels, but at that time they could not establish the identity of the garment from which the fragments originated. The fact that DC Entwistle and DI Brown's enquiries in this connection did not include any attempt to investigate the Yorkie label is further confirmation that the label was not identified until later. Had it been otherwise, it is inconceivable that the police would not have pursued that lead instead.

10.94 It should be noted that there are two statements by DI Brown regarding these enquiries. The first, S4458G (see appendix), refers only to PT/28 and suggests that the order number and meta label number were both found on that fragment. This statement refers to the unsuccessful attempts he and DC Entwistle made to identify the origin of the fragment. It also contains the following passage:

> *"It is significant to note at this stage that only part of the trouser seat and a small part of the pocket were recovered… The ongoing search at Lockerbie recovered production PI221 the seat of the trousers bearing [the Yorkie label]. I thereafter concentrated on tracing the brand name 'Yorkie' and established there was none in the USA."*

10.95 The statement goes on to describe that on 25 August 1989 DI Brown made contact with the US legal attaché in Italy, who had assisted him with the enquiries he had conducted regarding the babygro, to establish if Yorkie garments were manufactured in Malta. According to the statement, DI Brown received a reply the same day informing him of the address of Yorkie Clothing.

10.96 Clearly, there are inaccuracies in DI Brown's statement regarding the positioning of the identifying marks. The suggestion in the statement that PI/221 was examined after his enquiries with DC Entwistle is also inconsistent with the terms of DC Entwistle's statement. The second statement by DI Brown, S4458L (see appendix), is more in line with DC Entwistle's statement but states that, following "further information" from RARDE that PT/28 had a partially embroidered Yorkie label, he instigated enquiries in the USA and then with the legal attaché in Italy who advised him on 25 August 1989 of the Yorkie Clothing manufacturer in Malta. However, DI Brown's second statement was in fact written on his behalf by DC Entwistle in his role as a member of the "collation of reports team" (DC Entwistle confirmed this at interview with the Commission; he also confirmed that he wrote statements of behalf of Mr Bell and DS Armstrong, in which apparent errors in their earlier statements were corrected, but in the event those statements were not used in the police report). Although informative in describing the position as DC Entwistle

understood it to be in retrospect, in the circumstances DI Brown's second statement is of no evidential value.

10.97 As part of their enquiries members of the Commission's enquiry team interviewed DC Entwistle, DI Brown and Dr Hayes about the matters raised in the submissions (see appendix of Commission interviews).

10.98 DC Entwistle's initial position was that he was unable to explain the absence of any reference to the Yorkie label in his police statement or during the enquiries he and DI Brown conducted. When it was suggested to him that this might simply have resulted from the label having been missed during initial forensic examinations, at first DC Entwistle did not think that was possible and positively asserted that the label would have been seen. While he could understand the police officers at Lockerbie not noticing the label, he did not see how Dr Hayes could have missed it, because he knew how thorough Dr Hayes had been. DC Entwistle was sure, however, that there was nothing sinister in it.

10.99 Subsequently, DC Entwistle's position seemed to alter, and although he remained unable to explain the absence of any reference to the Yorkie label in his statement, his answers to questions acknowledged the possibility that the label might have been missed at first. He suggested that after he and Dr Hayes had examined the item, Dr Hayes might have continued the examination alone and discovered the Yorkie label at that stage. He specifically referred to the fragment having been folded up. The absence of any reference to the Yorkie label in his statement, he said, led him to believe that the label had not been discovered at the time of his examination of the item. When it was put to him that he had earlier doubted this possibility, he replied, "It's a terrible thing when you start to wonder." He repeated that he clearly remembered being present when Dr Hayes had found the order number. However, if the Yorkie label had been visible at the time, he could not believe that he would not have written it into his statement. According to DC Entwistle, this was information that he would immediately have sent back to Lockerbie.

10.100 At interview, DI Brown felt the obvious explanation as to why the Yorkie label was not spotted immediately was that it was on a separate fragment from the one

with the order number. He could not understand why, if the order number and the Yorkie label were on the same fragment, he had been told only about the order number when he had visited the textile outlets to try to source the fragments. He acknowledged that it was strange that the Yorkie label had not been found at the same time as the order number, but confirmed that, had it been found, he would have expected to be told about it as it was the most important and obvious clue. He reiterated several times that the only explanation he could think of was that they were on separate fragments. At another stage, however, he pointed out that the fragments were bomb-damaged and had been found in the snow and rain, and that he could understand even Dr Hayes missing part of the fragment.

10.101 DC Entwistle and DI Brown were also able to recall their subsequent investigations into the "Yorkie" label. DC Entwistle remembered that he had contacted the manufacturers of Yorkie chocolate bars. He also remembered the American legal attaché calling to confirm that there was indeed a Yorkie Clothing company in Malta, very close to where DI Brown had been when he went to see the manufacturers of the babygro. DI Brown, on the other hand, was unable to recall this telephone call, although he did recall making enquiries about "Yorkie".

10.102 Dr Hayes could not recall the Yorkie trouser fragments when shown a photograph of them, nor could he remember the order number. He was unable to explain why his notes suggested that he had examined PT/28 on 14 March 1989 and PI/221 on 16 May 1989, when DC Entwistle had apparently been present with him during an examination of both items on 21 March 1989. Prior to the results of the ESDA traces being brought to his attention, he accepted that the entry at the bottom of page 42 of his notes regarding the Yorkie label and the order number on PT/28 had been added to the page at a later stage. When he was referred to the statement by DC Entwistle, the report by DCI Baird, the photograph taken on or before 5 April 1989 and the subsequent photographs depicting the Yorkie label, he also accepted that it was possible that the Yorkie label had been attached to PT/28 and simply had not been apparent to him during his initial examinations of the item. When the results of the ESDA tracing were subsequently explained to him, Dr Hayes accepted that the reference to the Yorkie label on page 42 of his notes must have been inserted on or after 4 July 1989. He considered it to be a reasonable explanation that when he

revisited PI/221 on 4 July 1989, as described in page 42(a) of his notes, he might also have re-examined PT/28 and at that stage discovered the Yorkie label. Thereafter he might have added the reference on page 42.

10.103 Ultimately, there appear to be two competing explanations for the inconsistencies and apparent anomalies across the statements and other items:

(1) that the Yorkie label was not attached to PT/28 at the time of DC Entwistle's examination on 21 March, the implication being that it was deliberately sewn on to the fragment at some time thereafter, in an attempt to manipulate the evidence;

or

(2) that the label was simply missed by the police and Dr Hayes during their initial examinations and was discovered at some later time when PT/28 was revisited (presumably on or after 4 July 1989).

10.104 In the Commission's view the former explanation is inherently implausible whereas the latter stands up to scrutiny. Although the precise date on which the Yorkie label was discovered cannot be pinpointed from the available evidence, in the Commission's view there is no doubt that this had occurred by July or August 1989. Not only is that view consistent with the statements of DI George Brown, which refer to his enquiries with the US legal attaché on 25 August 1989, it is also consistent with the report by DC Crawford and DS Byrne which refers to an examination of PT/28 on 10 or 11 August 1989 and expressly mentions the Yorkie label.

10.105 Moreover, the photographic records indicate that a photograph of the Yorkie label contained in PT/18 (the booklet of photographs which correspond to the Polaroids taken by Mr Bell to Malta at the end of August 1989), bearing negative number FC3739, was taken on or before 23 August 1989, thereby refuting any suggestion that it somehow came into being only after Mr Bell's initial enquiries on the island. It is also consistent with the statements by Mr Bell, DS Armstrong and Mr Calleja, all of which describe Mr Calleja being shown the photograph of the Yorkie label on 1 September 1989.

10.106 With regard to what Dr Hayes, DI Brown and DC Entwistle said at interview, it is clear that the passage of time has affected their memories, perhaps more so in the case DI Brown and Dr Hayes. Nevertheless, in the Commission's view their accounts are at least consistent with, if not positively supportive of, the conclusion that the Yorkie label was simply missed during initial examinations. The fragment was clearly convoluted and had suffered heat damage. As DC Entwistle described at interview, the pocket on PT/28 had been stuck together by the heat to such an extent that it had to be pulled apart to reveal the order number. This might reflect the appearance of the fragment in the photograph that was taken on or before 5 April 1989, which does not depict the Yorkie label and which shows PT/28 in a much more crumpled, compressed state than the same fragment in photograph 107 of the RARDE report (in which the Yorkie label is visible).

10.107 In conclusion, the Commission is satisfied that the Yorkie label attached to PT/28 was simply missed during initial examinations, and that the inconsistencies in the various statements and other items are not evidence of some wider conspiracy by the police to fabricate evidence.

Submissions relating to the meta label

10.108 As explained, the submissions refer to the precognition obtained from Mr Calleja by MacKechnie and Associates, in which he suggests that the meta labels were attached sequentially to the trousers when they were cut, to ensure that the correct pieces were stitched together. As the five pairs of brown check trousers would have been cut one after the other, according to Mr Calleja's precognition the numbers on the meta labels attached to these pairs of trousers should have been consecutive. The meta label purportedly found on PI/221 was numbered 340001 (the 34 relating to the size of the trousers), and therefore Mr Calleja would have expected the meta labels attached to the other four pairs of brown check trousers that were made to have ended with numbers 2 to 5. However, the meta label attached to the control sample pair of trousers, DC/44, obtained by the police from Mary's House was numbered 360044.

10.109 In the Commission's view, nothing sinister can be read into this apparent anomaly. Various pieces of evidence vouch for the provenance of the meta label on PI/221. Most significantly, it is clearly depicted in the photograph referred to above, which was taken at RARDE on or before 5 April 1989. The report by DCI Baird of his visit to RARDE on 26 and 27 April 1989 also mentions the meta label number (although it erroneously describes it as 840001). Likewise the number is referred to in Dr Hayes' examination notes, and in the report by DC Crawford and DS Byrne.

10.110 Moreover, at interview with the Commission Mr Calleja did not seem concerned by the apparent anomaly between the meta labels on PI/221 and DC/44. He was more concerned about the fact that the documentation indicated that only 24 pairs of check patterned trousers were made, which he expected would mean that the meta label numbering went from 1 to 24. He was therefore surprised that DC/44's meta label ended in the number 44. However, he was able to envisage a possible explanation for this, and he also acknowledged that one simply could not tell what had happened seventeen years previously.

10.111 Lastly, the meta labels adhering to another control sample pair of Yorkie trousers (DC/42, a pair of size 36 herringbone trousers bought by the police from Mary's House) demonstrate that the numbering of the meta labels was not rigorous. According to the RARDE report, DC/42 had four meta labels attached to it, all of which one would expect to be printed with the same number. However, while two are numbered 360014, one is numbered 3620014 (pictured in photograph 128 of the RARDE report) and the last is numbered 360015 (pictured in photograph 127 of the RARDE report). It would be difficult to read anything sinister into anomalies in a system that is demonstrably imprecise.

10.112 In the Commission's view the above factors amply dispel any doubts about the provenance of the meta label on PI/221. The fact that Mr Calleja expressed surprise that the meta label survived the explosion is of no moment; nor, in the Commission's opinion, are the various inconsistencies in police officers' accounts of the meta label numbering.

Overall conclusions regarding the Yorkie trousers submissions

10.113 As stated above, a fourth ground, which addresses a number of disparate further issues raised in the submissions, is included in the appendix.

10.114 In conclusion, the Commission has considered in detail the various allegations raised in respect of the fragments of Yorkie trousers and does not believe that, even when these matters are considered cumulatively, a miscarriage of justice may have occurred under this ground of review. Over and above its concerns as to the Golfer's credibility, the Commission has found no evidence to support his allegations as to surveillance in Malta either before or after the bombing. In the Commission's view, Mr Grech's memory of the sequence of events is unreliable. With regard to Mr Calleja, standing the evidence which contradicts or undermines his account, as well as his concession that his memory of events may not be reliable, the Commission does not consider what he had to say as significant. Likewise, the Commission does not consider the various irregularities in the police records regarding the documents obtained from Yorkie Clothing to be evidence of a deliberate attempt by the police to conceal the "true" sequence of events in Malta. As regards the apparent anomalies in the identifying marks on the fragments, the Commission does not believe that these support the submission that efforts were made by the police or forensic scientists to alter the physical evidence in the case. On the contrary, the Commission is satisfied that evidence such as the FEL photographic records is significant in supporting the provenance of the fragments of Yorkie trousers.

CHAPTER 11
THE BABYGRO

Introduction

11.1 On 22 November 2004, MacKechnie and Associates lodged submissions with the Commission regarding the provenance of fragments of clothing which the trial court accepted were parts of a blue babygro (see appendix of submissions). The court found that this item had been within the primary suitcase, and was among those sold by Anthony Gauci.

11.2 It is argued in the submissions that the authenticity of the fragments of babygro is open to doubt because of allegations made by the Golfer. Central to these is the claim that the fragments were recovered, not from the crash scene, but rather as a result of the test explosions involving police and forensic scientists which took place in the US in 1989. According to the submissions, the fragments were then taken back to Scotland and passed off as having been recovered from the crash scene. The Commission has addressed these allegations under ground 1 below.

11.3 The submissions acknowledge that there is no positive proof that this occurred. However, it is claimed that certain circumstances relating to the conduct of the police and forensic scientists provide support for the Golfer's assertions and raise doubts about the provenance of the babygro fragments. These issues are addressed in ground 2 below.

Ground 1: The Golfer

11.4 The submissions make the following allegations in relation to the Golfer:

> *"From the beginning 'the Golfer' has stressed to us the importance of closely examining the background to the alleged recovery of the various fragments of the babygro as it was known to him that an* ***intact*** *babygro had been recovered and not fragmented items as claimed in evidence.*

Golfer has maintained that the reason for using a child's sleep suit was that it was an evocative item and was intended to shock and pull at the heart strings of a jury (as was anticipated at that time).

Golfer claims that he knows that an intact sleep suit was taken to America where it was fragmented and then introduced into the chain of evidence as having been found at the crash scene. He recollects that following the Test Explosions various fragments of bomb damaged property were taken back to Lockerbie and he remembers being shown some of these items as an indication of what they should be searching for…"

11.5 According to the submissions, the Golfer's position was that the "engineered" babygro evidence was initially to be used against one of the incriminees, Abo Talb ("Talb"), and that a similar garment had been purchased by Talb or his associates while they were under surveillance. However, the Golfer was said to have no evidence to support this allegation.

Consideration of ground 1

11.6 The Commission's views as to the Golfer's credibility and reliability are set out in chapter 5 above. Reference is made in that chapter to certain inconsistencies in the Golfer's three statements to the Commission so far as these relate to the babygro, and it is unnecessary to revisit these in detail here.

11.7 At interview the three passages from the submissions which are quoted above were read out to the Golfer (see the appendix of Commission interviews). During the second interview the Golfer's position was that the first passage, concerning his alleged knowledge that an intact babygro had been recovered, was true. Conversely, at his third interview, while the Golfer claimed to know that a babygro had been recovered, he did not know whether it was intact. During both his second and third interviews the Golfer denied informing MacKechnie and Associates that the reason for using a child's sleep suit was that it was an evocative item which was intended to shock and "pull at the heartstrings" of a jury. More importantly, he also denied telling

MacKechnie and Associates that an intact sleep suit was taken to America where it was fragmented and then introduced into the chain of evidence as having been found at the crash scene. The Golfer did, however, make the following allegations about the police enquiries into the babygro in Malta.

Cessation of babygro enquiries in Malta in July 1989

11.8 The Golfer alleged that Scottish police officers involved in enquiries in Malta to establish the source of the babygro were instructed to curtail their investigations, and he suggested that this must have been for sinister reasons. He connected the alleged withdrawal of officers from Malta to his allegation that there was surveillance conducted on Anthony Gauci's shop, Mary's House, prior to the first visit there by police (a matter which is addressed in chapter 10). The Golfer confirmed that the source of this allegation, and of many of the suspicions he raised about the babygro, was the police officer, Alexander Gay. The dubious nature of the Golfer's allegations regarding Mr Gay is discussed in chapter 5, above. However, as part of its enquiries into the babygro submissions, the Commission considered the circumstances surrounding the investigations by the Scottish police officers in Malta in July 1989, and the reasons for their apparent failure at that stage to identify Mary's House as a possible retailer of the babygro.

11.9 According to their HOLMES statements, two Scottish police officers, DI George Brown (S4458B; see appendix) and DC George Graham (S3145G; see appendix), visited Malta in July 1989 to pursue investigations into the babygro. The basis for these enquiries was the discovery of a manufacturer's label on one of the fragments of babygro, PK/669, which indicated that the item was made in Malta. Specifically, the officers had obtained information that a company based in Malta, PVC Plastics Ltd, had manufactured it. According to the officers' HOLMES statements, enquiries at PVC Ltd revealed that 125 blue babygros were sold on to another Maltese company, Big Ben Clothing Wholesale. Further, on 7 July 1989, Paul and Lino Gauci of Big Ben Clothing provided the police officers with a control sample of the babygro. However, they informed the officers that they had no records as to whom they had sold the babygros. According to the officers' statements it was for this reason that their enquiries in Malta came to an end at that stage.

11.10 However, after further enquiries had led the police to Mary's House on 1 September 1989 (see chapter 10), Paul Gauci of Mary's House (see his statement S4680 in the appendix) produced an invoice on 2 September 1989 for the babygros Mary's House had bought from Big Ben Clothing (CP 418). On 14 September 1989 Paul Gauci of Big Ben Clothing (see his statement S4692A in the appendix) informed DS Armstrong that, having checked his records, he saw that they had supplied twelve of the babygros to Mary's House on 22 September 1988. On 19 September 1989, the same Paul Gauci handed over to DS Armstrong a photocopy of the relevant invoice which corresponded to that obtained from Mary's House. D&G confirmed to the Commission that Lino Gauci of Big Ben Clothing provided the original invoice (CP 488) to the police on 23 April 1999.

11.11 As part of the Commission's enquiries, George Brown was interviewed on 26 September 2005 by two members of the enquiry team (see appendix of Commission interviews). He was asked, in particular, why he had been unable to recover from Big Ben Clothing in July 1989 the invoice confirming that babygros were supplied to Mary's House. Mr Brown's position was that Big Ben had no records. Indeed, Mr Brown said that he had only become aware of the production by Big Ben Clothing of photocopy invoices in September 1989 when members of the Commission's enquiry team told him about it during the interview. He had no explanation for it. He indicated that after he returned from Malta he was assigned to work on other areas of the case.

11.12 Although it may seem surprising that in September 1989 Paul Gauci of Big Ben Clothing was able to produce an invoice for the sale of the babygros to Mary's House, when in July of that year he apparently told police that Big Ben had no records showing to whom the garments had been sold, in the Commission's view this does not support the Golfer's suggestion that the officers concerned had been instructed to curtail their enquiries in Malta. There is also no reason to doubt that the invoice and its copies are genuine. For the reasons given in chapter 10, the Commission also has no basis for doubting that Mary's House was identified by police through enquiries at Yorkie Clothing on 1 September 1989. This is consistent with Mr Brown's account at interview, namely that after his return from Malta in July 1989 enquiries in relation to

the babygro were put in abeyance while all the other clothing was examined, and that the attention of police officers was led back to Malta by the evidence relating to the Yorkie trousers.

11.13 In light of the above, and in view of its doubts as to the Golfer's credibility, the Commission can see no basis for the allegation that police officers were instructed to curtail their enquiries in Malta in July 1989 for any reason other than that given in the officers' HOLMES statements, above.

Link between babygro and Talb

11.14 As regards the allegation that the babygro evidence was "engineered" to incriminate Talb, and that Talb or his associates had purchased a babygro while under surveillance, the submissions seek to support this by reference to the clothing seized from Talb's home in Sweden on 27 November 1989. DC Callum Entwistle took this clothing to Malta and showed it to various witnesses. Crown production number 1302 is the list, in Swedish, of the items seized from Talb's home, while Crown production number 1303 is an English translation of this. One of the items listed in production 1302 is described as "SB184 Sparkbyxa, blå, strl 60, A&A", the English translation of which is given in production 1303 as "Kick trousers, blue, size 60, A&A." However, a list of the clothing compiled by DC Entwistle (DC/318), which was not a production at the trial, is included within the submissions. There, the item is described as a "Blue overall style babygrow, two penguins on front, no label."

11.15 The suggestion by MacKechnie and Associates that Talb or other Palestinian terrorists were observed purchasing clothing while under surveillance has been rejected by the Commission in chapter 10 above. However, it is worth repeating here that at his third interview the Golfer distanced himself from the allegation that clothing had been purchased by individuals while they were under surveillance. Despite this, given the apparent coincidence that a blue babygro was found in Talb's possession, the Commission considered it appropriate to make further enquiries into item SB184.

11.16 The Commission instructed a linguist based at Glasgow University to translate the phrase "Sparkbyxa, blå, strl 60, A&A". According to the linguist, the Swedish term "Sparkbyxa" is "what the Americans would call a romper suit: a footed one-piece of clothing for babies", and the term "blå" simply means blue. The Commission also obtained from D&G various photographs of the clothing seized from Talb (CP 1245; police references DC/317 and DC/490). A photograph of SB184 within DC/490, which was not a production at trial, and a photograph of the control sample babygro, are reproduced below. The differences between the garments are clear. Needless to say, as SB184 was found intact in Talb's home it could not have been on board PA103.

Photo of SB184

Photo 139 from the RARDE report

11.17 Two members of the Commission's enquiry team interviewed Mr Entwistle on 24 June 2005 (see appendix of Commission's interviews). Mr Entwistle confirmed that he had travelled to Sweden in December 1989 to collect clothing seized from Talb. There were five cartons of clothing in all and Mr Entwistle arranged for these to be transported to Malta. The items were shown to various individuals linked to the clothing industry in Malta, including Frank Aquilina, Alexander Calleja of Yorkie Clothing and Paul Gauci of Big Ben Clothing, in an attempt to trace the manufacturers. According to Mr Entwistle SB184 was one of the items shown to the witnesses in Malta, but nobody expressed any interest in it. Mr Entwistle agreed that Anthony Gauci was not shown any of the items in his presence, and added that Paul Gauci of Mary's House had not been helpful with this enquiry.

11.18 In seeking to connect the items found in Talb's possession with the contents of the primary suitcase the submissions also refer to a "dispatch sheet" (CP 506) obtained from PVC Ltd, the company which manufactured the babygro established to have been within the primary suitcase. In particular, the submissions refer to an entry in the sheet, "Penguin Dungarees", and suggest that PVC Ltd may have manufactured item SB184. According to the submissions, if that is correct it is either a remarkable coincidence, or evidence that a possible link between Talb and the babygro fragments was engineered by the police.

11.19 As part of its enquiries in this area a member of the Commission's enquiry team interviewed Miriam Cianter, an employee of PVC Ltd at the relevant time (see appendix of Commission's interviews). Ms Cianter was shown photographs of the clothing seized from Talb, including one of SB184, and confirmed that PVC Ltd did not manufacture any of the items pictured. When asked about the "Penguin Dungarees" referred to in the dispatch sheet, Ms Cianter was able to describe this item. On being shown the photograph of SB184 again, she was certain that this was not the item produced by PVC Ltd.

11.20 Furthermore, at interview with members of the enquiry team (see appendix of Commission interviews) Paul Gauci of Mary's House was shown photographs of the clothing recovered from Talb but did not recognise item SB184. Although Paul Gauci believed that Mary's House stocked items similar to SB85 (a ladies' sweater recovered from Talb's home: see photograph number 1 in CP 1245), without seeing the manufacturer's label he was not able to confirm that they had stocked this particular item. In any event, according to Paul Gauci similar items were stocked by other shops and by the local market.

11.21 In the Commission's view, standing the results of the above enquiries, there is no evidence of a link between item SB184 and the babygro established to have been within the primary suitcase. Indeed, the Commission is satisfied that there is no evidence of a link between any of the clothing recovered from Talb, including the Mickey Mouse T-shirt and Melka trousers which are referred to in the submissions, and those items found to have been within the primary suitcase.

Conclusions in respect of ground 1

11.22 As indicated, the Golfer did not speak at interview to the central allegation made in the submissions, namely that fragments of a babygro obtained from the test explosions in the US were subsequently inserted into the chain of evidence as having been found at the crash scene. The Commission has addressed the other allegations attributed to him in the submissions, none of which cause it to doubt the provenance of the babygro fragments found to have been within the primary suitcase.

Ground 2: issues regarding the police and forensic investigation of the babygro fragments, including the US test explosions

11.23 It is also argued in the submissions that alleged irregularities in the police and forensic investigation of the babygro, including the test explosions carried out in the US, lend support to the Golfer's allegations. Given that at interview the Golfer did not support the central allegation made in the submissions, on one view most, if not all, of the additional issues raised under this ground can safely be rejected. However, given the seriousness of the central allegation, and the possibility that the Golfer might for some reason have been reluctant to speak to it at interview, the Commission considered it appropriate to address some of the points directly.

The test explosions in the US

11.24 The submissions refer to two reports by Henry Bell regarding test explosions carried out in the US (see appendix). According to these reports, five test explosions were held at the US Naval Explosive Ordnance Technology Centre, Indian Head, Maryland ("Indian Head") during the week beginning 17 April 1989. The purpose of those tests was to estimate the amount and location of the explosives used on PA103 by comparing the damage caused to luggage containers with that caused to AVE 4041, the container found to have contained the primary suitcase.

11.25 According to Mr Bell's reports four further tests were carried out at the Federal Aviation Administration headquarters ("FAA"), Atlantic City, New Jersey and again at Indian Head between 17 and 27 July 1989.

11.26 According to the reports, tests numbered in the reports as 6 and 7 were carried out at the FAA headquarters and used "lost baggage" supplied by the FAA. These tests were designed, among other things, to establish the extent of damage to the improvised explosive device ("IED"), the adjacent suitcases and their contents; and to ascertain what parts of the IED and its contents it was possible to recover and identify. The materials recovered following the explosions were to be used to allow the forensic scientists to make comparisons between them and items recovered following the bombing of PA103. In each test, a "capri blue child's walk suit," (i.e. a garment similar to the babygro) bearing both "PRIMARK" and "JELLY BEAN" labels, with a blue coloured plastic hanger and "Kimbo" tag, was placed on top of the IED which was housed in a radio cassette recorder (there is no indication that this garment was used in the April 1989 tests). The purpose of this was to evaluate the damage caused to the garment.

11.27 Tests numbered in the reports as 8 and 9 were carried out at the centre at Indian Head. The object of these tests was to facilitate a full recovery of all fragments of the IED suitcase, the radio and the suitcase contents, post explosion. This was in order to permit an assessment of the recovered debris and to establish what parts of the IED suitcase and its contents it was possible to recover and identify. The recoveries were also to be used to enable the forensic scientists to make comparisons between these and items recovered after the bombing of PA103. As in the earlier tests, the suitcase was packed with clothing and the "capri blue child's walk suit" was placed on top of the IED to allow an assessment of the damage to the garment.

11.28 According to the submissions the first of Mr Bell's reports, dated 21 April 1989, was obtained from the BKA files held by MacKechnie and Associates. The second report, dated July 1989, was said to have been found in MacKechnie and Associates' archives. The submissions point out that neither report was lodged as a production at trial. However, since MacKechnie and Associates provided both reports to the Commission, it is clear that the defence was in possession of them, and

accordingly there is no significance in the fact that the reports were not productions. Moreover, as the test explosions were expressly referred to in the trial court's judgment, in the RARDE report (CP 181), and in the evidence of Allen Feraday (21/3303 et seq), it is clear that there was no attempt to conceal the fact they had occurred.

11.29 The submissions suggest that the photographs of the babygro fragments recovered from the July 1989 test explosions resemble very closely the fragments of the babygro recovered from the crash scene. However, in the Commission's view, any similarities between the fragments recovered from the test explosion and those recovered from the crash site can be explained by the fact that the object of the July tests was to ascertain the damage caused to a babygro subjected to an explosion similar to that which occurred on board PA103.

11.30 Over and above the fact that the police were already investigating the fragments of babygro prior to the July test explosions, in the Commission's view the results of three enquiries, individually and cumulatively, demonstrate the provenance of a key fragment of the babygro, PK/669, prior to these tests being carried out. As indicated, PK/669 was of particular importance because it bore the manufacturer's label, including the words, "Made in Malta".

11.31 First, the Commission recovered a photograph of PK/669 which, according to the HOLMES statement of Strathclyde police scenes of crime officer, James Ryder, (S1234C, see appendix) he photographed on 10 January 1989, some 6 months prior to the July test explosions. Although the manufacturer's label is not itself visible in the photographs, the overall shape, size and appearance of this fragment is consistent with PK/669 as it appears in subsequent RARDE photographs. The date of 10 January 1989 is depicted in the photograph itself. A copy of the photograph is contained in the appendix.

11.32 Secondly, the Commission obtained from D&G photocopies of the front and back of PK/669 itself (see appendix). It appears that these photocopies were shown to witnesses by the police in an attempt to confirm the source of the label. They are referred to in the HOLMES statements of three civilian witness, namely Pamela

Coxell (S4685), Laura Cronshaw (S4686) and Philip Merry (S4687) and copies of these statements are contained in the appendix. The photocopies have been signed and dated 27-30 June 1989 and therefore pre-date the July test explosions.

11.33 Thirdly, the photographic records at the Forensic Explosive Laboratory ("FEL") assist in proving the provenance of the babygro fragments. According to this source, photograph 145 of the RARDE report (reproduced below) pre-dates the July test explosions. Specifically, the negative number on the reverse of photograph 145 is FC3594, which is recorded as having been returned from the developing laboratory on 29 June 1989 (see appendix to chapter 6). Thus, according to the records the photograph must have been taken on or before that date.

Photo 145 from RARDE report

11.34 During their second visit to FEL in March 2006, members of the Commission's enquiry team also examined the negative corresponding to FC3594, and found that it corresponded in appearance to photograph 145. The sheath containing the negative was date stamped "29 June 1989", consistent with the contents of the photographic log book.

11.35 The Commission also recovered from FEL a composite photograph of the babygro fragments PK/669, PK/2209, PK/202, PK/1505, PI/1391 and PI/1421 (see appendix), on the reverse of which appears the negative number FC3630. According to the photographic records, this was taken on or before 13 July 1989, again pre-dating the July test explosions.

11.36 In light of these enquiries, the Commission is satisfied that PK/669 was in existence well before the July 1989 test explosions.

11.37 Reference is also made in the submissions to the fact that photographs show that two labels (Primark and Jelly Bean) were attached to the fragments of babygro used in the July test explosions. As Mr Bell makes express reference to this in his report of the July tests, it is difficult to draw any sinister inference from it. Similarly, at interview with members of the Commission's enquiry team, George Brown made no attempt to hide the fact that an additional label was sewn onto the babygros used in the test explosions (see appendix of Commission interviews). Indeed, according to Mr Brown, it was he who had obtained the labels in question.

FBI and police enquiries in Malta

11.38 It is alleged in the submissions that FBI agents and police officers attended the factory premises of PVC Ltd in Malta earlier than the official position would suggest. The submissions refer to a number of statements and precognitions of various witnesses obtained by MacKechnie and Associates in support of this contention.

11.39 The sequence of events according to the relevant HOLMES statements is that George Brown was provided with information on two of the fragments of babygro, namely PK/669 and PK/2209, on 2 June 1989 (see his statement S4458B in the appendix). After receiving this information he was tasked with establishing the origin of the garment. As the label forming part of PK/669 stated that it was "Made in Malta", Mr Brown arranged for "tentative enquiries" to be carried out there to establish the main exporters of children's wear. Mr Brown was informed that PVC Ltd fitted this criterion and that they had a sister factory, Hellane, located in Ashby-de-la-Zouch in England.

11.40 The individual who carried out these enquiries on Mr Brown's behalf is not named in the relevant police statements. However, in his statement concerning the Yorkie trousers (S4458L, see appendix to chapter 10) Mr Brown said that he had previously carried out enquiries in Malta regarding the babygro, and therefore made

contact again with the American legal attaché who had assisted him on that occasion. The legal attaché in question, although not named in Mr Brown's statement, appears to have been James Frier. Mr Frier's defence precognition (see appendix) indicates that in 1988 he was the FBI legal attaché in Rome, from where he conducted investigations in countries in the Mediterranean and North Africa. He refers in his precognition to being sent photographs of labels from clothes by the Lockerbie task force, and being asked to travel to Malta to make enquiries in relation to these. He visited a number of factories and established that the clothing was made in Malta. He located the factory where the clothes had been manufactured and discovered that this type of clothing had not been exported. According to the precognition he could not recall the name of the factory. Shortly after Mr Frier had sent a report to the Lockerbie task force, Scottish officers and FBI agents were dispatched to Malta where they spent some considerable time conducting enquiries. Copy correspondence from Interpol identifies Mr Frier as having conducted his initial enquiries in Malta in relation to this matter on 7 June 1989 (see appendix).

11.41 The Commission has examined all the statements and precognitions which are referred to in the submissions in support of the contention that FBI agents and police officers were conducting enquiries in Malta prior to the time which has been officially acknowledged. In fact, the precognition of only one witness, Jeff Grewcock, which was obtained by MacKechnie and Associates after the appeal, contains timings which are inconsistent with the official chronology (see appendix). The terms of Mr Grewcock's precognition are described below. Although there is a suggestion in Dennis Satariano's precognition, which was also obtained after the appeal, that the FBI were in Malta in about May 1989 (see appendix), given that this is only an approximate timescale, it is not necessarily inconsistent with the official timings.

11.42 Mr Grewcock was a production manager at PVC Ltd. He refers in his precognition to his passport which confirmed that he travelled to Malta on 19 June 1989 to visit the PVC factory there and returned to England on 24 June 1989. He recalls in his precognition that on a previous visit to Malta he had been present when police officers had attended the factory. As his passport indicated that his previous visits to Malta were in April and May 1989, this suggests that the police visited the

PVC factory at a time prior to that suggested by the official chronology. However, Mr Grewcock was unable to recall in his precognition obtaining a control sample babygro on 23 June 1989 and delivering it to the factory in England, which his HOLMES statement (S4684, see appendix) confirms that he did. In these circumstances, and standing the evidence in support of the official chronology, the Commission does not consider Mr Grewcock's current recollection about the timing of the officers' visit to the PVC Ltd factory to be reliable.

11.43 Reference is also made in the submissions to the following passage within "On the Trail of Terror", a book about the case written by David Leppard, a journalist with *The Sunday Times*. It is said that the passage supports the allegation that police officers were in Malta at a time prior to that suggested in the HOLMES statements. The passage is as follows:

> *"It was not the first time that John Orr's men had been in Malta. In March, Detective Sergeant William Armstrong, Bell's right-hand man on the Co-ordination team, had travelled there to make enquiries about the origins of the blue romper suit"* (at p158).

11.44 The Commission notes that none of DS Armstrong's HOLMES statements refers to such a visit, nor is there any mention of this in his defence precognitions. Furthermore, D&G confirmed to the Commission by letter dated 14 April 2005 that, having researched the matter, they could find no confirmation of any visit prior to June 1989. Indeed, as far as could be established by D&G, the first visit was made by George Brown and George Graham in July 1989. According to D&G, there is no documentation to support the claim in Mr Leppard's book. D&G also advised that George Graham (now Deputy Chief Constable) had been asked about the matter and had confirmed that his was the first visit to Malta by Scottish police officers. According to D&G Mr Graham indicated that the visit in July was a preliminary visit to assess what "might be available to evidence manufacture and distribution of particular items of clothing."

11.45 Lastly, the submissions point out that, in terms of the trial court's judgment and the evidence at the trial, the police investigation in Malta regarding the babygro

began in August 1989, rather than in July of that year. It is suggested that the trial court was misled into concluding that the initial investigations into the babygro took place in August 1989 with "no other agency involvement".

11.46 In the Commission's view, while the trial court may well have wrongly believed that these initial enquiries took place August 1989, there can be no question of any deliberate attempt to mislead the court. As the submissions acknowledge, Mr Bell made specific reference in his evidence to police enquiries into the babygro taking place in July 1989 (53/7144). The defence was also aware of these enquiries from various other sources including the precognition obtained from George Brown. Nor can it be said that the absence of any reference at trial to the FBI investigations in June 1989 prejudiced the defence in any way, given that this too was known to the defence through James Frier's precognition and accompanying documentation. Although there is a suggestion in the submissions that the defence should have raised this issue at trial, the Commission does not consider this as significant.

The control sample

11.47 Doubts are expressed in the submissions about the authenticity of the control sample babygro obtained by the police from Paul and Lino Gauci of Big Ben Clothing in Malta on 7 July 1989. The control sample was given the police reference DC/34, and featured in photographs 139 and 140 of the RARDE report. The submissions refer to various precognitions taken by MacKechnie and Associates in support of its claim that the origin of the control sample is doubtful.

11.48 The Commission is not persuaded that any of the matters raised give rise to doubt as to the provenance of the control sample. In particular, the Commission notes that one purported criticism about the control sample's authenticity in fact provides support for its provenance. This criticism relates to the presence of particular cards attached by tags to the control sample. In his HOLMES statement (S4689, see appendix) Dennis Satariano explained that when a finished garment left the PVC factory it did not have paper or cardboard cards (which he describes as "Kimballs") attached to the labels. These cards were attached by PVC Ltd's sister company, Hellane, by means of a small plastic tag. However, when garments were returned by

Hellane to PVC Ltd the cards were left attached. According to Mr Satariano, when PVC Ltd sold the batch of walk-in sleepers to Big Ben Clothing these tags were still attached to the garments.

11.49 During a visit to Dumfries police station on 3 March 2005, two members of the Commission's enquiry team examined all three control sample babygros, including DC/34, and were present when a scenes of crime officer photographed them. DC/34 still had the same cards attached to it, consistent with the account given by Mr Satariano.

11.50 In any event, the Commission notes that at trial Anthony Gauci, Paul Gauci of Big Ben Clothing and Mr Satariano, confirmed that the control samples shown to them in court, DC/34 (Crown label 439) and DC/97 (Crown label 451), were the same as those manufactured or sold by them.

11.51 It is also argued in the submissions that the recovery of a pink control sample babygro (DC/97; label 451) by police from Paul Gauci of Mary's House was suspicious, as his initial position was that there were no other babygros of the kind sold by Mary's House in stock. For what it is worth, the Commission notes that Mr Bell in an entry in his diary, dated 2 October 1989 (see appendix), confirms that it was in fact Mr Gauci's sister who found the pink babygro. Even without this, however, there is clearly no substance to this point.

11.52 For the foregoing reasons, the Commission is satisfied that there is no reason to doubt the authenticity of the control sample.

Criticisms of Dr Hayes' examination notes

11.53 The submissions contain various criticisms of the examination notes of the forensic scientist, Dr Thomas Hayes, in which he records his examination of some of the babygro fragments (CP 1497). A number of these criticisms are addressed in the following paragraphs.

(i) Preliminary examination of PK/669

11.54 Reference is made in the submissions to the preliminary pages of Dr Hayes' examination notes, in which large numbers of items are listed, and marked either with an "R" (signifying that the item is of "possible significance") or a "G" (signifying that it is of "no significance"). The submissions point out that on the page dated 25 January 1989 PK/669 is marked "G", suggesting that at that stage Dr Hayes considered it to be of no significance. The Commission notes that this is confirmed by the police report, which indicates that PK/669 was sent to RARDE on 16 January 1989 but was returned as "showing no particular explosive significance." The submissions question how an item subsequently said to be of such significance could have been considered at one time to be of no significance.

11.55 In fact, the situation highlighted in the submissions is by no means unique to PK/669, as other fragments initially regarded as of no significance were subsequently considered to display explosion damage (see e.g. PI/236, PK/1504, PK/1978). Clearly PK/669 was identified by the police as being of possible significance fairly soon after the initial assessment at RARDE, as it was resubmitted to RARDE on 9 March 1989 (see LPS form 351, CP 288). According to page 75 of Dr Hayes' notes, he examined PK/669 in detail on 22 May 1989 and concluded that it was severely damaged and was blackened and scorched around its periphery. No IED or other significant fragments were recovered from it. It appears that it would only have been once it was associated with the other fragments of babygro, particularly PK/2209 (which Dr Hayes' notes, at pages 84-86, indicate he examined on 1 June 1989), from which fragments of the Toshiba manual were recovered, that it could be concluded that PK/669 was of particular significance. Dr Hayes confirmed this when he was interviewed by members of the Commission's enquiry team on 8 March 2006 (see appendix of Commission's interviews).

(ii) Reference to "rompersuit"

11.56 The submissions also refer to page 75 of Dr Hayes' examination note and point out that Dr Hayes describes PK/669 as a "rompersuit". The submissions

question how Dr Hayes would have known at that point that PK/669 came from a romper suit.

11.57 The submissions appear to ignore the actual wording of Dr Hayes' examination note: *"Possibly originating from a sock? rompersuit? NB 86cm?"* It is clear from the insertion of the question mark and the other stated possibility that Dr Hayes was not certain that the fragment had originated from a rompersuit. In any event, given the information on the label – the age of 12-18 months and the height measurement of 86cm – it seems a reasonable deduction that the item might in fact have originated from a rompersuit.

(iii) Cross-reference to page 142

11.58 The submissions point out that in the same examination note Dr Hayes wrote, just below the entry for PK/669, the words "NB see pg 142 (cf DC/34)". Page 142 of Dr Hayes' examination notes is dated 16 November 1989 and records a comparison between the control sample babygro (DC/34) and the babygro fragments. The submissions suggest that the cross-reference to page 142 on page 75 may have been inserted at the same time as the other writing on page 75, which would indicate that the notes on page 75 could not have been written on 22 May 1989.

11.59 As noted in chapter 6, a recurring theme in the submissions regarding the provenance of items of debris is whether Dr Hayes' examination notes are contemporaneous. As part of its enquiries in this area, the Commission arranged for the forensic document examiner, John McCrae, to examine pages 75 and 142 of Dr Hayes' notes. In his report dated 26 April 2005 (see appendix to chapter 6), Mr McCrae had the following to say in relation to page 75:

> *"'NB See pg 142 (cf DC/34)' is same ink as on page 142, same as on page 75 with similar indented pressure. Could have been written with remainder page 75 and is contemporaneous with preceding lines."*

11.60 In a supplementary report dated 15 December 2005 (see appendix to chapter 7), Mr McCrae stated:

"*I refer to my report date 26th April 2005 and wish to clarify my findings on Page 2 re 'Page 75'…*

…Impressions of page 75 were found by ESDA on page 76. The entry 'NB See pg142 (cf DC/34)' and above, were found to be consistent with page 75 being in alignment with page 76.

These entries were in the same ink, with similar pressure, - a feature indicating writing possibly made at the one time. It is not necessary that this is the case, and it is very possible that the entry 'NB See pg 142 (cf DC/34)' was written some time later.

When the ESDA sheet from page 76 is overlaid on page 75, the writing from 'NB See pg 142 (cf DC/34)' and above are in the same position, not usual when a writing is later added."

11.61 In the Commission's view, the terms of Mr McCrae's reports on this issue are neutral. On the one hand, Mr McCrae points to features within the notes which suggest that the cross reference on page 142 of the notes was written contemporaneously with the other entries on page 75. On the other hand, Mr McCrae considers it "very possible" that the cross-reference was written some time later.

11.62 In the Commission's view, the important question is whether one can be satisfied as to the provenance of PK/669. For the reasons given (in particular, those concerning the police photograph of PK/669 taken in January 1989, the RARDE photographs and the photocopies of PK/669 signed by witnesses in June 1989) the Commission can see no basis for doubting the provenance of this item.

(iv) <u>Absence of reference to second label on PK/669</u>

11.63 According to the submissions it is suspicious that on page 75 of Dr Hayes' notes there is no sketch or entry regarding the finding of the small label which was recovered along with the larger Primark label on PK/669. In the Commission's view,

this is a minute criticism which, when considered along with the Commission's conclusions as to the provenance of PK/669, is of no significance. For what it is worth, the smaller label features in the composite RARDE photograph of the babygro fragments taken on or before 13 July 1989 (see appendix). Mr Satariano also provides an explanation for the presence of such labels in his HOLMES statement (S4689, see appendix).

(v) Sketch of plastic tie on PK/669 label

11.64 Lastly in relation to Dr Hayes' notes, the submissions refer to the sketch of PK/669 on page 75. According to the submissions the sketch shows the plastic tie penetrating the label on PK/669. The submissions question whether this sketch was made at the time the note was written and, if so, why there is no mention of the plastic tie in the main text of Hayes' notes. The submissions also query how Dr Hayes would have known that the plastic tie came from a label.

11.65 Again, viewed in the context of the Commission's other findings, this point is of no significance. It is perhaps worth highlighting that photograph 145 in the RARDE report, referred to above, clearly depicts the plastic tie.

Other alleged irregularities

11.66 The submissions point to various other alleged irregularities concerning the babygro fragments. In the Commission's view, none of these matters raises any doubt about the provenance of the fragments. However, the Commission has addressed two of them in the following paragraphs.

(i) Finding of an intact babygro

11.67 Precognitions obtained post-trial by MacKechnie and Associates were provided to the Commission in support of the suggestion that an intact babygro was found after the explosion. For example, according to the precognition of Robert Mole (see appendix), a former police sergeant, he recalled seeing an intact babygro which may have been pink. David Thomson, who assisted with the searches and found

PK/669, recalled in his post-trial precognition (see appendix) that possibly a few days before the end of 1988 one of his team, David Clark, became upset when he found a "blue baby romper type suit." Mr Thomson could not recall any details of labels or markings on the item, but he remembered that it was intact and that it showed no sign of damage. He was shown a photograph of the control sample babygro from the RARDE report (photograph 139 – see above) by MacKechnie and Associates, and although he said it looked very similar, he could not say with any certainty that it was the same. David Clark in his precognition (see appendix) recalled finding a baby's nappy and an intact blue babygro. He too was shown a photograph of the control sample babygro by MacKechnie and Associates. He said that it was identical, apart from the fact that he could not remember the type of motif there had been on the item he had found.

11.68 The Commission notes that in David Clark's HOLMES statement (S2619, see appendix), he refers to finding, on 29 December 1988, a pink coloured child's "Rompersuit" marked from 0-6 months. According to the statement, there was also a baby's disposable nappy found approximately 70 metres from this item While David Thompson's (not Thomson as per the MacKechnie and Associates precognition) HOLMES statement (S758D, see appendix) refers to David Clark finding on 29 December a T-shirt which had a "Forearm and Fist" motif with the word "Hezbollah", it contains no reference to the finding of a pink romper suit. David Clark's HOLMES statement also refers to the finding of this T-shirt, although, according to the statement, he was unable to read it as the logo was in Arabic. In their respective precognitions obtained by MacKechnie and Associates, both witnesses refer to the T-shirt being found at the same time as the babygro. (The Commission notes that at a meeting between a representative of MacKechnie and Associates and the former CIA officer, Robert Baer, on 9 February 2002 Mr Baer apparently said that he had given a "Hezbollah" T-shirt to one of the passengers on board PA103, Charles McKee, see appendix to chapter 15).

11.69 Accordingly, there are indications that the item found by these witnesses was not a blue babygro, but a pink one. In any event it is a completely separate item from the babygro fragments established to have been within the primary suitcase. It is not surprising that baby clothing was found at the crash site, given that two babies, a boy

and a girl, each aged two months, were on the flight. There were also a number of other children on the plane aged 1 and under.

11.70 The submissions also refer to a memorandum dated 21 June 1989 from DI Watson McAteer to the BKA which contains the following passage (see appendix):

> "*During a recent search an article described as possibly being a Childs Romper suit (one piece overall) was found. Tom Hayes at RARDE examined this item and has concluded verbally, that it had been contained within the suitcase that had held the Toshiba radio cassette device. The Romper suit is blue in colour, and sized to fit a child aged between 12 and 18 months. There is a 'Made in Malta' label attached. The article is being subjected to further examination and a full report will be provided when at hand…"*

11.71 The submissions suggest, first, that this passage indicates the babygro was intact and, secondly, that its description – "one piece overall" – would be more consistent with the babygro found in the possession of Talb. In the Commission's view, neither of these propositions is of any merit. The first requires too much to be read into the wording of the memorandum, which might just as easily describe the fragments of babygro eventually linked to the primary suitcase. The second point is entirely speculative. The Commission is satisfied that the origin of the babygro fragments has been established, and the contents of DI McAteer's memorandum do not alter that conclusion. The same applies to submissions made regarding John Crawford's defence precognition in which he refers to an intact babygro, and to a further memorandum dated 15 June 1989 from the US Department of Justice, both of which were provided to the Commission by MacKechnie and Associates.

(ii) Witness expenses

11.72 It is alleged in the submissions that after a meeting with representatives of MacKechnie and Associates on 7 October 2004, Paul Gauci of Big Ben Clothing informed a Maltese lawyer, Dr Emmanuel Mallia, who had sat in on the meeting, that he had received an unusually high award of expenses in connection with his involvement as a witness at trial. According to the submissions the sum paid to Mr

Gauci was 4000LM (said to equate to around £7000) plus hotel and travel expenses. It was submitted in volume A that this witness was in fact a Charles Gauci but MacKechnie and Associates later informed the Commission that this was an error. According to the submissions, the payment was made to Paul Gauci of Big Ben after he had decided not to attend the trial due to what he considered to be the "paltry" level of expenses on offer.

11.73 The Commission has verified the position with Crown Office and is satisfied that the sum paid to Paul Gauci of Big Ben was calculated in a manner consistent with expense payments made to all other witnesses in the case. It is sufficient to say that the amount paid is substantially less than that alleged in the submissions. Even if the allegation were true, however, it is difficult to see how it would ever be capable of undermining the applicant's conviction.

Overall conclusion

11.74 In the Commission's view nothing in the submissions made by MacKechnie and Associates succeeds in casting doubt upon the provenance of the babygro fragments. As explained, the Golfer denied at interview the central allegation that this evidence had been fabricated. The Commission also found nothing to support such an allegation in any of the issues raised by MacKechnie and Associates dealt with under ground 2 above. Indeed, the results of the Commission's enquiries in this area serve to confirm the authenticity of the fragments.

11.75 It is worth adding that even if the Golfer had spoken to the allegation at interview, given the lack of support for this, the inconsistencies in his statements regarding the babygro and the doubts as to his credibility, the Commission would have had little hesitation in rejecting it. Even when the matters raised are considered cumulatively, the Commission does not believe that a miscarriage of justice may have occurred under this ground of review.

CHAPTER 12
ABUSE OF PROCESS

Introduction

12.1 It is alleged on behalf of the applicant (see chapter 14 of volume A) that certain activities on the part of those investigating and prosecuting the case indicate that there was a misuse of state power sufficient to amount to an abuse of the court's process. Before considering these allegations it is important to set out the legal and factual submissions on which they are based.

The legal submissions

12.2 According to the submissions while the term "abuse of process" is well established in England it was recognised only recently in Scotland in *Brown v HMA* 2002 SCCR 684. Reference is also made in the submissions to the decision of the House of Lords in the English case of *R v Loosely* [2001] 1 WLR 206 where it was held that the court has an inherent power to prevent an abuse of its process so as to ensure that state agents do not misuse the coercive law enforcement functions of the courts to oppress citizens.

12.3 The submissions argue that a plea of abuse of process is similar to one of oppression under Scots law, but that the former is concerned with questions of whether the exercise of executive power is an affront to ordinary notions of fairness or to the public conscience. The issue, according to the submissions, is not whether the accused was given a fair trial but whether the abuse in question should be countenanced.

12.4 In terms of the submissions an abuse of process might amount to oppression, in which case the prosecution must fail or be dismissed. It might also, it is submitted, breach the principles of the European Convention on Human Rights and, by virtue of section 57(2) of the Scotland Act 1998, render the prosecution *ultra vires*.

The factual submissions

12.5 Although it is alleged in the submissions that certain features of the case point to, and may amount to, an abuse of the process, it is acknowledged that such a plea cannot be established without further evidence. Various "causes for concern" are thereafter listed. As many of these concerns (eg regarding the provenance of items PI/995 and PT/35(b), the Golfer, Mr Gauci's treatment by the Scottish police and the disclosure of the CIA cables) are addressed by the Commission elsewhere, they are not examined in detail here. It is sufficient to say that in light of its conclusions in respect of those allegations the Commission does not consider any of them to be capable of amounting to an abuse of process.

12.6 The following are the remaining issues which it is said may amount to an abuse of process.

(1) Interference with the crash site

12.7 According to the submissions there are a number of "reported suggestions" of items being "spirited away" from the crash site and of unofficial CIA involvement in the recovery and examination of these. Reference is made in this connection to a defence precognition obtained from a former police constable, Mary Boylan, who reported finding a CIA "badge" which according to the submissions the police were "instructed not to report". Reference is also made to evidence that productions were "interfered with" and, in particular, that a suitcase (PD/889; label production number 96) had been cut open and its contents disturbed.

(2) Concerns over the "control" of witnesses

12.8 A further matter raised concerns the control said to have been exercised by both the UK and US authorities over crucial witnesses. According to the submissions the Crown witnesses, Abdul Majid Giaka ("Majid") and Edwin Bollier, were "handled" by US agencies in that they were interviewed countless times and spent periods staying in government quarters there. Majid, for example, was a paid informer who it is alleged had been rewarded by the US Government and whose

evidence was heavily influenced by the CIA. It is alleged that US officials had interviewed him extensively since 1991 and that he was prompted in respect of the content of his evidence.

(3) The role of the US authorities

12.9 More generally the submissions express concern over the role of the US authorities in the investigation and prosecution of the case. The picture presented by the case, it is submitted, is that the US authorities were not only behind the scenes but often in control. According to the submissions this was demonstrated in a variety of ways: their presence from the outset at the locus, their role in the shifting of focus in the investigation from the PFLP-GC to Libya, their control over and concealment of information before and during the trial and their presence at the prosecution table throughout the proceedings.

The Commission's response

12.10 As noted above the relevant Scottish authority in this area is *Brown v HMA* where, in considering the appellants' allegations of entrapment by police officers, the High Court adopted the approach taken to this issue by the House of Lords in *R v Loosely.* In doing so, the judges appeared to endorse the wider concept of abuse of process, a principle already firmly established under English law. In particular, Lords Philip and Clarke in *Brown* quoted with approval the following passage from Lord Nicholls' speech in *R v Loosely*:

> *"[E]very court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state."*

12.11 Lord Philip went on to observe that in entrapment cases, "the abuse of state power is so fundamentally unacceptable that it is not necessary to investigate whether the accused has been prejudiced or has been the victim of any form of unfairness" (at p 694).

12.12 Lord Clarke adopted the following passage from Lord Steyn's speech in *R v Latif* [1996] 1 WLR 104 at p 112:

> *"Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed… The speeches in* R v Horseferry Road, ex parte Bennett *[1994] 1 AC 42, conclusively establish that proceedings may be stayed…not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place… [The] judge must weigh in the balance the public interest in ensuring that persons charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means"* (at 2002 SCCR p 695).

12.13 Based on that passage and other English authorities Lord Clarke reached the following conclusion:

> *"I consider, therefore, that it is more appropriate to recognise that in such cases the proper function of the court is to mark the unacceptability of certain practices being adopted by the police and prosecution authorities, which the law will not tolerate and that the principle involved is that the court is refusing to allow an abuse of process. To put the matter another way, I would refer to what Lord Hoffmann said in* Loosely *at para 71, that is, the question is:*
>
> > *'Whether the involvement of the court in the conviction of the defendant who had been subjected to such behaviour would compromise the integrity of the judicial system'"* (at p 695E-F).

12.14 Lord Marnoch observed that the onus would be on the defence to establish any abuse of process (at p 690).

12.15 In terms of those principles the Commission would require to be satisfied of the following in order to base a reference on an alleged abuse of process:

- that there is evidence, capable of being considered credible and reliable by a reasonably jury (or court), which might establish that the police and/or prosecuting authorities have acted in such a way as to cause affront to the public conscience or to compromise the integrity of the judicial system; and

- that viewed alongside all other relevant aspects of the case the evidence suggests that a miscarriage of justice may have occurred.

12.16 It is with these principles in mind that the Commission has considered each of the applicant's concerns.

(1) Interference with the crash site

(a) Mary Boylan's allegations

12.17 The first allegation under this heading is that a CIA "badge" was recovered from the search area after the explosion and that instructions were issued not to report the find. The allegation is made in a precognition of a former police officer with Lothian and Borders police, Mary Boylan, which was obtained by the defence after the trial but before the appeal. Ms Boylan makes no reference to finding such an item in her pre-trial defence precognition, her Crown precognition, or in either of her statements contained on the HOLMES database. Copies of all these accounts are contained in the appendix.

12.18 According to her post-trial precognition Ms Boylan had been sent to the Lockerbie area following the crash. On 28 December 1988, while searching fields in the area, she is said to have found a CIA badge, following which she immediately summoned Constable Derek Forrest in order to corroborate the find. According to the precognition Mr Forrest informed her that at an earlier briefing "he had been instructed that in the event of such a find, nothing was to be recorded and that they

were to be handed over to a Senior Officer". Ms Boylan thereafter approached an inspector who confirmed this instruction and took the badge from her. As far as Ms Boylan could say, the inspector did not record it in any way. She had no idea who the inspector was.

12.19 Ms Boylan retired from the police in 1993 but according to the precognition she was contacted again in 1999 and asked to go to Dumfries to give a statement to a procurator fiscal depute. She was asked by the fiscal depute to describe from memory some of the items she had recovered and was then shown a suitcase rim and handle which she recognised as having found with Mr Forrest. She asked the fiscal depute about the significance of this item and according to the precognition was told that she would be "hearing a lot more" about the owner of the suitcase, a Joseph Patrick Curry, during the trial.

12.20 Ms Boylan describes in the precognition how after her interview with the fiscal depute she went to the garden of remembrance for those who died in the Lockerbie disaster. While she was there she saw on a plaque the inscription "Joseph Patrick Curry, Captain US Army Special Services, killed in the line of duty". Later that evening she remembered finding the CIA badge and the following day she contacted the fiscal depute to tell him about this. According to the precognition the fiscal depute told her not to worry and said that all of the CIA badges had been returned to the US Government.

12.21 Ms Boylan is said in the precognition to have always been troubled by this area of the case as she believed that the treatment of the CIA badge was contrary to normal police procedures in the gathering of evidence. The reason she had not mentioned the CIA badge when precognosced by the defence prior to the trial was that the person noting the statement was an ex-police colleague who she knew was in contact with serving officers and who she did not trust to keep the information confidential.

12.22 By letter dated 14 December 2005 the Commission asked D&G to provide all the information in its possession regarding this matter. In the event a response was not received until 29 November 2006. In the intervening period members of the

Commission's enquiry team examined various protectively marked materials produced during the police investigation by the D&G Joint Intelligence Group ("JIG"). One of the JIG files, which was marked "X", was considered to be of possible relevance to Ms Boylan's allegations. D&G was advised of this by letter dated 15 September 2006 in order that the contents of the file could be taken into account by them in their response to the Commission's initial request.

12.23 D&G's replied by letter dated 29 November 2006. According to this D&G holds no information on HOLMES concerning either the allegation that CIA badges were removed from the search area after the explosion, or instructions that such items should not be recorded. Despite the Commission's letter of 15 September 2006 D&G's letter of 29 November made no reference to JIG file X. The Commission therefore requested D&G to examine the contents of that file and provide details of any information relating to Ms Boylan's claims.

12.24 In its reply dated 4 December 2006 D&G confirmed that a reference to a US Special Forces Group badge in the name of "J P Curry" had been found in JIG file X and that two photographs of this item were present in the file and formed part of a document dated 27 January 1989. According to the letter "[t]here is no clear indication on HOLMES as to when or where this item was recovered". However, the letter states that records held on HOLMES showed that an item, PF/554 (described in the Dexstar log as a "Wallet containing papers of Joseph P Curry Special Forces Group (Airborne) + Keys + Medal" (see appendix)) was found in sector F on 27 December 1988. According to the letter the records on HOLMES indicated that a "medal" was found in the wallet. D&G advised that it was possible that the badge belonging to Mr Curry referred to in JIG file X may in fact have been the "medal" linked to PF/554. Support for this view was said to be provided by an entry in the Dexstar log for item PF/1381 (see appendix) which refers to two "code cards" also found within PF/554. D&G explained that these cards appear in the photographs of the badge referred to in JIG file X. It appears to the Commission from this information that the Special Forces Group badge belonging to Mr Curry was found in item PF/554.

12.25 D&G also suggested in its letter that the senior investigating officer at the time would have been involved in any direction to staff that certain finds should not be recorded.

12.26 In light of the information provided by D&G the Commission considered it necessary to interview Ms Boylan and to carry out further enquiries in connection with her claims. Copies of all statements obtained in this connection are contained in the appendix of Commission interviews.

- Mary Boylan

12.27 At interview Ms Boylan maintained that during searches conducted by her on 28 December 1988 she had found a CIA badge and that she had been advised by both Mr Forrest and a police inspector not to record its discovery. She did not know the identity of the inspector.

12.28 According to Ms Boylan after being precognosced by the Crown in Dumfries (on 2 March 1999) she was being driven home by a friend when she remembered finding the CIA badge. She had said to her friend "My God, I found a CIA badge and I didn't put it through my notebook." She later telephoned the fiscal depute who had precognosced her (who she recalled was Mr Logue) to inform him of this. According to Ms Boylan, Mr Logue said not to worry about this and told her that all the CIA badges had been returned to the US Government.

12.29 Ms Boylan informed the members of the enquiry team that the reason she had not mentioned the matter when precognosced by the defence prior to the trial was because the precognoscer was "too friendly" with police officers she knew and that she did not trust him with the information. She did not want the police to know that she had mentioned the CIA badge in her defence precognition and thought that her discovery of the badge was "hush-hush". She had held back the information because she "hoped to get in touch directly with the defence lawyers". She accepted, however, that she did not in fact do so until after the trial.

12.30 Ms Boylan described the badge she had found, saying "I think it was in a leather folder, that it was black leather with a badge on the front and I just flicked it over and saw 'CIA'. I do not remember any person's name." She was also asked to sketch the badge (see appendix).

12.31 During the interview Ms Boylan was shown the photographs of the US Special Forces badge or medal which according to D&G belonged to Mr Curry. However, Ms Boylan did not recognise this as the item she had found.

12.32 Ms Boylan was also shown an image of a CIA badge obtained by the Commission from an internet website (see appendix). Ms Boylan said that seeing this image had caused an "emotional reaction" in her and she appeared shocked and tearful. The badge in the image bore the words "Central Intelligence Agency" and a symbol which Ms Boylan described as having "spikes protruding from it". According to Ms Boylan it was similar to the item she had sketched earlier in the interview and matched the item she remembered finding.

- Crown Office

12.33 Following Ms Boylan's interview the Commission wrote to the Crown Agent seeking any information the Crown might have in relation to Ms Boylan's claims. By letter dated 14 February 2007 the Crown Agent confirmed that Ms Boylan had been precognosced by John Logue on 2 March 1999. According to the letter:

> "*She impressed* [Mr Logue] *with her detailed recollection of the piece of debris which was the subject of the precognition, part of Joseph Curry's baggage, and a book which she was able to describe in some detail before discovering a record which supported her recollection. As part of the effort to assist the defence in preparing for trial, her precognition was shared with the defence and her evidence was the subject of agreement as was the evidence of Derek Forrest who was precognosced by John Logue on 4 June 1999.*"

12.34 The letter added that Mr Logue had no recollection of Ms Boylan telephoning him about the finding of a CIA badge and that if she had done so then Mr Logue would have recorded this in her precognition.

- Derek Forrest

12.35 Mr Forrest was interviewed by the Commission. He said he knew Ms Boylan quite well in December 1988 and said that during searches on 28 December 1988 they were to corroborate one another's finds. Asked whether he remembered Ms Boylan finding a CIA badge on that day, Mr Forrest replied that he had no recollection of this. Mr Forrest said that his recollection of Ms Boylan's other find that day (a piece of suitcase rim) was "quite vivid" and so he thought that a CIA badge would "definitely have stuck" in his mind.

12.36 According to Mr Forrest no instructions were issued to hand over particular kinds of items to a senior officer, as is alleged by Ms Boylan. He did not recall advising Ms Boylan not to record any finding of a CIA badge and said that although he might be mistaken he was "99.9 per cent sure" that the incident described by her did not happen. Mr Forrest was also "99.9 per cent sure" that no instructions were issued "to treat particular finds in a special way". Mr Forrest thought Ms Boylan was "completely wrong" about finding a CIA badge and was "adamant" that it did not happen.

- Sir John Orr

12.37 Ms Boylan's allegations were also put to the former senior investigating officer in the Lockerbie enquiry, Det Chief Supt (now Sir John) Orr.

12.38 Sir John said that an instruction not to record items found during the searches would have been "contrary to the procedures of evidential procurement" and would border on "a possible attempt to pervert the course of justice". He considered Ms Boylan's allegations to be "centred in the realm of fantasy" and claimed they were "absolute nonsense". He denied that any such instruction had come from him and he

doubted whether one would have been issued without his knowledge. According to Sir John, anything of possible significance that was found during the searches had to go through proper channels and recording procedures. He said that he would expect to have been told about such a find if it had occurred, but he was not. He had never heard of a CIA badge being found and said that he did not give or condone any instruction to keep such a find quiet.

- Consideration

12.39 In the Commission's view there is little support for Ms Boylan's allegations and a good deal of evidence to undermine them. Her corroborating officer on the day in question, Mr Forrest, has no recollection of her finding a CIA badge and believes that he would have remembered if she had. In addition Mr Forrest was almost certain that no instruction had been given to the effect that such finds should not be recorded, and was supported in this by Sir John Orr. Furthermore, Mr Logue has no recollection of Ms Boylan telephoning to inform him of having found the badge and claims that if she had done he would have been recorded this in her precognition.

12.40 For these reasons the Commission does not consider that Ms Boylan's allegations are capable of being considered reliable by a reasonable jury or court.

(b) Alleged interference with a suitcase

12.41 The second issue under this heading concerns the alleged interference with a suitcase (recorded in the Dexstar log as PD/889) belonging to one of the passengers on PA103. Although the submissions make no reference to the identity of the passenger concerned, it is clear from the evidence at trial that this was a Charles McKee. According to section 34 of the police report Mr McKee was a Major in the "US Army Intelligence Section" and was attached to the US Embassy in Beirut, Lebanon. PD/889 was one of two suitcases belonging to Mr McKee that were recovered from the crash site, the other having been recorded in the Dexstar log as PD/120.

12.42 At trial it was agreed by joint minute number 1 that Mr McKee's suitcase, PD/889, was recovered near a farm on 30 December 1988 (7/1014). In evidence the forensic scientist, Dr Thomas Hayes, confirmed that he had examined the item on 20 January 1989 and was referred to the relevant page in his notes in which he had written the words "Labels, name tag, brand name apparently removed" (16/2636 et seq; CP 1497, p 22). Dr Hayes' notes also contained a sketch of the item on which he had written the words "Hole cut" near to his depiction of the handle of the case. Dr Hayes agreed with the suggestion put to him in cross examination that a hole had been cut in the vicinity of the locking mechanism of the case and that this had clearly not been caused by blast or impact damage. He also agreed that an inference could be drawn that someone had interfered with the case following the disaster but before it was made available for forensic examination. Dr Hayes' notes also contained reference to a plastic bag which had accompanied the suitcase and which bore a label marked "Contents of grey suitcase belonging to Charles McKee". In his notes Dr Hayes had said of this item "Contents: Assorted clothing which unlike the suitcase from which it was supposedly taken showed little evidence of explosives involvement". He agreed in cross examination that one interpretation of his use of the word "supposedly" was that the items did not on the face of them represent the contents of the suitcase (16/2640).

12.43 The presence of the hole in PD/889 was also referred to in the RARDE report itself (CP 181, section 4.2.12) which contained a photograph of the suitcase (CP 181, photograph 74).

12.44 Although the trial court was aware of the alleged interference with Mr McKee's suitcase there was no explanation given for this in evidence nor is there any such explanation in the relevant HOLMES statements or in the police report. The Commission therefore wrote to D&G on 14 December 2005 requesting all information in its possession as to who might have been responsible for the alleged interference. The Commission also enquired as to whether any items were removed from the suitcase (either permanently or temporarily) and whether records of such items existed. A response to these enquiries was not received from D&G until 29 November 2006. In the intervening period members of the Commission's enquiry team noted that there was reference to Mr McKee in JIG file X. D&G was informed

of this in order that they could take account of the contents of that file in preparing their response.

12.45 In its letter of 29 November 2006 D&G confirmed that there is no information held on HOLMES which would explain the hole that was allegedly cut in Mr McKee's suitcase and that no other records of any relevance had been found. As the letter made no reference to the contents of JIG file X, the Commission asked that this be examined to establish whether it contained any information relevant to Mr McKee's suitcase. In a further letter dated 4 December 2006 D&G confirmed that JIG file X contained several references to Mr McKee's property, as well as photocopies of various photographs and personal papers. The file was said also to contain an inventory of Mr McKee's effects which D&G assumed related to a separate entry in the Dexstar log, PD/1324 (described in the log as "Miscellaneous Leaflets/Papers, Charles McKee" found in PD/889). According to the letter, which was written by DCI Dalgleish, now senior investigating officer in the case:

> *"the presence of Mr McKee on PA103, along with certain others, appears to have been the focus of high level discussions between Senior Police, Security Service and American officials. It is clear that the American authorities were keen to recover any items that may have belonged to McKee in particular, which could be linked to their duties. It may well have been the case that certain items were not recorded in the normal manner to protect American interests but this is purely speculation on my part. Again it is my opinion that the Senior Investigating Officer would be aware if such a decision had been taken.*"

12.46 The Commission also enquired with D&G as to whether generally there was known to have been any deliberate or unintentional failures to record items found at the crash scene. In response DCI Dalgleish said that he was not aware of any such examples. Indeed, some years ago DCI Dalgleish had been part of an audit of all baggage and wreckage material held at Loreburn Street police station in Dumfries which, according to DCI Dalgleish, had established that "everything was recorded and numbered".

12.47 Given that D&G's responses did not provide any explanation for the presence of the rectangular hole which Dr Hayes said had been cut into Mr McKee's suitcase, the Commission considered it appropriate to carry out further enquiries in this connection. In the first instance the Commission enquired with the Crown Agent as to whether Crown Office had any information that might explain the presence of the hole. By letter dated 14 February 2007 the Crown Agent replied that Crown Office "does not possess any further information on this issue other than the evidence which was before the court…"

12.48 The Commission also requested D&G to arrange for photographs to be taken of both of the suitcases belonging to Mr McKee which had been recovered (ie PD/889 and PD/120). The photographs are reproduced below (with close ups of the rectangular hole in PD/889 and the combination lock of PD/120), along with Dr Hayes' sketch of PD/889.

12.49 The Commission also interviewed a number of witnesses whose accounts are summarised below (copies of their statements are contained in the appendix of Commission interviews).

- Kenneth Marshall

12.50 Mr Marshall (a retired police constable) confirmed that he and his colleague PC John Ritchie had found PD/889 in search sector D on 30 December 1988. He said

that the above photograph of PD/889 showed the condition of the suitcase at the time of its discovery. He recalled that it was "burst open" at the time and that there was a "big hole" in one corner of it. Mr Marshall could not remember whether the suitcase was open or shut when he found it but he recalled seeing an envelope addressed to Mr McKee which he believed was in the hole in the corner of the case. Mr Marshall's account of having found this envelope is consistent with what he said in his police statement (S646A, see appendix; CP 130).

12.51 When asked about the rectangular hole just above the handle on PD/889 Mr Marshall could not recall whether this had been present at the time he found the case. He was referred to the photograph of PD/120 above and agreed that the combination lock of that item was in the same position as the rectangular hole in PD/889. He accepted that it would be reasonable to infer that the hole had been caused by the absence of the combination lock. However, he had no recollection of removing a combination lock from PD/889 and believed that this was something he would have remembered.

- Stephen Comerford

12.52 Mr Comerford (a retired detective constable) said that for the first month after the explosion he was responsible for recording items found in search sector D and transporting these to the Dexstar property store. He explained that a member of the recovery team had found PD/889 and had handed it in to the collection point for that sector. Along with DC Ian McLure, Mr Comerford had logged the item in the production book and on 4 January 1989 transported it to the Dexstar store. Mr Comerford recalled that at that time the suitcase was bashed and partly open. Furthermore, the seals in the middle of the case had come away and the lock was open. He assumed at the time that the case might have been opened by the officers who had found it. He recalled seeing the rectangular hole in the case and the missing lock. He remembered thinking at the time that it was a "neat hole". It looked to him as if the locking mechanism had come out in one piece but he did not know what had caused this. After being referred to the photograph of the suitcase PD/120, Mr Comerford said that he suspected what was missing from PD/889 was its combination lock.

12.53 Mr Comerford explained that during the searches on 24 or 26 December 1988 he was accompanied by a man named Ralph Fadner. Mr Comerford was advised at the time that Mr Fadner was a Pan Am engineer but had suspected him to be an intelligence officer. (It is worth noting that Mr Fadner is described as a Pan Am engineer in a number of statements held on the HOLMES database as well as in a number of defence precognitions).

- William Williamson

12.54 Mr Williamson (a retired Chief Inspector) said that on 11 January 1989 he and DCI John (Jack) Baird were given an instruction by the senior investigating officer at the time, Det Chief Supt Orr, to examine baggage identified as belonging to Mr McKee at the Dexstar property store. According to Mr Williamson they were instructed by Det Chief Supt Orr to return to him with any items considered to be of "potential relevance to intelligence matters". Mr Williamson recalled that he and DCI Baird found a number of documents in PD/889 and PD/120 which indicated that they belonged to Mr McKee. He also recalled finding a series of photographs in one of the cases. He and DCI Baird removed these items and later the same day took them to Det Chief Supt Orr. Mr Williamson explained that no index was prepared of the items removed and said that it was only he and DCI Baird who had examined the cases that day. According to Mr Williamson there was absolutely no link in his view between the documents recovered from Mr McKee's suitcases and the PA103 bombing. He did not recall any difficulty opening PD/889.

12.55 Mr Williamson did not recall whether at that time there was a rectangular hole above the handle in PD/889. However, he confirmed that he and DCI Baird had not cut any holes in the case or removed anything like a combination lock. He agreed that the rectangular hole in PD/889 was in the same position as the combination lock in PD/120 and that it was reasonable to infer that the missing lock could explain the presence of the hole.

12.56 It is perhaps worth noting in this connection the following passage in DCI Baird's Crown precognition (see appendix) in which he refers to the items that were removed from Mr McKee's suitcases:

> "*I should also say that we were aware of the significance of McKee and his background and in fact there were within the case photographs which were passed on to Special Branch. We formed the view at the time that they were photographs of a Middle Eastern Building*."

- Sir John Orr

12.57 Sir John Orr was interviewed on two occasions in relation to this matter. At the first interview he said that he had no knowledge of any interference with Mr McKee's suitcase and had no explanation for the existence of the rectangular hole. However, this interview took place before the photographs of PD/889 and PD/120 were obtained by the Commission and before Mr Williamson had been interviewed in this connection. It was therefore considered appropriate to re-interview Sir John in light of that information.

12.58 At his second interview Sir John was shown the photographs of PD/889 and PD/120. He reiterated that he could not explain the presence of the rectangular hole in PD/889, although he agreed that the combination lock on PD/120 was in about the same position. Sir John could not recall instructing Mr Williamson and DCI Baird to examine the contents of Mr McKee's suitcase for intelligence-related items but he did rule out that this had happened. Sir John added that the events had taken place twenty years ago and that it was important to bear in mind that "this was a massive investigation and Charles McKee was not the focus of our enquiries".

- Consideration

12.59 The Commission has found no evidence to suggest that anyone other than Scottish police officers came into contact with Mr McKee's suitcase, PD/889, at the crash scene. Indeed, the fact that what were considered to be intelligence-related

items remained in Mr McKee's suitcases until removed by Scottish officers on 11 January 1989, after the hole in PD/889 had first been noticed by the police, tends to undermine any suggestion that that the suitcase might have been interfered with by intelligence agents in order to "spirit away" items contained within it.

12.60 The Commission has also found no evidence, beyond what was stated at trial, to support the allegation that the rectangular hole in that suitcase was cut after the disaster in order to gain access to its contents. At interview Mr Marshall (who found the suitcase) and Mr Comerford (who came into contact with it shortly after) variously described PD/889 as "burst open", "partly open" and as having a "big hole" in one of its corners. Indeed, it appears from both his original police statement and his account to the Commission that on 30 December 1988 Mr Marshall was able to extract from the case an envelope addressed to Mr McKee. Given the condition of the case at the time of its discovery it is difficult to understand why anyone would require to have cut a hole in the case or remove the locking mechanism in order to gain access to the contents. Indeed, in view of the location of that hole it is possible that this occurred as a result of the locking mechanism having been dislodged by the blast or by the fall or at the point of impact with the ground. In other words the hole in PD/889 might well have been made at the time of manufacture in order to accommodate the locking mechanism.

12.61 The question that requires to be considered by the Commission is whether the actions of the police in removing intelligence-related items from Mr McKee's suitcases are capable of amounting to an affront to the public conscience or of compromising the integrity of the justice system. In the Commission's view the facts as established fall well short of satisfying this test. As DCI Dalgleish states in his letter of 4 December 2006 it is clear that the US authorities were keen to retrieve items belonging to Mr McKee that could be linked with his official duties. This might explain the instructions which Mr Williamson claims he and DCI Baird were given to examine the contents of Mr McKee's suitcases. Had the items retrieved by them been material to the bombing then it is conceivable that their exclusion from the chain of evidence might amount to an abuse of process (although it would more likely form an appeal based on fresh evidence). However, the Commission has examined the relevant contents of JIG file X and is satisfied that the items referred to there bear no

relevance to the destruction of PA103. In other words it seems that the actions of the police were designed not to conceal material evidence but to assist in the recovery of intelligence-related items unconnected with the bombing. In these circumstances it does not appear to the Commission that the actions of the police amount to an abuse of process.

(2) Concerns over the control of witnesses

12.62 Various allegations are made in the submissions regarding the treatment of Majid and Mr Bollier by the US authorities. The credibility and reliability of both witnesses were major issues at trial and the court was prepared to accept only limited parts of their evidence.

12.63 The status of Majid as a paid informer of the CIA was referred to expressly in the trial evidence, as were his many meetings with the CIA. Indeed, the trial court commented at paragraph 42 of its judgment that Majid's "continued association with the American authorities was largely motivated by financial considerations" and that "[i]nformation provided by a paid informer is always open to the criticism that it may be invented in order to justify payment, and in our view this is a case where such criticism is more than usually justified." The court went on to say in paragraph 43 that it was "unable to accept [Majid] as a credible and reliable witness on any matter except his description of the organisation of the JSO and the personnel involved there".

12.64 In the Commission's view Majid's status as a paid informer of the CIA is not in itself something that would cause an affront to the public conscience or which compromises the integrity of the judicial system. The situation would have been different if there was evidence that the police or prosecution had colluded in inventing aspects of his account but the Commission has come across no such evidence. Accordingly, the Commission does not consider that an abuse of process has been established in this connection. The Commission has reached the same conclusion in respect of the allegations concerning Mr Bollier. Again the Commission knows of no evidence to suggest that the police or the Crown acted in any way inappropriately towards this witness.

(3) The role of the US authorities

12.65 The submissions also express concerns over the role of the US authorities in the investigation and prosecution of the case. However, the Commission has come across nothing to suggest that their involvement amounted to an affront to the public conscience or compromised the integrity of the judicial system. The investigation into the bombing of PA103 involved police forces and intelligence services from a number of different countries. The participation of US agencies is understandable given the number of passengers on the plane who were American citizens and the perception that the bombing was effectively an attack upon that country. Contrary to the suggestion in the submissions, the Commission sees no basis for concluding that the shift of focus in the investigation from the PFLP-GC to Libya resulted from anything other than natural developments in the police investigation (see chapters 7 and 8). Moreover leaving aside the issue of the CIA cables relating to Majid (see chapter 14 below) the Commission is not aware of any instances in which it could be said that the US authorities withheld material evidence from the police or the Crown.

12.66 Nor does the Commission consider that a sinister inference should be drawn from the presence of US officials in the well of the court. At interview with the enquiry team the applicant's trial solicitor Mr Duff was dismissive of any suggestion that the presence of those officials prejudiced the defence or the trial. In his view the officials concerned simply sat and watched the proceedings and were able to give advice about technical issues. According to Mr Duff this seemed perfectly understandable.

Conclusion

12.67 The Commission does not consider that any of the matters raised in the submissions can be said to amount to an abuse of the court's process in terms of the principles approved in *Brown v HMA*. In these circumstances the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 13
KHALED JAAFAR

Introduction

13.1 Since the time of the bombing a substantial number of allegations have been made as to the possible involvement of Khaled Jaafar, a passenger on PA103 who boarded PA103A at Frankfurt. In volume A of the application (chapters 12 and 16.8) some of those allegations are repeated and a number of questions are raised as to Mr Jaafar's reasons for being on the flight and as to possible links between his recovered belongings and the explosive device. Although further reference is made to Mr Jaafar in the section of chapter 14 which relates to the "Goben memorandum", it is appropriate to deal separately with the submissions that concern him directly.

The applicant's submissions

13.2 It is submitted that within days of the crash there was speculation in the media about Mr Jaafar's role in the explosion. It was reported in the media that he was a drugs courier acting on behalf of the US Drug Enforcement Agency ("DEA") and that he might have been duped into carrying the bomb on board PA103. According to the Golfer (see chapter 5 above), Mr Jaafar was initially one of the prime suspects in the case and the Golfer had produced a profile of him which it is said would have been recorded on the HOLMES system. The submissions also refer to Juval Aviv, a former Mossad agent who was commissioned by Pan Am to investigate the cause of the crash, and whose report (the "Interfor" report) repeated the allegations that had been made about Mr Jaafar in the media. Similar allegations were also made in a book "Trail of the Octopus" written by a former DEA agent, Lester Coleman.

13.3 It is also suggested in the submissions that a former CIA agent, Robert Baer, (see chapter 15) could confirm that Mr Jaafar was a member of the Popular Front for the Liberation of Palestine – General Command ("PFLP-GC"), and that the El Salheli

brothers, with whom Mr Jaafar associated in Dortmund before he boarded the flight at Frankfurt on 21 December 1988, were also members of that organisation.

13.4 According to the submissions the Crown's position was that only one passport belonging to Mr Jaafar was recovered from the crash site, although it was accepted that he held two, namely a US one and a Lebanese one. A witness, Yasmin Siddique, testified to having seen Mr Jaafar with a US passport when he checked in at Frankfurt, but it was his Lebanese passport that was produced at trial.

13.5 The submissions suggest that prior to the trial the defence investigated the situation concerning the passports in order to establish Mr Jaafar's movements in the period leading up to the bombing. Reference is made to the entry in the Dexstar log (CP 114) for item PH/504, the recovered passport, which indicates that it was found on 3 January 1989 by DC John Crawford and another officer (identified from other records as David Freeburn). The nationality of the passport is not specified in the entry. The "disposal of property" column within the log indicates that this passport was returned to its owner's representative on 28 April 1992. Despite this, a Lebanese passport in Mr Jaafar's name was lodged as Crown production number 1307 (under the police production reference DC/1730). According to the submissions it is not known how Crown production number 1307 came into the possession of the police and the Crown. The submissions refer to a statement given by FBI Special Agent David Edward in which he said that the FBI had this passport in connection with ongoing investigations which were being made in the US concerning the allegations by Juval Aviv and Lester Coleman.

13.6 It is suggested in the submissions that the passport which was recorded in the Dexstar log as PH/504 was actually Mr Jaafar's US passport rather than the Lebanese passport produced at trial. It is asserted that David Freeburn, one of the finders of the passport, provides some support for this contention. In early 2003 he was interviewed on behalf of MacKechnie and Associates and according to the submissions his opening words were "Have you come about that passport?" Thereafter Mr Freeburn was shown a copy of Mr Jaafar's Lebanese passport (CP 1307) and a copy of his application for a US passport (CP 1308). Both contained photographs of Mr Jaafar.

Mr Freeburn was uncertain which of the passports he had found, but said the photograph in the US passport application looked familiar to him.

13.7 According to the submissions the Golfer could confirm that during the police investigation he had possession of Mr Jaafar's US passport, which he had arranged to be photographed at Strathclyde Police headquarters. It is alleged that thereafter it was taken for fingerprinting to a Metropolitan Police laboratory in London, where it was handed over to John Creer (in fact it was Kenneth Creer, see below) and John Irving.

13.8 A further matter raised in the submissions is that in his defence precognition DC John Crawford stated (at p 111) that during an examination of immigration cards received from the Maltese police he found a card with the name "Jaffer Khaled" which indicated that this individual had left Malta on 20 June 1988. According to the submissions the defence made no attempt to investigate this embarkation card prior to the trial.

13.9 The submissions also refer to the Crown's position that Mr Jaafar checked in only two items of luggage (productions PD/403 and PD/825) and that neither showed any sign of scorching or blast damage. It is pointed out that neither of these items had attached to it a Pan Am label which, according to the submissions, one would expect to have found had they been checked in to the hold. In addition, PD/825 was said to contain travel documents, which indicated that it might be hand luggage. The submissions refer to the passenger manifest for PA103A (CP 199) which showed that Mr Jaafar checked in only two bags. According to the submissions the joint minute agreeing this evidence (joint minute number 13) was signed by the defence despite the possibility that an additional bag, which was not recovered or identified, might have been checked in by Mr Jaafar.

13.10 It is submitted that support for this proposition is contained in the Dexstar log in which it is recorded that on 20 February 1989 an item with the reference PH/695 was found. According to the submissions this item was described in the log as "a piece of brown material, (possibly suitcase lining)" and was identified as belonging to Khaled Jaafar. The entries for items PH/696 to PH/705 all relate to PH/695 and indicate that they were found "within suitcase lining". It is submitted that the police

officers who originally dealt with PH/695 were in no doubt that it was a piece of suitcase lining. The application refers to the evidence of a police officer, William Williamson, in which he referred to PH/695 (65/7982-7994). According to the submissions, Mr Williamson's testimony demonstrates that the applicant's defence team at trial was aware of the existence of PH/695 and the items linking it to Mr Jaafar. The submissions state that although the allegation might have been made that the defence should have carried out tests on PH/695 to ascertain its origins, it is clear from the Dexstar log that this item and the items connected with it were returned to their owner's representative on 28 April 1992. The submissions allege, however, that the presence of PH/695 and its contents should have alerted the applicant's defence team to the danger of signing a joint minute which, according to the submissions, accepted that Mr Jaafar was in possession of only two bags.

13.11 Reference is also made in the submissions to the fact that multiple copies of pages from the Koran were included in Mr Jaafar's personal property recovered from the crash site. According to the submissions informal opinions obtained by MacKechnie and Associates from various "Muslim contacts" indicate that the contents of these pages deal with an individual's fear for his own safety.

Consideration

13.12 As the trial court recognised (paragraph 75 of its judgment), there was evidence that before travelling to Frankfurt airport Mr Jaafar had two holdalls in his possession. The passenger manifest for flight PA103A (CP 199) indicates that he checked in two items of luggage, both of which the trial court accepted had been found close by one another at the crash scene. Neither had suffered any explosion damage.

DEA operation

13.13 The submissions refer to the claims made by Lester Coleman, Juval Aviv and various media reports to the effect that Mr Jaafar was a DEA mule tricked into carrying the bomb onto PA103. In the Commission's view there is no evidence capable of being considered credible and reliable by a reasonable court to support

these claims, which in any event were well known to the defence prior to trial. Furthermore, Mr Coleman pled guilty to a charge of perjury in respect of allegations he had made about Mr Jaafar in a sworn statement, further details of which are given below.

Robert Baer

13.14 The submissions refer to comments attributed to Robert Baer suggesting that Mr Jaafar and the El Salheli brothers were members of the PFLP-GC. It appears from a file note provided with the application that Mr Baer made these comments at a meeting which took place with a journalist, John Ashton, on 9 February 2002. However, according to a another file note provided with the application, dated 10 February 2002, Mr Baer confirmed to Mr Ashton that he could find no information to back up these claims and that he might be mistaken about what he had said. Copies of those file notes are contained in the appendix to chapter 15. Accordingly there is nothing in the submissions which causes the Commission to doubt the evidence given at trial by Hassan El Salheli to the effect that Mr Jaafar arrived in Dortmund on 8 November 1988 with the same two holdalls as he had in his possession when he left to travel to Frankfurt on 21 December, and that to Mr El Salheli's knowledge these contained only clothing.

Passport PH/504

13.15 As indicated, it is suggested in the submissions that the passport recovered from the crash scene and given the reference PH/504 was Mr Jaafar's US passport and not his Lebanese one as maintained by the Crown at trial. In support of that suggestion reference is made to Yasmin Siddique's evidence at trial; to an allegation by the Golfer that he had possession of the US passport and had it photographed prior to it being sent for fingerprinting; and to a precognition of David Freeburn (see appendix), one of the finders of PH/504, in which he said that although he could not recall which passport he had found, the photograph on Mr Jaafar's US passport application looked familiar.

13.16 Reference was made in the evidence at trial to the two passports belonging to Mr Jaafar. The Lebanese passport (CP 1307) was spoken to by Ian Howatson (65/7954 et seq) and Mr Jaafar's use of his US passport at passport control in Frankfurt airport was spoken to by Ms Siddique (67/8193).

13.17 The HOLMES statement of Mr Freeburn (S1823: see appendix) and the Dexstar log entry for PH/504 (see appendix) indicate that he found Mr Jaafar's passport on 3 January 1989 in H sector, but neither source contains details as to the nationality of the passport. As the submissions point out, the Dexstar log indicates that PH/504 was returned to its owner's representative on 28 April 1992. The submissions suggest that, assuming PH/504 is indeed Mr Jaafar's Lebanese passport, it is not known how this came to be in the possession of the Crown at trial.

13.18 By letter dated 13 June 2005, D&G advised the Commission that on 8 May 1992 DS Thomas Gordon (S2481F: see appendix) in the presence of DC Derek Henderson (S452CC: see appendix) handed over Mr Jaafar's Lebanese passport to the US Consul's Office. According to various HOLMES statements referred to in the letter the purpose of this was "for return to the families of American victims".

13.19 However, in terms of a letter dated 28 December 1993 (see appendix), a copy of which was provided to the Commission by D&G, confirmation was given by the US Department of Justice to Crown Office that Mr Jaafar's Lebanese passport was being held by the FBI for use in the trial of Lester Coleman in the US. The letter also refers to the passport as bearing the reference PH/504. According to the defence precognition of FBI Special Agent David Edward (see appendix) the charge against Mr Coleman was one of perjury relating to an affidavit sworn by him in which he made various allegations against Mr Jaafar. The precognition also refers to Mr Coleman's plea of guilty to this charge and to his "plea allocution" (ie the formal statement which Mr Coleman made to the court in connection with his plea of guilty). According to the plea allocution (a copy of which was passed to the Commission by D&G: see appendix) Mr Coleman accepted that he had no basis for alleging that Mr Jaafar was ever involved in drug smuggling, or had anything to do with terrorists, or played any role, witting or unwitting, in placing the bomb on board PA103. Mr

Coleman also apologised to the parents of Mr Jaafar for making these allegations. According to Mr Edward's precognition Mr Jaafar's US passport was never found.

13.20 According to Mr Edward's HOLMES statement (S5847: see appendix), he recovered Mr Jaafar's Lebanese passport at the request of Mr Brisbane of Crown Office and handed it to DC Richard Brown on 5 November 1999. In the statement the passport is given the reference DC/1730. At the same time he handed over the certified copy of Mr Jaafar's US passport application to DC Brown (DC/1731).

13.21 As regards the Golfer, in his second interview with the Commission he confirmed that during his involvement in the police enquiry he produced a profile on Mr Jaafar which included details as to his movements (p 20 et seq of 14 December 2005 statement, see appendix of Commission's interviews). The Golfer's position was that he could not be absolutely certain but that he was "sure" two passports belonging to Mr Jaafar had been recovered. He stated that he arranged for these to be photographed and took them to London for fingerprinting. He said he could remember one of them being a US passport. He was asked if he recognised the photograph on Mr Jaafar's application for a US passport (p 25 of 14 December 2005 statement, although the statement wrongly refers to this as a visa application) and he confirmed that he did. He thought it had been attached to documentation, either a passport or a visa application, which had come from Mr Jaafar's personal effects.

13.22 The Commission's conclusions in respect of the Golfer's accounts are set out in chapter 5. As indicated, the Commission does not consider him to be a credible witness. In relation to his claims about Mr Jaafar, the Commission has found no records to suggest that two passports were recovered. In any event it is notable that the Golfer did not claim the US passport contained evidence of any sinister movements by Mr Jaafar, which calls into question why there would be any need to conceal its recovery.

13.23 Various documents identified as relating to Mr Jaafar were taken to the Metropolitan Police laboratory for fingerprinting and were dealt with there by witnesses named John Irving and Kenneth Creer. In his signed statement of 5 July 1989 (S4587: see appendix to chapter 9) Mr Irving, who was a senior identification

officer at the laboratory, states that on 8 April 1989 he received a number of items including Mr Jaafar's passport PH/504 which he processed for finger and palm marks. The items from which marks were recovered were then handed to Mr Creer to be photographed (S4585: see appendix).

13.24 The Commission obtained the photographs referred to in these statements (see appendix). Two of them bear the reference PH/504 and show the page of a passport containing Mr Jaafar's photograph. These photographs are entirely consistent with the relevant page of Mr Jaafar's Lebanese passport (CP 1307) and are wholly inconsistent with the photograph in his US passport application (CP 1308). In the Commission's view the photographs provide convincing evidence that PH/504 was the Lebanese passport belonging to Mr Jaafar. This reflects D&G's position, as confirmed in its letter to the Commission of 13 June 2005. According to the letter PH/504 is Mr Jaafar's Lebanese passport and is exactly the same item as formed Crown production number 1307 and police production DC/1730. D&G also provided to the Commission a copy of Mr Jaafar's passport held on HOLMES and a separate colour copy of the passport which was held elsewhere in their records. Both are identical to the Lebanese passport (CP 1307). In a letter dated 23 June 2005 D&G confirmed that Mr Jaafar's US passport was never recovered.

13.25 As a result of these enquiries the Commission is entirely satisfied that it was Mr Jaafar's Lebanese passport that was recovered after the explosion of PA103 and that his US passport was not found.

PH/695

13.26 The submissions suggest that the item PH/695, which was described in the Dexstar log as possibly being suitcase lining, might have established that Mr Jaafar had an additional piece of luggage in his possession on the flight (see appendix for the relevant extract from the log). The submissions suggest that despite its "blatant" relevance to the defence this evidence was returned to its owner's representatives in 1992. It is also submitted that the mere existence of PH/695 should have been enough to alert the defence to the dangers of signing a joint minute agreeing that Mr Jaafar was in possession of only two bags.

13.27 As regards that latter assertion, the application proceeds on a misunderstanding of the position at trial. The joint minute in question (number 13) confirmed only that Mr Jaafar checked in two bags and that two bags identified to him were recovered from the crash site. It did not contain any agreement that Mr Jaafar was in possession of only two bags.

13.28 According to the HOLMES statement of DC Denis Feeney (S35H: see appendix) he was a member of the team of officers searching H sector at CAD Longtown on 20 February 1989 when he recovered PH/695. In his statement DC Feeney describes the item as a piece of "pocket lining containing documentation identifying it to Khaled Jaafar." This account is supported by the HOLMES statement of DC Graham Clark (S1977L: see appendix).

13.29 The submissions point out that there is no record in the Dexstar log of PH/695 being transported to RARDE, but that a laboratory request form dated 21 February 1989 records the transfer of the item to William Williamson for transmission to RARDE (CP 288, image 329). A note attached to that form indicates that PH/695 was flown to RARDE that day but was not logged there and was returned to the productions office the same day. The notes of the forensic scientists (CPs 1497 and 1498) do not contain any reference to an examination of the item that day. There is, however, a forensic examination note dated 29 March 1990 recording Mr Feraday's examination of PH/695 (CP 1498-E019). That note indicates that that PH/695 was "NPES", the abbreviation for "no particular explosive sign", suggesting that the fragment was not associated with the primary suitcase. Mr Feraday's examination was conducted at Lockerbie in the presence of DC McManus (as noted in CP 1498-E006). The next record of the item is in the HOLMES statements of DS Gordon (S2481F) and DC Henderson (S452CC) which indicate that on 28 April 1992 it was passed to a US Government representative to be returned to Mr Jaafar's family. As indicated, this is reflected in the relevant entry in the Dexstar log.

13.30 William Williamson was the only witness who gave evidence about PH/695 at trial (65/7982-7994), but owing to a successful defence objection he was not asked the result of the forensic examination of the item in February 1989. Mr Williamson

was asked about the item at interview with the Commission's enquiry team on 5 January 2006 (see appendix of Commission interviews). His recollection was that on 20 February 1989 his team was searching a particular sector at CAD Longtown. Two police officers, namely Dennis Feeney and Graham Clark, were side by side examining the debris when one of them found PH/695 which was a piece of brown material with other bits of material attached to it. Some of the items within PH/695 bore Mr Jaafar's name. Mr Williamson did not witness officers Feeney and Clark finding PH/695 but they had shown him the item.

13.31 Mr Williamson said that at the time this find generated a lot of excitement amongst the officers because PH/695 appeared identical to what the officers remembered the lining of the fragments of primary suitcase to be like. The officers had been shown fragments of the primary suitcase earlier that month. Mr Williamson said that he and officers Feeney and Clark were so sure that they had found something of real significance that they all went to Lockerbie to tell the then senior investigating officer John Orr about it. However, they did not at the time have a piece of the primary suitcase with which to compare the fragment. Mr Orr thereafter called a meeting of senior officers and a decision was reached that Mr Williamson should go to RARDE the next day so that PH/695 could be compared to the suitcase lining.

13.32 Mr Williamson said that on 21 February 1989 he took PH/695 to RARDE. His recollection was that another officer, Gordon Ferrie, accompanied him on that visit. When they arrived at RARDE, one of the forensic scientists examined PH/695 although Mr Williamson could not recall for certain whether this was Mr Feraday or Dr Hayes or whether they were both present. Mr Williamson recalled that upon examination it was immediately clear that PH/695 was not part of the lining of the primary suitcase. Moreover, the scientists could see at that point that PH/695 showed no sign of explosive damage. The Commission's enquiry team also asked Mr Feraday and Dr Hayes about the examination of PH/695 but neither had any recollection of this.

13.33 Mr Williamson was asked at interview why there was no police statement from him or anyone else regarding the outcome of this examination at RARDE. He replied that if PH/695 had been found to be of significance then a statement would

have been noted. However, as the item was found to be of no significance it was no more important than hundreds of other items. Mr Williamson said that he understood that PH/695 turned out to be a piece of pocket from an item of Mr Jaafar's clothing. He thought that it might have come from a piece of the brown leather jacket worn by Mr Jaafar.

13.34 The Commission also requested information from D&G regarding PH/695. In a letter dated 13 June 2005, D&G advised that a number of other items had been linked to PH/695. As well as the various items found within it, reference was made in the letter to PH/887 which is described in the Dexstar log as a piece of brown material possibly connected with PH/695 (see appendix). According to D&G's letter PH/887 was described on 22 January 1991 as being part of a brown leather jacket although no further information is given about this. The letter states that the outcome of enquiries appeared to suggest that PH/695 was from a jacket as opposed to a suitcase and reference is made to the HOLMES statements of officers Clark and Feeney (above) in which they described PH/695 as pocket lining. D&G's letter also confirms that no photographic record of PH/695 could be found and that apart from the laboratory request form (CP 288, LPS 329 referred to above) no other documentation could be found regarding the forensic examination of the item. The letter makes no reference to Mr Feraday's examination of PH/695 on 29 March 1990.

13.35 In the Commission's view the enquiries narrated above, in particular Mr Williamson's recollections about the result of the forensic examination of PH/695 on 21 February 1989 and the examination note by Mr Feraday on 29 March 1990, leave no basis for suggesting that PH/695 was connected to the primary suitcase.

Embarkation card in the name "Jaffer Khaled"

13.36 The submissions refer to a passage in the defence precognition of DC John Crawford in which he refers to an embarkation card in the name of "Jaffer Khaled." This card was not referred to in the evidence at trial. According to the precognition DC Crawford seized a number of Maltese embarkation cards in January 1991 which included one in the name of "Jaffer Khaled", which indicated that the person in question left Malta on 20 June 1988. The Commission notes that a defence

precognition of DI Peter Avent also refers to this embarkation card, as do the HOLMES statements of both officers (S609AX and S5388C respectively, see appendix), although there the name of the individual is given as "Khaled S Jaafer".

13.37 The submissions criticise the defence at trial for not investigating whether the card was of significance. However, the Crown and defence profiles of Mr Jaafar both suggest that he was in the US on 20 June 1988. There is also no indication in his Lebanese passport that he travelled either to or from Malta in 1988 and his US passport was not issued to him until 24 June 1988, four days after "Khaled S. Jaafer" left Malta. Moreover, the initial in that name is inconsistent with the individual being Mr Jaafar whose middle name, as recorded on his Lebanese passport, is Nazir. In these circumstances, it is doubtful that the embarkation card in the name "Khaled S Jaafer" (or "Jaffer Khaled") relates to the Khaled Jaafar who was killed on PA103. In any event, it is difficult to see how the latter's presence in Malta in June 1988 could itself be significant given that there is nothing to link Mr Jaafar's recovered belongings to the explosive device.

The pages from the Koran

13.38 Reference is made in the submissions to multiple pages of the same verse of the Koran which were found in Mr Jaafar's luggage (see CP 197, image 1; see also the evidence of Ian Howatson: 65/7963-4).

13.39 The Commission instructed the Language Centre at the University of Glasgow to translate the pages in question along with two other documents found within Mr Jaafar's luggage. This confirmed that the pages were indeed multiple copies of a particular verse of the Koran (see appendix). A further report was thereafter obtained from the Centre for the Study of Islam at the university as to the meaning of the verse (see appendix). In terms of the report the verse is a popular one which is often recited by Muslims before they go to sleep and may also be read to the sick by family members. The report explains that one does not have to be ill or in danger to recite the verse.

Conclusion

13.40 In the Commission's view the results of its enquiries provide no support for the allegation that Mr Jaafar was involved, unwittingly or otherwise, in the bombing of PA103. Accordingly, the Commission does not believe that a miscarriage of justice may have occurred in this connection.

CHAPTER 14
ALLEGED NON-DISCLOSURE BY THE CROWN

Introduction

14.1 In the application to the Commission a number of submissions were made alleging failures by the Crown to disclose material to the defence. In this chapter four specific areas are addressed, namely (1) the Bundeskriminalamt ("BKA") papers, (2) the CIA cables, (3) the Goben memorandum and (4) information in relation to the incriminees. Further issues in relation to disclosure are addressed in chapters 22-25.

(1) The BKA papers

Introduction

14.2 The BKA is the national criminal police force of the reunified Germany and, at the time of the bombing, was the national force for the former West Germany. It was responsible for the "Autumn Leaves" operation on 26 October 1988 which resulted in the arrest of various PFLP-GC members, and was also involved in investigations into the destruction of PA103. As such, the BKA had in its possession a substantial number of files relating to both incidents most, if not all, of which were in German.

The applicant's submissions

14.3 It is alleged on behalf of the applicant that the Crown refused to provide the defence with copies of translated versions of the BKA files which it had obtained prior to the trial. A similar allegation was made by Mr MacKechnie of MacKechnie and Associates at a meeting with members of the enquiry team, when he asserted that the defence had attempted to carry out its own translation of the files but required to abandon this process, incomplete.

Consideration

14.4 Prior to the trial, the defence obtained copies of various untranslated BKA files from the German authorities and sought copies of the English translations of these from Crown Office. Specifically, by letter dated 2 August 1999, the applicant's representatives requested the English translations of the files relating to the Autumn Leaves operation. In its response dated 17 August 1999 Crown Office said that steps had already been taken to clear the release of the English translations of these files with the German authorities. On 5 September 1999 Crown Office advised that before the translated files could be disclosed the Crown was obliged to request the German authorities formally to release the files to them, and that it would thereafter require to cross-refer these to the untranslated files which had been released.

14.5 Subsequently, however, in a letter dated 8 October 1999, Crown Office informed the defence that it would only be with the permission of the German authorities that it could disclose either the German text of any of these files, or the English translations. According to the letter, before the German authorities would authorise this they required Crown Office to satisfy them that the translated material did not include any material which was not in the "official" files i.e. those lodged with the German court. However, without a German/English speaker to check this, there was no way in which Crown Office could satisfy the German authorities on this point. Crown Office suggested in the letter that a translator could carry out this task, and confirmed that the Lord Advocate would be prepared to issue a letter of request to Germany requesting that the defence be given access to the files.

14.6 Thereafter, on 1 November 1999, the applicant's representatives wrote to Crown Office saying that their understanding from the German authorities was that the defence had been given copies of everything and therefore that they had the same untranslated materials as the Crown itself had.

14.7 On 5 November 1999, identical devolution minutes were lodged on behalf of both accused, in which access was sought to the translated versions of the BKA's Autumn Leaves files as well as to those relating to the PA103 investigation. According to the minutes, Crown Office had obtained the Autumn Leaves files from

the Federal Prosecutor in Germany in response to a letter of request in 1989 and had then had these translated. Although the German Federal Prosecutor had granted the defence access to parts of the Autumn Leaves files in their original form, according to the minutes the time it would take the defence to translate these would be likely to necessitate an application for postponement of the trial.

14.8 The devolution minutes also made reference to the BKA's investigations into the bombing of PA103. According to the minutes the resulting 170 files, amounting to approximately 40,000 pages, had been forwarded to the Crown by the German authorities and had been translated. Although the German authorities had given the defence access to these files in their original form, again it was averred that the time it would take to translate these would be likely to necessitate an application for postponement of the trial.

14.9 Shortly before the preliminary hearing on the minutes which took place on 22 November 1999 Crown Office provided the defence with six floppy disks containing translations of the BKA's Autumn Leaves files. Five further disks were disclosed to the defence on 26 November 1999 containing what Crown Office described as a substantial part of the material from the BKA's "investigative" files, i.e. those relating to its investigation into the bombing of PA103. On 3 December 1999, following further court procedure, Crown Office provided the defence with what were said to be the outstanding translations. In its letter of that date, however, Crown Office explained that a small amount of documentation relating to communications between prosecutors and police in Germany and the UK had not been disclosed. According to the letter there was nothing in the nature of evidence in this material, nor did it contain the type of information ordinarily amenable to recovery through the courts.

14.10 According to the minutes of a further hearing which took place on 8 December 1999 counsel for the applicant and the co-accused accepted that the matters raised in the respective devolution minutes had been satisfactorily resolved. The court thereafter allowed the devolution minutes to be withdrawn.

14.11 This version of events was broadly reflected in what Mr Beckett told members of the Commission's enquiry team at interview. According to Mr Beckett the Crown said that it had applied the *McLeod* test (which the Commission has set out below in relation to the CIA cables issue) and gave an assurance that all materials had been disclosed except for a small amount that was subject to public interest immunity which the Crown said did not contain anything exculpatory. Although it was a concern to the defence that the Crown had exercised its judgment about the undisclosed materials, in Mr Beckett's view it was not possible for the defence to do any better given that the principles of *McLeod* had been met.

14.12 Mr Beckett was also asked about Mr MacKechnie's allegation that the defence had required to translate the BKA materials throughout the trial, but in the event were forced to abandon this process when it was still incomplete. Mr Beckett could not remember this having occurred but said that this did not mean that it did not happen. He added, however, that the defence knew what was in the BKA materials. There was a file on Autumn Leaves, as well as a batch of general BKA files. According to Mr Beckett, defence solicitors went through these files and counsel were given synopses of them. Much of the material was lodged as productions, and some was led in evidence and brought out at cross examination. As the defence knew what was in the materials, Mr Beckett presumed there must have been English copies. Mr Beckett did not think that the defence had been hampered by anything concerning the disclosure of the BKA papers.

14.13 The Commission sought access to those sections of the BKA materials that were withheld from the defence. However, by letter dated 26 May 2006, Crown Office advised that having reviewed their files they had not been able to find any copies of this material or any information in relation to their consideration of it (see chapter 4).

Conclusion

14.14 The Commission is satisfied in light of the above that the Crown eventually disclosed the translations of the BKA files to the defence, and therefore that the allegation made on behalf of the applicant is without merit. While the defence might

very well have carried out its own translation of this material, there is nothing to suggest that it was prejudiced by any inability to complete such an exercise.

14.15 As far as the undisclosed material is concerned, the Commission was unable to assess the significance of this for itself, but it has no reason to doubt the Crown's assurances as to its content. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred in this connection.

(2) The CIA cables

Introduction

14.16 It is alleged on behalf of the applicant (see chapter 12 of volume A) that the Crown's approach to the disclosure of CIA cables concerning the Crown witness Abdul Majid Giaka ("Majid") amounted to a breach of the Crown's duty of disclosure as set out in *McLeod v HMA* 1998 SCCR 77. It is also alleged that the applicant's right to a fair trial under article 6 of the European Convention on Human Rights ("the Convention") was violated.

14.17 The Commission has set out below a summary of the submissions on which these allegations are based.

The applicant's submissions

14.18 It is alleged in the submissions that important information in the CIA cables concerning Majid's credibility and reliability was deliberately hidden from the defence, and that details which would have strengthened the incrimination defence were left "out of reach". According to the submissions, the events at trial surrounding the disclosure of the cables exemplify the amount of material kept hidden from the defence, and demonstrate that the disclosure of information was controlled by a third party, namely the US authorities.

14.19 According to the submissions the Crown included in its list of productions on 5 November 1999 25 heavily redacted CIA cables (CPs 804-828) consisting of reports

of meetings between Majid and his CIA handlers in Malta. The redactions were made by the CIA and the US Department of Justice. On 16 December 1999 the co-accused's representatives requested disclosure of all such material and suggested that the Crown obtain a letter of request for this purpose. In response the Crown said that it had not seen the unedited versions of the cables. CIA personnel precognosced by the defence suggested that all cables relating to Majid had been produced. Subsequently, annotations to the redacted passages in the cables were disclosed.

14.20 According to the submissions on 21 August 2000 the advocate depute Alastair Campbell QC informed defence counsel, apparently informally, that the Crown had seen the unedited cables. On the following day the defence asked the court to invite the Crown to provide complete versions of the cables. The Lord Advocate opposed this motion, arguing that the redacted sections had "no bearing upon the cables themselves." In particular, the advocate depute who saw the cables, Alan Turnbull QC, had concluded that they contained "nothing…that bore upon the defence case." The Lord Advocate added that in any event he did not have control over the documents, which lay with the US authorities. He repeated to the court that there was "nothing in these documents which related to Lockerbie or the bombing of PA103, or which could in any way impinge upon the credibility of Mr Majid in these matters."

14.21 In the event, the court invited the Lord Advocate to use his "best endeavours" to bring about the disclosure of all material in the cables, adding that some passages might require to be deleted if they concerned matters which could put lives at risk, would be prejudicial to national security or, in the opinion of the Lord Advocate, could have no relevance to any of the issues at trial. Accordingly, it is submitted that the Lord Advocate was given a discretion to withhold material on grounds of national security (ie in terms of public interest immunity).

14.22 Fresh copies of the 25 cables, along with one new cable, were provided to the defence on 25 August 2000. The Lord Advocate explained to the court that the cables "have now been produced in their entirety, except for those areas which relate to the safety of individuals, to the national security of the United States and to relevance." He added that a broad view had been taken of the latter issue. Although there were a

good deal fewer redactions, according to the submissions the defence was disturbed to see that certain of the new passages were highly relevant, eg comments by Majid's handlers that they considered him to be motivated by monetary reward. In light of this, counsel for the co-accused submitted that it was "inconceivable" that the Crown could have considered this material as anything other than relevant to the defence. The submissions point out that the less redacted versions of the cables suggested the existence of other cables.

14.23 On 28 August 2000, the Lord Advocate explained that the Crown's access to the unedited cables had taken place in restricted conditions. No notes were permitted to be taken and both Mr Turnbull and Norman McFadyen (the then Regional Procurator Fiscal, who also viewed the cables) were required to sign an undertaking as to the purpose of the exercise. According to the submissions the precise nature of this undertaking was not known to the defence despite enquiries they had made (it is not clear whether these were undertaken by the applicant's trial solicitor, or more recently by MacKechnie and Associates). In particular it was not known whether its terms might have breached the Crown's duty of disclosure. According to the submissions the picture presented is one in which the US authorities, rather than the Crown, were in control of information.

14.24 Following disclosure of the less redacted versions, the defence sought letters of request directing the US to disclose the complete cables. The Lord Advocate opposed that motion on the basis that it would cause considerable delay, and also that there was "no way" the US would release the unredacted versions. The court refused the defence motion, partly on the basis of delay, and asked the Lord Advocate simply to use his best endeavours to obtain any other cables.

14.25 The Lord Advocate advised the court on 21 September 2000 that he had disclosed a further 36 cables to the defence. According to the submissions it was clear to the defence from these cables that a substantial amount of information should have been disclosed previously. For example, the new cables indicated that the co-accused was not a member of Libyan intelligence, that the supposed "dummy run" by Nassr Ashur, referred to in charge 2(a) of the indictment, actually arose from a re-routing of the flight to Frankfurt due to bad weather and that Majid had previously

told his handlers that he had no information about PA103. According to the submissions the terms of these new cables suggested yet again that others had not been disclosed.

14.26 In terms of the submissions, the defence thereafter "asked the court to request the Lord Advocate to call upon the CIA to produce all information in its possession relating to the alleged involvement of Talb and the PFLP-GC." The court refused. The court also refused a further defence motion in which letters of request were sought directing the US to disclose the information referred to in the earlier motion.

14.27 In conclusion, the submissions allege that the defence was given only that information which was deemed appropriate by the Lord Advocate who, in turn, was given only that deemed appropriate by the US authorities. There was no effective review by the court of the material in question and no judicial protection of the rights of the applicant. According to the submissions it is surprising that the court dealt with the disclosure issues in ignorance of the Convention and by means of the traditional reliance upon the Lord Advocate's views. Such an approach is said to be made all the more unattractive by the fact that the Lord Advocate misled the court on the matter. By relying upon the Lord Advocate to determine what information should be released, the trial court is alleged to have violated article 6 of the Convention. In terms of that provision it is the *procedure* for disclosure (or lack thereof) which constitutes the breach. In other words, what matters is not the difference which disclosure would have made but the method of disclosure and the decision making processes involved.

14.28 According to the submissions, while the court rejected most of Majid's account, it still relied upon him for "one crucial piece of evidence", namely the applicant's membership of the JSO. In these circumstances, it is submitted that the cables and the disclosure of their contents remain a material issue. It could not be said, for example, that the failures in respect of disclosure no longer mattered because the evidence of the witness had been entirely rejected. Moreover, the unredacted cables contained more that just information about Majid. Their limited disclosure also led to the deletion from the indictment of the allegation concerning the dummy run. According to the submissions, such an allegation was not libelled in the US

indictment presumably because the authorities there knew that it had no substance whatever.

The events at trial

14.29 Before considering these allegations, it is important to set out in more detail the events at trial relating to the cables. Although, in doing this, certain aspects of the submissions are inevitably repeated, in the Commission's view a fuller account allows one to see clearly the difficulties which emerged at trial and the reasons why particular measures were adopted in order to address them.

22 August 2000 (day 41)

14.30 According to Mr Taylor's submissions the first edition of the cables, large sections of which were redacted, was disclosed to the defence as productions on 5 November 1999 (CPs 804-828). On 16 December 1999 the defence wrote to the Crown seeking clarification as to who had redacted the cables and why, and requesting assistance in recovering the unedited versions. On 2 January 2000 the Crown confirmed that the CIA had redacted the cables in conjunction with the US Department of Justice in order to remove material considered irrelevant or potentially damaging to US national security. The Crown also indicated that it had not examined the unedited cables. On 16 February 2000 the defence requested annotated versions of the cables and these were disclosed on 29 February 2000 (the "second edition" of the cables). While the defence had accepted the Crown's assurance that it had not examined the unredacted cables, according to Mr Taylor the position was radically altered by Mr Campbell's revelation the previous day that Mr Turnbull had in fact done so.

14.31 The Lord Advocate confirmed to the court that on 1 June 2000 Mr Turnbull and Mr McFadyen were given access to largely unredacted versions of the 25 cables. The purpose of this, the Lord Advocate explained, was to consider whether any of the information behind the redactions undermined the Crown case in any way, for example by reflecting on Majid's credibility or the incrimination defence. According to the Lord Advocate Mr Turnbull had concluded that nothing in the cables bore upon

those matters. The cables were in the hands of the US authorities and the Crown did not have copies of them. On 5 June 2000 two cables (CPs 817 and 819) with fuller annotations were disclosed to the defence.

14.32 In Mr Taylor's submission the playing field had ceased to be level on 1 June 2000. Moreover, the Crown had not informed the defence of its examination of the cables on that date until 21 August 2000. Mr Taylor said that witnesses relevant to the cables had been precognosced by the defence and had refused to answer questions about the redacted sections. However, as a result of this process Mr Taylor knew of material behind the redactions (although not its precise content) which would be of use in cross-examining Majid. As a first step, Mr Taylor proposed that the Crown use its best endeavours to secure disclosure of the unredacted cables. Mr Keen adopted these submissions, pointing out that as a result of the precognition process it appeared that some of the redacted sections related to offers and counter-offers of payments to Majid.

14.33 The Lord Advocate replied that the Crown had disclosed details of all payments made to Majid in a separate production (see CP 863, which provides a break-down of annual payments made to Majid by the US authorities between 1989 and 1992). While there were references to payments of "compensation" within the redacted sections of the cables, the Lord Advocate pointed out that the amounts already disclosed to the defence were in excess of these. In the circumstances, the Lord Advocate considered that the Crown had complied with its duty of disclosure.

14.34 In the event, the court considered that there might be information in the redacted sections of the cables to indicate that Majid was actively seeking a reward, and that such information would be material to the defence. In the court's view it was significant that on precognition of one or other of the CIA agents it became apparent that some of the redacted passages related to offers and counter-offers of payments to Majid. In addition, the Lord Advocate himself had accepted that some of the redacted passages contained references to such matters. In these circumstances, the court invited the Lord Advocate to use his best endeavours to ensure that all information contained in the cables be disclosed, apart from that which could put lives at risk,

which was prejudicial to the national security of the US or which, in the opinion of the Lord Advocate, could have no relevance to any issue in the trial.

25 August 2000 (day 44)

14.35 The Lord Advocate informed the court that fresh versions of the 25 cables (the "third edition") had been disclosed to the defence that afternoon. There were, the Lord Advocate explained, still a number of redactions, the basis for which he proposed to address the court on later.

28 August 2000 (day 45)

14.36 The Lord Advocate informed the court that he had consulted with CIA officials about the redaction exercise which had been re-done in accordance with the principles laid down by the court. As part of the exercise he had been shown "virtually complete" cables, although a number of words were still redacted. However, from what he had been told, and from the context in which these redactions had been made, they appeared to be single words or cryptonyms for names or places. Where redactions were still necessary, annotations had been made to assist the defence. The CIA had been concerned to ensure that the names of its officers were protected, along with those of other individuals whose lives or safety might be at risk if their identities were revealed. The CIA had also sought to protect "sources or methods of operation", as well as "internal operational and administrative detail", which might be useful to enemies of the US. The CIA considered that the release of such detail would prejudice the security of the US.

14.37 In respect of the original examination of the cables carried out by Mr Turnbull and Mr McFadyen on 1 June 2000 the Lord Advocate explained that this had occurred because the CIA had responded to the suggestion that the Crown be allowed sight of the largely unredacted versions of the cables. The examination had taken place in restricted circumstances at the US Embassy in The Hague. No opportunity was given to copy the cables or to make notes of them, and Mr Turnbull and Mr McFadyen were required to sign an undertaking as to the circumstances in which the examination took place, and its purpose. In terms of the undertaking, the purpose of

the examination was "not to make available information for the Crown's use at trial but was restricted to an assessment as to whether there existed information which would undermine the Crown case or supported any of the incrimination." During this exercise, both Mr Turnbull and Mr McFadyen "examined portions of the cables which still had certain redacted portions", and were given an explanation of what lay behind these by CIA officials. They were not in a position to demand access to the information, nor to disclose it, but were to ask the CIA whether there was any method by which they could bring to the attention of the defence any matters which might need to be disclosed. Essentially, Mr Turnbull and Mr McFadyen were looking for material which contradicted the Crown's assertion that the two accused were responsible for the offence or which supported the special defence. In the event, Mr Turnbull was satisfied that there was nothing in this connection. In the Lord Advocate's submission, Mr Turnbull was correct in his assessment.

14.38 According to the Lord Advocate, Mr Turnbull and Mr McFadyen had also attempted to ascertain whether information provided by Majid within the body of the cables was obviously false. Had they found such material they would have required to give consideration to the question of how to deal with it. While there were references in the cables to Majid's desire to undergo sham surgery and a request for payment on one occasion, according to the Lord Advocate this information had already been revealed to the defence.

14.39 The Lord Advocate confirmed that the Crown had disclosed another cable, dated 19 April 1989 (the "fourth edition"), containing information which Majid was said to have given to the CIA about the Crown witness, Vincent Vassallo. According to the Lord Advocate this was the only other cable concerning statements from Majid which the Crown were shown during the precognition stage.

14.40 In the Lord Advocate's submission the Crown had acted entirely properly in relation to its interaction with the cables. These had now been produced in their entirety, except for those areas relating to the safety of individuals, the national security of the US and relevance. The defence, he said, had seen all the cables which the Crown had seen and, in particular, had seen all the information with the exception of information in the three areas outlined above. The Lord Advocate was satisfied

that the CIA had now disclosed "everything which they feel proper [sic] should be revealed."

14.41 Following an adjournment, Mr Taylor confirmed that the defence had received three editions of the cables. The first of these, he said, contained large blanks; the second contained the same blanks but with annotations purporting to describe the information hidden in the redacted sections; and the third in which parts hitherto obscured were now revealed, but to which new annotations had been made which were sometimes at variance with the previous annotations.

29 August 2000 (day 46)

14.42 Mr Taylor began by referring the court to various matters of significance which had not been revealed in the earlier versions of the cables. Thereafter he submitted that despite assurances given at precognition by various CIA handlers, there were in fact more cables in existence than those lodged by the Crown. In support of this Mr Taylor referred to the further cable disclosed by the Lord Advocate the previous day, which was not a production. In addition, the disclosed cables were littered with phrases such as "as reported upon separately" or "as confirmed earlier." In Mr Taylor's submission, it was plain that the full complement of cables had not been disclosed.

14.43 Mr Taylor went on to make five applications to the court (four of which are relevant for present purposes): first, to invite the Lord Advocate to use his best endeavours to ensure that the further cables were disclosed; secondly, to instruct the Crown to disclose details of the dates, times and duration of all meetings between Majid and his CIA handlers between August 1988 and August 1989; thirdly, that the defence be allowed to see the still redacted sections of the cables which had been disclosed; and fourthly, that the court issue letters of request to obtain certain documents, the details of which would be the subject of submissions by Mr Keen.

14.44 Mr Keen moved the court to grant letters of request to the US authorities seeking in unredacted form all cables relating to Majid held by the CIA from August 1988 to July 1991 and in particular those relating to: (a) the activities of the Libyan

intelligence services or members thereof in Malta from August 1988 to July 1991; (b) the activities of both accused; and (c) the activities in Malta of persons suspected of involvement in the bombing of PA103, namely Abu Nada, Talb, the PFLP-GC and the PPSF.

14.45 The Lord Advocate first addressed Mr Taylor's various applications. In respect of the first and second of these, the Lord Advocate was prepared to give some thought as to whether they could be achieved. In the Lord Advocate's submission there was now a level playing field between the Crown and defence, with the exception of the still redacted material. Although the Lord Advocate was not able to say that every cable which might have reported some observation by Majid had been shown to the Crown, he was prepared to consider a similar exercise to that conducted by him the previous week in order to enable him to give such an assurance.

14.46 As to the third of Mr Taylor's applications (that the defence be allowed to see the redacted sections of the cables already disclosed), the Lord Advocate said that he had done everything he could on this matter and that the court could not accede to this request. According to the Lord Advocate, there was "no way" that the cables would be released in their full form, and this was for "good reasons associated with the security of the United States." The Lord Advocate traditionally exercised a role in relation to any claims of public interest immunity. Although he had considered inviting the court to review this process in the present case, he had decided against this for two reasons. The first was that it would not be in accordance with Scots law, and the second was that it would involve the court, as the fact finder, overseeing cables which might not then be led in evidence.

14.47 With regard to Mr Keen's motion for letters of request, the Lord Advocate highlighted various practical obstacles. The Lord Advocate submitted that as well as the likely delays involved in such a process, "great deference" would be paid in practice to the views of the Director of Central Intelligence as to whether confidential material should be released. Classified material held by the CIA would not ordinarily be made public, nor would it ordinarily be handed over through a process of discovery. In the Lord Advocate's submission, it was essentially the CIA's views on the question of national security that would prevail in considering such a request.

Because of this, the Lord Advocate did not consider that the letter of request procedure provided an effective way of dealing with the information sought by the defence. On the other hand, if he were to undertake the exercise suggested by Mr Taylor this would be done a lot more quickly. According to the Lord Advocate, the choice was between, on the one hand, simply relying upon the views of the CIA as to what material should be made available and, on the other, having his own involvement in reviewing this.

14.48 Mr Keen submitted in reply that under US law the final say as to how such a request would be dealt with did not lie with the CIA, although he accepted that the views of that organisation would be considered material in the circumstances. As to delay, Mr Keen had no doubt that the US authorities would do everything in their power to expedite any request made by the court.

14.49 In the event, the court was not inclined to grant authority for the letters of request sought by the defence. This was partly because of the possible delays involved and also because, if at all possible, any alternative route would be preferable. Instead, the court considered that the Lord Advocate should use his best endeavours to obtain such other cables as might have a bearing on what Majid told his handlers in Malta. In the event that the Lord Advocate felt unable to assist, or was unable to obtain the cooperation of the CIA, the court might require to reconsider the matter.

14.50 In respect of Mr Taylor's motion that the defence be allowed to see behind the redactions, the court said that no further request should be made of the Lord Advocate in respect of the existing cables. This was on the basis that the Lord Advocate had made it clear that there was nothing further he could do in this connection. Having regard to his personal involvement in the production of the latest versions of the cables, and his assurances in relation to the still redacted sections, the court was prepared to accept this view.

<u>30 August 2000 (day 47)</u>

14.51 The Lord Advocate informed the court that the Crown could undertake the exercise to which he had referred the previous day. This would entail a search for

excerpts of all CIA cables etc from August 1988 to July 1991 relating to Majid which reported what he had said to his handlers about the activities of both accused and of Abu Nada, Talb, the PFLP-GC and the PPSF. The exercise would also involve a search for cables in the same period relating to negotiations for payments, advantages, benefits or rewards to be made available to Majid. As to Mr Taylor's request for details of the dates, times and duration of meetings between Majid and his handlers, the Lord Advocate was not in a position to give an assurance on this matter. He would, however, use his best endeavours to provide such information as was available in this connection.

14.52 According to the Lord Advocate CIA officials would carry out the exercise, but he would review their work and consider "what should properly be made available and what requires to be made available."

14.53 Neither Mr Taylor nor Mr Keen took any exception to these proposals.

21 September 2000 (day 49)

14.54 The Lord Advocate confirmed that he had reviewed a number of cables which had been shown to him by the CIA. As a result of this exercise 35 additional cables were disclosed to the defence on 18 September 2000 (the "fifth edition" of the cables). A further cable (the "sixth edition") was disclosed to the defence on the morning of 21 September.

14.55 According to the Lord Advocate the approach taken was that if the cable could fall within one of the categories specified to the court on day 47 it should be disclosed. For example, even passing reference to the accused would merit disclosure. Where a cable was deemed to fall within one of the categories, the view taken was that as much as possible of it should be revealed. The Lord Advocate had been shown "lightly redacted" cables, by which he meant that what he understood to be CIA names and cryptonyms had been obscured. The further redactions had been made on the same basis (ie where information could put lives at risk, was prejudicial to the national security of the US or was, in the opinion of the Lord Advocate, of no relevance to any issue in the trial). Nine of the cables disclosed as a result of this

exercise did not fall within any of the specific categories, and the decision to disclose these was made, in some instances, on the basis that they were referred to in other cables.

14.56 The Lord Advocate added that on each occasion that the court had, through him, requested information from the CIA, this had been supplied. On the basis of what had been shown to him by the CIA the Lord Advocate considered that he had carried out the task described by him on 30 August 2000.

14.57 Mr Taylor informed the court that the cable passed to the defence that morning related to an allegation set out in paragraph (a) of the first alternative charge on the indictment (charge 2 - murder). It was alleged in that paragraph that the applicant and the co-accused caused Nassr Ashur to travel from Tripoli to Luqa airport on 10 November 1988 and from there to Frankfurt on 11 November 1988 using a passport in the false name of Nassr Ahmed Salem. Mr Taylor explained that at a preliminary hearing in the case the Lord Advocate had argued that these events constituted a dummy run for the progress of a bag from Malta to Frankfurt for onward transmission. However, the contents of the cable disclosed to the defence that morning indicated that Nassr Ashur had in fact transited Frankfurt airport on this occasion because of poor weather conditions. In Mr Taylor's submission, the cable, which was dated 12 December 1988, was therefore of the utmost materiality.

14.58 Mr Keen submitted, in the first instance, that the existence of the additional cables called into question assurances which had been given to the defence by two members of the CIA at precognition to the effect that the cables initially lodged by the Crown constituted all those available, and not just a selection.

14.59 Secondly, it was clear from the 35 additional cables that there were more cables, including ones involving negotiations for increases in salary payments. Thirdly, in Mr Keen's submission there existed a very substantial body of evidence which had not been disclosed by the CIA to the Crown, and consequently to the defence. In particular, it was noted in some of the cables that the co-accused was not a JSO staff officer, even though the indictment had proceeded upon that basis. Another cable, dated 1 September 1989, incorporated a series of requests from one

CIA station to another concerning the movements of "Abu Talb" from Sweden in Malta. A further cable, dated 6 September 1989, which in part responded to certain questions, observed: "Station shall query [redaction] re Abu Talb or Tulba and his travels to Malta at next meeting scheduled for 13th September." According to Mr Keen, however, the defence had no cable relating to any meeting on that date.

14.60 Mr Keen also made reference to the following passage in a cable dated 20 September 1989:

> *"[A]t 19th September meeting, Majid could not identify individual who purchased clothing found in suspect's suitcase aboard PanAm 103 from either blank sketch or from blank computer image."*

14.61 Mr Keen reminded the court that on 13 September 1989 Mr Gauci had assisted in the preparation of an artist's impression and computer image of the purchaser, who, the Crown maintained, was the applicant. Majid, Mr Keen pointed out, was well known to the applicant, yet the information contained in the cable was considered by the CIA to be of no relevance to the defence.

14.62 In Mr Keen's submission, it was clear from the last two cables that Majid was in fear that the CIA might abandon him as being of no further use, and that he might be turned over to Libya for cash. According to the cables, Majid understood that a meeting with US personnel was not a guarantee of future assistance or support, and that he might be returned to Malta without compensation. In Mr Keen's submission this had to be considered against the background of earlier information given by Majid that he knew nothing about a suitcase bomb at Luqa airport.

14.63 Mr Keen said it was clear that the CIA had evidence relating to certain of the incriminees which could be material to the Crown case or to any undermining of it. He referred in particular to the reference to Talb in the cables, as well as to the PFLP-GC and the cell based in Frankfurt led by Dalkamoni. According to Mr Keen, while the Crown was bound to meet its obligations under *McLeod*, the CIA was not, and the Crown could disclose only what the CIA disclosed to them.

14.64 Mr Keen moved the court to invite the Lord Advocate to call upon the CIA to produce to the Crown all information in its hands relating to the alleged involvement of Talb and the PFLP-GC in the destruction of PA103. In the event that the Crown was not prepared to comply with this request, Mr Keen said that he would present a letter of request to this effect.

14.65 Mr Taylor submitted that the Lord Advocate was "not the master in his own house". It was obvious that the Lord Advocate could only disclose to the defence material of which he was in possession. It was equally plain, in Mr Taylor's submission, that those who had been determining relevancy outside the law of Scotland had made fatal errors of judgment in important areas of direct relevance to the trial and to its fairness. In these circumstances, Mr Taylor moved that the court invite the Lord Advocate to request from the CIA all information in its possession which touched upon the enquiry into the bombing of PA103. In Mr Taylor's submission, the information which had come to light was exculpatory of the applicant and there were good grounds for believing that further material of this kind existed.

14.66 In reply the Lord Advocate said that while what had been addressed earlier were cables relating to Majid, the defence now sought evidence in the hands of the CIA relating to the alleged involvement of Talb and the PFLP-GC in the bombing of PA103. Evidence had been given by one of the police witnesses that the early suspects in the case were the PFLP-GC and, in the Lord Advocate's submission, what the defence now sought was the disclosure of investigative files. However, the defence had no right to demand all of the fruits of the investigation. Merely serving notice that they intended to lead evidence which might tend to incriminate a third party did not entitle the defence to conduct a fishing exercise through the investigative files of a police force or other agency. According to the Lord Advocate what Mr Keen was seeking was not evidence which pointed to Talb or the PFLP-GC, but all reports, from whatever source, whether found to be reliable or unreliable, which detailed nothing more than suspicions or rumours. The CIA, he added, like all such agencies, dealt with matters of intelligence, not evidence.

14.67 In reply, Mr Taylor said that the CIA had been "caught out" because until that morning it had "sat on" exculpatory evidence dated December 1988, on the basis

of which the indictment would not have been drafted in its current form. Mr Taylor made it clear that his submission was not that the CIA should hand over to the defence all their files, but that these should be given to the Crown. According to Mr Taylor, it was for the Crown to decide what required to be divulged to the defence.

14.68 Mr Keen replied that, contrary to the Lord Advocate's submission, it was apparent that the CIA was possessed not of rumour or suggestion, but of real evidence going to the case against both accused. Lord Sutherland queried with Mr Keen what real evidence he was saying the CIA possessed in relation to Talb and the PFLP-GC. Mr Keen replied that the cable dated 6 September 1989 referred to Talb's activities in Malta. In reply, the Lord Advocate explained that this particular cable contained the description of a man quite different to the Talb mentioned in the notice of incrimination. According to the Lord Advocate, the reference to "Tulba" in that cable was to the man described there. Mr Keen said in response that one paragraph in the cable related to Talb and the other to Tulba. In the event, it was agreed that the two cables relating to this matter would be passed to the court.

14.69 The court then considered the motions made by Mr Taylor (ie that the court should invite the Lord Advocate to ask the CIA to disclose all information in its possession which touched upon the bombing of PA103) and Mr Keen (ie that the court should invite the Lord Advocate to ask the CIA to disclose evidence of the alleged involvement of Talb and the PFLP-GC in the bombing).

14.70 The court noted that two of the 36 additional cables produced related, possibly, to Talb's activities in Malta. The first was a request from the CIA to its Malta station in the following terms:

> *"Would appreciate station querying Majid about following. What has Majid learned from Libyan intelligence circles regarding Pan Am 103? What are Libyan officials saying about the incident? Is Majid aware of the use of Malta as a staging area for radical Palestinians? Does Majid know an Abu Taleb from Sweden? Is Majid aware of any radical Palestinian activity in Denmark or Sweden? Finally, is Majid aware of any Libyan involvement with the activities of the PFLP-GC cell led by Dalkamoni in Frankfurt?"*

14.71 The second cable consisted of the response from the Malta station:

> *"Re individual Mohamed (Abu Taleb), Majid could recall only one Palestinian with similar name, Mohamed (Tulba). Majid met Tulba at Luqa International Airport when latter requested assistance with some individuals he was escorting to/from Libya and Egypt. Tulba eventually revealed to Majid that he was a 'security officer.'"*

14.72 According to the court there followed a description of Tulba and then the passage: "Majid could not recall any other Palestinians who received assistance or support while travelling through Malta." The cable then said:

> *"Station will query* [blanked-out name, which appears to be a source other than Majid] *re Abu Talb (or Tulba) and his travels to Malta at next meeting, scheduled for 13th September."*

14.73 The next paragraph stated that Majid could not provide any additional information in response to the requirements set out in the previous cable as quoted above. The court noted that, according to Mr Keen, none of the other cables produced made reference to Talb or to the PFLP-GC.

14.74 The court considered that what it had to decide was whether the information before it would be sufficient to warrant further investigation into information the CIA held about the activities of Abo Talb or the PFLP-GC in relation to the bombing of PA103. In terms of *McLeod*, the court required to be satisfied that there was a valid basis for ordering the haver to produce documents, that these had a proper purpose and that they would be likely to be of material assistance to the defence. The court observed that the context for these tests was whether the failure to produce any such documents would jeopardise the fairness of the trial. The court concluded that, on the information which had been placed before it, it was not satisfied that the test in *McLeod* had been met. In these circumstances, the court refused the motions made on behalf of both accused.

14.75 Thereafter, counsel for both accused moved the court to grant letters of request in the same terms as their earlier motions. The court declined these motions for the reasons it had already given.

The information contained within the cables

14.76 In order to illustrate the nature and extent of evidence initially concealed from the defence, the following examples are given of information withheld in the first edition of the cables (CPs 804-828, lodged on 5 November 1999) but revealed in the third edition (25 August 2000 – day 44):

- The cable dated 11 August 1988 (CP 805) disclosed Majid's request for help to undergo sham surgery to prevent him having to undertake military service in Libya. It also mentioned that Majid, as a distant relative of King Idris, the former King of Libya, had wanted to work against the Gadaffi regime for years.

- The cable dated 14 September 1988 (CP 806) referred to a meeting with Majid and his CIA handler arranged for 24 September 1988, a meeting to which none of the other cables referred.

- The cable dated 5 October 1988 (CP 810) referred to Majid discussing with his CIA handler the possibility of the CIA permitting or supporting him to leave LAA and the ESO (i.e. the former JSO) altogether, in favour of setting up a small car rental agency in Malta. The section originally redacted indicated that Majid had saved $30,000 from his salary, which it was suspected by his handlers had been acquired from illegal commissions earned as a result of his position at LAA, perhaps through low level smuggling. Majid had estimated his car rental venture would cost $60,000 in start up expenses. According to the cable, he hoped that the CIA would meet the balance.

- The cable dated 19 January 1989 (CP 819) referred to Majid meeting his CIA handler to discuss the purpose of a visit to Malta by Nassr Ali Ashur. It

referred to Majid having been given 500LM (approx $1,500) for "OPS" expenses he would incur in the near future and his being passed the money in an Arab-English dictionary.

- The cable dated 27 February 1989 (CP 823) referred to a planned meeting between Majid and his handler scheduled for 20 March 1989. It referred to 500LM in expenses money having been passed to Majid in a cassette tape case.

- The cable dated 11 April 1989 (CP 824) referred again to the sham surgery, this time giving more detail than did the cable of 11 August 1988. It also mentioned a meeting with Majid scheduled for 15 April 1989, to which none of the other cables referred.

- The cable dated 10 May 1989 (CP 825) referred to Majid providing several items of information about Libya which it was said would be forwarded separately. It also referred to Majid having been paid the $7,200 balance into his "escrow account" (the word "escrow" is an annotation in the cable describing the redacted word or phrase which appears before the word "account") and his receiving advance payment of 705LM (approx $2015) for "Tripoli Ops" expenses and payment for two airline tickets for travel between Libya and Malta. There was also reference to a proposed arrangement to meet with his CIA handlers in June 1989.

- The cable dated September 1989 (CP 828) referred to Majid requesting reimbursement of 1000LM for a second operation on his arm and of 500LM for 20 days of hotel, car rental and per diem expenses encountered on his trip to Malta. It said that the CIA handler planned to provide Majid with the above-mentioned funding, in addition to the $5,000 salary owed to him throughout August 1989, at a meeting on 4 September 1989. According to the cable, Majid was to be advised that the CIA would not provide any additional financial assistance for operations on his arm, and that it would continue his $1000 per month salary payment only for the remainder of 1989. There was

also a reference to the effect that if Majid was not able to demonstrate sustained and defined access to information of intelligence value by January 1990, the CIA would cease all financial support until he could prove such access.

14.77 The Commission does not consider that the fourth edition of the cables contained anything material. However, the following are examples of significant information disclosed in the fifth (18 September 2000) and sixth (21 September 2000) editions of the cables:

- The fifth cable, dated 10 October 1988, indicated that, according to Majid, the co-accused was not an ESO staff officer, but was receiving some financial support from the ESO and that his business would serve as an ESO front company.

- The eleventh cable, dated 15 and 17 April 1989, referred to the sham surgery, stating that, according to Majid, it would cost 2000 LM (approximately $6000), a sum which the handler said the CIA would pay.

- The twenty-second cable, dated 19 September 1989, referred to Majid's failure to identify the photo-fit or sketch of the purchaser prepared on the basis of Mr Gauci's description.

- The twenty-third cable, dated 16 October 1989, stated that Majid had no further information about the applicant beyond his travelling to Malta with the co-accused in late September 1989. It reported Majid's belief that the co-accused was a regular LAA employee while in Malta and that he served as an ESO co-optee.

- The thirty-second cable, dated 20 December 1990, reported that Majid was asked if he had ever placed, or arranged to have placed, a suitcase on an airline from Luqa airport. Majid responded firmly in the negative, adding that if he had been asked to undertake such an operation he would have required to

make a detailed feasibility study for his superiors, which he had never been asked to do. When he was asked who could have been positioned to place a suitcase on a plane at Luqa airport, Majid suggested: "Abd-Albasit Ali (Al-Magrahi) aka Mas'ud M Abu (Aqila) and his partner Lamin (Fhimah), Libyan owners of Medtours in Malta." The cable also referred to Majid's request to obtain $2000 to buy bananas in Malta to sell in Libya, where they would sell at a greater price. According to the cable Majid clearly did not want to be part of the security apparatus in Libya and was milking all of his contacts, including the CIA, for whatever he could get during this transition period.

- The thirty-sixth cable, dated December 1988 (the precise date is not specified), referred to Majid having reported that Nassr Ashur passed through Malta in early November 1988. According to Majid, Ashur, on first arriving in Malta, had intended to travel directly to Belgrade on a Yugoslav flight but owing to weather conditions was obliged to go via Frankfurt.

Further enquiries

14.78 As part of its assessment of this ground, the Commission wrote to Crown Office seeking further information as to the Crown's examination of the cables. By letter dated 28 April 2006 Crown Office confirmed that the six editions of cables referred to in the submissions at trial represented all those considered by the Crown. According to the letter the first edition of these (CPs 804-828) was examined by the Crown on 1 June 2000 in an almost entirely unredacted form, the only blacked out words being cryptonyms and names of agents. The purpose of the examination was to satisfy the Crown's obligations under *McLeod*. They did not obtain the unredacted versions of these cables.

14.79 In a further letter dated 5 May 2006 Crown Office advised that during the exercise which resulted in the disclosure of the additional 36 cables the Crown was shown other cables which it did not consider fell within the calls made through the court. By letter dated 17 May 2006 Crown Office confirmed that they were not given copies of these other cables. Although enclosed with that letter was a one-page note containing details of these cables, in the Commission's view this reveals very little. A

copy of the letter and note are contained in the appendix. Crown Office also provided a confidential file note relating to the examination of the cables on 1 June 2000 and gave the Commission consent to disclose a redacted version of this (see appendix). The note states:

> *"In the case of the productions annotated copies had, with the agreement of the CIA, been made available to the defence. We were able to satisfy ourselves that there was nothing omitted which could assist the defence in itself. There were some references to matters which in isolation might be thought to assist the defence - eg details of payments or efforts by Majid to secure sham surgery - but since evidence was being provided as to the total of payments made and of the requests for sham surgery, the particular material did not appear to be disclosable."*

14.80 Crown Office also confirmed in its letter of 17 May 2006 that although a number of cables relating to Edwin Bollier and MEBO were made available to the Crown, in the event these were not lodged as productions. The Crown was given copies of these cables: one set redacted with no annotations, and the other redacted with annotations. Although the unredacted versions of these cables were considered by the Crown on 1 June 2000 (ie the same date as Mr Turnbull and Mr McFadyen viewed the initial 25 cables relating to Majid) the Crown was not provided with copies of these. In the event, none of the information contained within either set of cables was considered by the Crown to be disclosable in terms of *McLeod*, and Crown Office has no record of them ever having been disclosed. Crown Office supplied the Commission with both sets of cables in its possession (see appendix).

14.81 Crown Office confirmed in the same letter that unredacted versions of cables relating to enquiries in Senegal (CP 273-281 are the redacted versions of these) were also examined on 1 June 2000**.** According to the letter, annotated versions of these cables had been provided to the Crown in early 2000 but Crown Office had no record of these ever having been disclosed to the defence. Again, copies of the annotated cables were supplied to the Commission (see appendix).

14.82 Finally, Crown Office confirmed by e-mail dated 8 June 2006 that the cables referred to in its previous three letters comprised the full extent of the CIA cables made available to the Crown.

The applicable law

14.83 At the time of the applicant's trial, the principles governing the Crown's disclosure of evidence to the defence were as set out in *McLeod v HMA* 1998 SCCR 77. There the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown's duty of disclosure extended to information in its possession that would tend to exculpate the accused or was likely to be of material assistance to the proper preparation or presentation of the accused's defence (per Lord Justice General (Rodger) at p97), and to information in its possession and knowledge which was significant to any indicated line of defence, or which was likely to be of real importance to any undermining of the Crown case or to any casting of reasonable doubt upon it (Lord Hamilton at p100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the Convention (see Lord Rodger's opinion at paragraph 65).

14.84 According to *McLeod* if it emerged at trial that something had gone wrong and a material statement or other document came to light at that stage, the procedure in Scotland was well able to afford the necessary remedy, whether by adjournment, permission to lead additional evidence or in an extreme case by desertion of the diet (Lord Justice General (Rodger) at pp98-99).

14.85 In the Commission's view such an approach is consistent with that taken by the European court which, in determining alleged violations of article 6 of the Convention, views proceedings in their entirety, including the way in which evidence was taken (*Edwards v UK*, at paragraph 34). It is also the approach which has been adopted by the High Court in several recent decisions. In *HMA v Higgins* 2006 SCCR 305, for example, the Crown's failure to disclose information before the trial was held to have been cured by an adjournment during which the defence had an opportunity to

precognosce the relevant witness. On the other hand, in *McClymont v HMA* 2006 SCCR 348, where a failure to disclose material evidence was not discovered until after the relevant witness had testified, the court held that the appellant's trial had been unfair and quashed his conviction.

14.86 Article 6(1) of the Convention provides that in the determination of any criminal charge the accused is entitled to a fair hearing. This has been interpreted by the European court as including a right to disclosure of all material evidence "for or against the accused" in the possession of the prosecution (*Rowe and Davis v UK* 2000 30 EHRR 1; *Dowsett v UK* 2004 38 EHRR 41). It follows that the Crown is under no obligation to disclose information not in its possession (although in terms of *Holland* it seems that in certain circumstances they will require to take appropriate steps to search for information not immediately to hand: Lord Rodger at paragraph 74). In addition, it is clear that in order to hold that there has been a violation of article 6(1) the information in question must be of *some* significance, in that it must be capable of altering the course of the evidence and therefore the eventual outcome of the trial (see *Holland* at paragraphs 82-84; *Sinclair v HMA* 2005 SCCR 446, at paragraph 35). Accordingly, a failure by the Crown to disclose evidence on some entirely insignificant point, not material to the accused's defence, would not amount to a defect (*McLeod*, Lord Justice General at p94).

14.87 However, as the submissions emphasise, it is also necessary in determining whether there has been a violation of article 6(1) to consider the procedures and decision-making processes in cases where evidence has been withheld from the defence on public interest grounds. In *Jasper v UK* (2000) 30 EHRR 441, for example, the applicant sought to establish that the withholding of evidence from him on the ground of public interest immunity undermined his right to a fair trial. After narrating the Crown's obligation to disclose to the defence all material evidence, the European court made the following observations:

> "*[52] However...the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings, there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed*

against the rights of the accused. In some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.

[53] In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, such as the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material. It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interest of the accused."

14.88 The European court noted in *Jasper* that at the original proceedings the trial judge had examined the material in question and ruled that it should not be disclosed. Although the defence was not informed of the reasons for the judge's decision, in the European court's view the fact that the issue of disclosure was at all times under his assessment provided a further important safeguard. This was on the basis that the judge could monitor throughout the trial the fairness or otherwise of the decision to withhold the evidence. The judge, the European court observed, was fully versed in all the evidence and issues in the case and was in a position to assess the relevance of the material during the course of the trial. Moreover, during the appeal proceedings, the Court of Appeal had itself considered whether the evidence should be disclosed, thereby providing additional protection of the applicant's rights. In the circumstances, the court was satisfied that the decision-making procedure applied during the proceedings incorporated adequate safeguards to protect the interests of the accused.

14.89 The importance attached to the role of the trial judge in determining whether the withholding of material is justified in the public interest was emphasised in *Rowe and Davis v UK*. During the original trial proceedings in that case in 1990, the Crown withheld certain evidence from the defence on public interest grounds without notifying the trial judge that they had done so. At the subsequent appeal, the Court of Appeal observed that in light of its decision in *R v Ward* [1993] 1 WLR 619, it was now for the court, not the Crown, to decide whether information subject to potential public interest restrictions should be disclosed to the defence. The material in question was thereafter shown to the Court of Appeal, though not to the defence. In the event, the court declined to order disclosure.

14.90 The European court held (unanimously) that the procedure adopted at the applicants' trial, whereby the prosecution itself attempted to assess the importance of information concealed from the defence and to weigh this against the public interest in keeping the information secret, did not comply with the requirements of article 6(1). Although the Court of Appeal had itself examined the material, in the European court's view this procedure was not sufficient to remedy the unfairness caused at trial by the absence of any scrutiny by the trial judge. Unlike the latter, who saw the witnesses give evidence and was fully versed in all the evidence and issues in the case, the Court of Appeal was dependent for its understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the accounts given to them by Crown counsel. In the European court's view the trial judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, and when it was still open to the defence to take a number of different directions. In these circumstances, the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. A similar conclusion was reached by the European court in *Dowsett v UK*.

14.91 In *Sinclair*, Lord Hope took from these cases that decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. In Lord Hope's view, there must be "sufficient judicial safeguards in

place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary" (at paragraph 33; see also *Holland* , Lord Rodger at paragraph 71).

14.92 In light of these authorities it seems to the Commission that there are two ways in which the withholding of evidence from the defence can violate article 6(1). The first (referred to below as a "substantive violation") is where the undisclosed evidence is material and was withheld from the defence for reasons other than public interest considerations (*Edwards v UK*; *Sinclair*). In such cases it is necessary to assess whether the evidence is sufficiently material to justify the conclusion that the accused's Convention rights were infringed, and then to consider whether, taken as a whole, the trial was unfair in terms of article 6(1).

14.93 The second way in which a breach of article 6(1) may occur (referred to below as a "procedural violation") is where evidence is withheld on the grounds of public interest, and where the procedures which led to this decision failed to incorporate adequate safeguards to protect the interests of the accused (*Rowe and Davis v UK*; *Dowsett v UK*). In such cases, since the undisclosed evidence may never have been revealed, the correct approach is not to consider its potential materiality, but rather to assess whether the decision-making procedures complied with the requirements of article 6(1). Any procedure whereby the Crown itself attempts to assess the importance to the defence of concealed information, and to weigh this against the public interest in withholding it, will not comply with such standards. In order to satisfy Convention rights, information may be withheld from the defence on the grounds of public interest only where a decision to this effect has been taken by the trial judge who, having seen the material, is in a position continually to monitor the need for disclosure throughout the course of the trial (*Jasper v UK*). Where such procedures are absent or lacking article 6(1) may be infringed and the trial, taken as a whole, may be deemed unfair.

Consideration

14.94 In the Commission's view consideration of the applicant's submissions can be divided into two principal questions:

(1) Do the circumstances surrounding the disclosure of the cables indicate a substantive violation of the applicant's article 6(1) rights?

(2) Do the same circumstances indicate a procedural breach of his article 6(1) rights?

(1) Substantive violation

14.95 It is important to make clear at the outset that the Commission has not seen the complete and unredacted versions of the cables relating to Majid. Accordingly, it is not in a position to assess the potential significance of those passages which remained obscured at the end of the disclosure process.

14.96 Regardless of what occurred subsequently, as at 1 June 2000, when Mr Turnbull and Mr McFadyen viewed largely unredacted versions of the initial 25 cables (CP 804-828) at the US Embassy in The Hague, the Crown had a substantially greater awareness of their contents than did the defence. Although some details of payments to Majid were disclosed in Crown production 863 (as was some information about his sham surgery in Crown production 1486 pp 4-5), it is difficult to understand the Lord Advocate's assurances to the court on 22 August 2000 that there was "nothing within these documents which relate to Lockerbie or the bombing of Pan Am 103 which could in any way impinge on the credibility of Mr Majid on these matters" (41/6101). The matter is all the more serious given that part of the reason for viewing the cables on 1 June 2000 was precisely in order to assess whether information behind the redacted sections reflected upon Majid's credibility. As the above account demonstrates, a substantial number of the passages did just this. Indeed, the information contained in some of the passages, such as Majid's claim that he was related to King Idris and his interest in financial payment, formed the basis of the court's eventual rejection of much of his evidence (see paragraphs 42-43 of the judgment).

14.97 Furthermore, while it was the advocate depute himself who revealed that the Crown had examined the original 25 cables on 1 June 2000, it seems that the

information revealed in the third edition of the cables on 25 August 2000 might not have been disclosed at all without the further efforts of the defence. In the Commission's view there is no reason why the same consideration would not apply to the further 36 cables eventually disclosed on 18 and 21 September 2000. As explained, these latter cables were particularly important as not only did the contents reflect upon Majid's credibility and reliability, they also undermined certain aspects of the libel: namely that the co-accused was a member of the JSO, and that Nassr Ashur's travel arrangements in November 1988 amounted to a rehearsal for the bombing itself.

14.98 It seems clear in terms of the explanations given by the Lord Advocate on 22 and 28 August 2000 (days 41 and 45) that the Crown's failure to disclose details of the initial 25 cables following its examination on 1 June 2000 arose from errors of judgment as to the materiality of the information contained within the redacted passages. However, even if this had been recognised, the Crown's ability to disclose such details might well have been constrained by the written undertaking signed by Mr McFadyen on 1 June 2000 (see appendix; although the Lord Advocate informed the court that Mr Turnbull signed a similar undertaking, the Commission has not seen this). Headed, "Nondisclosure Agreement", clause 2 of the undertaking obliged Mr McFadyen never to "divulge, publish or reveal either by work, conduct or other means [the information in question] unless specifically authorised to do so by an appropriate official of the USG [United States Government]." In terms of clause 4, access to the information was "solely for the purpose of determining whether it contains any information which is exculpatory to the defendants". Mr McFadyen also undertook not to use the information "for lead [*sic*] purposes in furtherance of the Crown's case without the consent of the proper USG official."

14.99 Clearly the terms of this undertaking run contrary to the Crown's obligations of disclosure under *McLeod*. It is important to emphasise, however, that there was no attempt by the Crown to conceal from the defence or the court the fact that such an undertaking had been given. Although the undertaking itself appears never to have been disclosed, the Lord Advocate made several references to it in his submissions (eg 45/6540). He also made clear to the court (45/6540-1) that on 1 June 2000 Mr Turnbull and Mr McFadyen were not in a position to demand access to or disclose

information, but were to ask the CIA whether there was any method by which the Crown could bring to the attention of the defence any matter which might need to be revealed. In the event, of course, neither Mr Turnbull nor Mr McFadyen considered that the material they were shown warranted disclosure. Accordingly, while the giving of such an undertaking was highly unusual, it does not appear, assuming the Lord Advocate's submissions are correct, that its potential for undermining the Crown's obligations under *McLeod* was ever realised. Even if Mr Turnbull and Mr McFadyen had considered that material within the cables justified disclosure, there is no indication that the US authorities would have withheld consent to disclosure, or that the Crown would not have brought this to the attention of the defence or the court. It is also important to bear in mind that the purpose of the Crown's examination of the cables on 1 June 2000 was in order to assess whether information within the redacted passages warranted disclosure under *McLeod*. Leaving aside what the Commission considers were errors of judgment as to the materiality of that information, it seems to the Commission highly unlikely that the Crown would have been able to conduct this exercise in the absence of such an undertaking.

14.100 It is clear even from the brief history of events given above that the manner in which the information contained within the cables came to light was far from ideal. However, in determining whether there was a substantive breach of the applicant's article 6(1) rights, the Commission must consider not just the way in which disclosure occurred but also the outcome of this process and its overall impact upon the fairness of the trial. In terms of the authorities (*Edwards v UK*; *McLeod* and *Higgins*) it is clear that failures to disclose material timeously can be remedied at trial, or even appeal. In the present case, following defence submissions, the trial court granted several adjournments with a view to facilitating the disclosure of further evidence. The overall process may well have been awkward, but the result was that the defence was provided with valuable material for use in its cross examination of Majid. While many of the items were disclosed late in the day (the information contained in the 36 additional cables was disclosed only 5 days before Majid began his evidence) neither defence team indicated that this was inadequate. In the event, Majid's cross examination took place over three days during which the material revealed in the CIA cables was used to significant effect. The end result, of course, was that the court

accepted only one aspect of his evidence, namely his account of the hierarchy within the JSO at the material time.

14.101 Accordingly, not only was significant additional material eventually disclosed to the defence, the evidence of the witness to whom it related was rejected almost in its entirety. In the Commission's view these factors are of decisive significance in determining whether a substantive breach of article 6(1) occurred. The submissions argue that the issues surrounding the disclosure of the cables remain live because the court accepted Majid's evidence that the applicant was a member of the JSO. However, as explained in chapter 27 below, while at no time did the applicant admit that he was a "member" of that organisation, in the Commission's view he was so closely associated with it as to amount to the same thing. For example, as head of airline security with LAA in 1986 he was "seconded" to the JSO during which time he received reports from junior JSO officers. His superior at that time was Said Rashid who in 1986 was also seconded to the JSO as chief of the operations department. In 1987 the applicant became coordinator of the Centre for Strategic Studies, an organisation funded by the JSO which, according to one of his defence precognitions, was effectively part of the intelligence services.

14.102 Viewed in this context, it appears to the Commission that the one aspect of Majid's evidence which the court accepted has some basis in fact.

14.103 The submissions also highlight the cables' wider impact upon allegations that the co-accused was a member of the JSO, and of the "dummy run" involving Nassr Ashur. As explained, however, the Commission has seen only those versions of the Majid cables that were eventually disclosed to the defence. It is therefore in no better a position than the defence was at trial to assess the potential significance of those passages which remained obscured. While the events surrounding the disclosure of the cables do not inspire confidence, the exercise undertaken by the Lord Advocate between 30 August and 21 September 2000 appears to have been capable of detecting any information in the cables which related to the incriminees or to the applicant. Furthermore, having examined all six editions of the cables, it appears to the Commission that the remaining redactions relate to matters such as the names of CIA

officers, "electronic addressing", operational details and place names, none of which would be material to the applicant's defence.

14.104 For these reasons, the Commission does not consider that the events surrounding the disclosure of the Majid cables amount to a substantive breach of the applicant's Convention rights. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred as a result of these events. The Commission has reached the same conclusion in respect of the decision by the Crown not to disclose the annotated versions of the Senegal and Bollier cables referred to above. In the Commission's view, neither set of cables contains information which required to be disclosed in terms of the principles set out in *McLeod*.

14.105 As to the submission that the defence was denied information in the cables which would have strengthened the incrimination defence, this appears to relate to the cable dated 6 September 1989 in which Majid makes reference to an individual by the name of "Tulba". As indicated, this cable was a reply to an earlier one dated 1 September 1989 which requested any information Majid might have about the incriminee Abo Talb or the PFLP-GC. However, while the names "Talb" and "Tulba" are similar, in the Commission's view it is doubtful that Majid was referring to Abo Talb. For example, the reference in the cable to Majid having met Tulba about three times per month from 1986 until 1988 is inconsistent with the available evidence regarding Abo Talb's movements into and out of Malta. Moreover, Majid was unable to recall any other Palestinians who received support while travelling through Malta, and could not provide any additional material on radical Palestinians. In these circumstances, bearing in mind the principles of *McLeod* to which it referred, the court's conclusion that no further investigation was required into information held by the CIA concerning Abo Talb and the PFLP-GC seems justified.

(2) Procedural violation

14.106 As indicated, the European court has emphasised the need for any limitation on an accused's Convention rights to be sufficiently counterbalanced by appropriate judicial procedures. In the context of evidence withheld from the defence on public interest grounds, the European court has made clear that a procedure whereby the

prosecution itself attempts to assess the importance of the evidence, and weigh this against the public interest in its concealment, does not comply with the requirements of article 6(1). Instead, in a number of cases the court has approved a procedure whereby the trial judge considers the evidence and rules upon the issue of disclosure. According to the submissions it is precisely this form of judicial safeguard which was lacking in the approach taken to the cables at the applicant's trial.

14.107 In the Commission's view it is possible to draw a distinction between, on the one hand, the information withheld in cases such as *Jasper v UK* and *Rowe and Davis v UK*, and on the other, the information withheld from the defence in the applicant's case on the other hand. In the former cases the Crown was clearly in possession of the information in question and the decision to withhold it from the defence was taken either by the prosecution itself (*Rowe and Davis*; *Dowsett*) or by the trial judge (*Jasper*). In the applicant's case, while the Crown was given access to largely unredacted versions of the cables, they were not permitted to take copies of these and the final decision as to what should be disclosed appeared to lie with the US authorities. This is reflected by the Lord Advocate's submissions on 28 August 2000 (day 45) that the CIA had now revealed "everything which they feel proper [sic] should be revealed", and on 30 August 2000 (day 47) that the search for additional cables relating to Majid would be carried out by CIA officials but that he would review this. In other words, during the exercises carried out in August and September 2000 the Lord Advocate was responsible for determining issues of relevancy and materiality, while the US authorities determined whether disclosure was consistent with its own national security. It was therefore the US authorities which determined the (US) public interest, not the Crown. In light of this conclusion, the Commission does not accept the suggestion made in the submissions that the Lord Advocate was somehow given a discretion to withhold material on national security grounds.

14.108 In the Commission's view this lack of control over the information makes it difficult to apply the principles in cases such as *Rowe and Davis v UK*. In particular, it does not appear that the present case is an example of a procedure whereby the Crown has taken upon itself the task of assessing the significance of the evidence to the defence and of weighing this against the public interest in withholding it. In terms of the Lord Advocate's submissions the reason that details of unredacted passages

were not disclosed following Mr Turnbull's and Mr McFadyen's examination on 1 June 2000 was not based upon any public interest factor but rather because they were viewed as having no bearing upon the defence case. The subsequent disclosure of less redacted versions of these cables on 25 August 2000 was authorised, not by the Crown, but by the US authorities. With regard to the further 36 cables eventually disclosed, as indicated the Crown was not aware of their existence until they were produced to them by the CIA.

14.109 In these circumstances, the Commission does not consider that the role adopted by the Crown in respect of the cables amounted to a procedural violation of article 6(1). While the Lord Advocate, having viewed the cables, required to assess them in terms of his obligations under *McLeod*, it was the US authorities, not the Lord Advocate, which determined whether disclosure of particular items satisfied (US) national security interests.

14.110 It might be said that, in terms of the principles set out by the European court, the trial court should have insisted that it be given the unredacted versions of the cables in order to assess whether full disclosure was necessary, or at the very least should have granted the letters of request sought by the defence. However, in terms of the Lord Advocate's submissions, it seems unlikely that the US authorities would have been prepared to produce unredacted versions of the cables even to the court. In addition, as Mr Keen himself accepted, in the event that the court had granted letters of request it was likely that the attitude of the CIA to full disclosure would have been material in any ruling by the US courts on the matter. In these circumstances, one can perhaps understand why the trial court decided to rely upon the Lord Advocate's "best endeavours" to encourage the production of further material. As the Lord Advocate suggested in his submissions, the court was faced with two choices: one in which the CIA were relied upon to determine what material should be made available; and the other in which he was involved in reviewing this. Given that the end result of the process was that the defence was given sufficient information to undermine Majid's evidence, it is difficult to see how the trial court's approach to the matter can be criticised from the applicant's perspective.

14.111 It is worth adding that even if it could be said that the Lord Advocate's involvement in the process amounted to a procedural violation of article 6(1), viewed in the context of the court's almost wholesale rejection of Majid's evidence, the Commission does not consider this would have been capable of rendering the applicant's trial unfair.

Conclusion

14.112 Although the manner in which the cables were disclosed was awkward and unsatisfactory, for the reasons given the Commission does not consider that this gave rise either to a substantive or procedural breach of the applicant's rights under article 6(1) of the Convention. Accordingly, the Commission does not consider that a miscarriage of justice may have occurred in this connection.

(3) The Goben memorandum

The applicant's submissions

14.113 It is alleged on behalf of the applicant (see chapter 12 of volume A) that the Crown's approach to the disclosure of a document known as the "Goben memorandum" amounted to a breach of its duty of disclosure as set out in *McLeod*. It is also alleged that the applicant's right to a fair trial under article 6 of the Convention was violated.

14.114 According to the submissions, on 3 October 2000 (in fact it was 9 October, day 58 of the trial) the Lord Advocate informed the court that he had received important information from a foreign government. The trial was thereafter adjourned in order to allow the Crown to carry out investigations. Three weeks later the Crown informed the defence that Palestinian asylum seekers in Norway who were relatives of Mobdi Goben, a deceased senior member of the PFLP-GC, had informed the Norwegian Security Service that they had seen a memorandum which had been written by Goben before his death. One of those seeking asylum was Goben's son, Samir Goben, who claimed to have tape-recorded himself reading out his father's memorandum. That recording was provided to the Crown by the Norwegian