

CHAPTER 15

ROBERT BAER

Introduction

15.1 It is alleged on behalf of the applicant (see chapter 16.3 of volume A) that new and important information was obtained after the trial from Robert Baer, a former case officer with the CIA. Mr Baer was employed within a department of the CIA known as the Directorate of Operations which has primary responsibility for the clandestine collection of foreign intelligence, including “human source intelligence”. During his time in the CIA Mr Baer worked almost exclusively in the Middle East. Between 1988 and 1991 he was involved in the CIA investigation into the bombing of PA103.

15.2 In January 2002 a book by Mr Baer about his experiences in the CIA was published in the US. Entitled, “See No Evil: The True Story of a Ground Soldier in the CIA’s War on Terrorism”, the book contained several references to intelligence information which it was suggested might implicate Iran and various incriminees including Abo Talb (“Talb”) in the bombing (relevant extracts from the book are contained in the appendix).

15.3 No evidence was led from Mr Baer at either the trial or the appeal, and his name did not feature in the Crown or the defence lists of witnesses. At interview with the Commission’s enquiry team Alistair Duff, the solicitor who represented the applicant during the proceedings, was certain that Mr Baer had not been precognosed by the defence. Although the defence files suggest that an attempt was made to investigate the claims made by Mr Baer in his book, it appears that this occurred in the period between the end of the appeal hearing and the issuing of the appeal court opinion (see the letter from Alan Jenkins to Ibrahim Legwell dated 19 February 2002 in the appendix). In the Commission’s view, given the timing of the publication of Mr Baer’s book it is not surprising that the defence was unable to investigate his allegations prior to the appeal.

The applicant's submissions

15.4 Reference is made in the submissions to notes of four meetings between Mr Baer and individuals representing the applicant. Copies of these notes are contained in the appendix.

15.5 The first note relates to a meeting which took place on 9 February 2002 between Mr Baer and a journalist, John Ashton, who according to the note was an investigator on behalf of the “parallel defence team”. The membership and status of this group are not entirely clear to the Commission, although it appears that it was a separate entity from the team which represented the applicant at trial and appeal (see the statements by Mr Duff and Mr Beckett in the appendix of Commission interviews).

15.6 The second note concerns a further meeting between Mr Ashton and Mr Baer on 10 February 2002. Shortly after this meeting, on 17 February 2002, the *Sunday Herald* published an article by Mr Ashton which related to his meetings with Mr Baer (see appendix). The third note contains details of a meeting on 11 October 2002 between Mr Baer, Mr Ashton and the applicant's former solicitor, Edward MacKechnie. The final note refers to a further meeting between Mr Baer and Mr MacKechnie which took place on 15 January 2003.

15.7 According to the submissions Mr Baer provided the following information at these meetings:

- The Popular Front for the Liberation of Palestine-General Command (“PFLP-GC”) and Talb both received substantial payments after the bombing of PA103. In particular Mr Baer had details of bank accounts showing payments of \$11m to the PFLP-GC in Lausanne on 23 December 1988 and \$500,000 to Talb on 25 April 1989 in Frankfurt. According to the submissions Mr Baer believed the payments came from Iran.

- Talb and Haj Hafez Kassem Dalkamoni (“Dalkamoni”) appeared on the Iranian “roll of honour” in 1990 for “great service” to the Iranian revolution. According to Mr Baer the list of those honoured was held by the CIA who considered Talb to be an Iranian agent.
- Mr Baer had seen and had details of telephone intercepts involving Palestinian terrorists, including Talb, the terms of which incriminated them in the bombing of PA103. According to the submissions these intercepts were new to the defence and were separate from the limited details of calls made by Talb to his wife and girlfriend from Cyprus in October 1988. The intercepts were said to have been provided by GCHQ, and it is suggested in the submissions that the Commission could obtain these.
- Mr Baer saw evidence that the “main PFLP-GC activists” were operating after the Autumn Leaves raid and, in particular, were “plotting” between October and 21 December 1988.
- Abu Elias was the main focus of the investigation and it was “thought” that the fifth device which Marwan Khreesat (“Khreesat”) made for the PFLP-GC (i.e. a device he said he had worked on but which was not recovered during the Autumn Leaves raids, in which only four devices were seized) was the one used in the bombing of PA103, albeit there were differences between this and the other bombs made by him. The components for the bombs were “believed” to have been supplied by Abu Elias.
- The CIA knew of Edwin Bollier long before the US Government sources claimed to have discovered him in the investigation.

The allegations in Mr Baer’s book

15.8 Many of the points made by Mr Baer in his book relate to matters of which the defence was aware and to which reference was made at the trial. However, the book also contains certain details of which the defence might not have been aware at

the time of the proceedings. Some of these details reflect those outlined above. They are as follows:

- A few days after the destruction of an Iranian Airbus by the US Navy battle-cruiser, the USS Vincennes, on 3 July 1988, a meeting took place in southern Lebanon between Dalkamoni, an officer of the Iranian Islamic Revolutionary Guards Corps (“IRGC” or “Pasdaran”) and another member of the PFLP-GC known only as “Nabil”. According to the book, Iran had decided to take revenge for the shooting down of the Airbus and the IRGC officer issued instructions to Dalkamoni and Nabil to “[b]low up an American plane in the air, in order to kill as many people as possible”. The CIA was able to identify with “a fair amount of certainty” that Nabil was a PFLP-GC official named Nabil Makhzumi (aka Abu ‘Abid) who at the time was an assistant to Dalkamoni. Makhzumi’s Iranian case officer was a senior IRGC official named Feridoun Mehdi-Nezhad. According to the book Mehdi-Nezhad had visited Libya in early 1988 and Frankfurt in July of that year.
- On 23 December 1988, two days after the bombing of PA103, a transfer of \$11m “showed up” in a PFLP-GC bank account in Lausanne, Switzerland. The money then moved from that account to a PFLP-GC account with the Banque Nationale de Paris and then to another account at the Hungarian Trade Development Bank. According to the book the number of the Paris bank account was found in Dalkamoni’s possession when he was arrested. Mr Baer questions in his book whether this payment was made by Iran as a “success fee” for the bombing of PA103.
- Talb received a payment of \$500,000 on 25 April 1989.

15.9 It is perhaps worth noting that within Mr Baer’s book there is a disclaimer which indicates that, although the contents were reviewed by the CIA’s “Publications Review Board”, this was not to be construed as an “official release of information, confirmation of its accuracy or an endorsement of the author’s views.”

The Commission's enquiries

Enquiries with Robert Baer

15.10 Given the nature of Mr Baer's allegations, the Commission considered it necessary to obtain a direct account from him. He was interviewed on three occasions, once by telephone on 20 April 2005 ("the April interview", see appendix of Commission interviews), and twice in person. The first of the personal interviews was informal and took place on 28 July 2005 when notes were taken of Mr Baer's responses to questioning. During this interview Mr Baer made reference to a source from which he had obtained certain information, but said that he was not prepared to discuss this "on-tape". The second of these interviews took place the following day and was recorded ("the July interview", see the appendix of Commission interviews). Members of the Commission's enquiry team also met with Mr Baer on a number of other occasions to clarify matters he had raised and to obtain materials from him.

15.11 During the April interview Mr Baer confirmed that he had worked on the CIA's investigation of the Lockerbie case on a part-time basis from 1988 to 1991. At that time he was based in Paris. He explained that the information in his possession had not originated from his own investigations, but from various CIA telexes containing reports on the case. At the July interview he accepted that the accuracy of this material depended on "the reliability of the information provider" and explained that just because information was reported in a telex did not necessarily mean that the CIA had verified it. Mr Baer said that he had also seen information about the case on CIA databases. He confirmed that none of the information in his possession was based on first-hand accounts such as from witnesses he had interviewed. At the April interview Mr Baer said that he had continued to "go into" the case until 1998.

15.12 Mr Baer referred at interview to various "index cards" on which he said he had made notes about the case. In the July interview he explained that these cards represented the only records he had kept of the matters under discussion and that he did not have any CIA documentation about the case. Mr Baer was asked to produce the index cards to the Commission and he later did so in two batches. Copies of the cards were made and the originals returned to him.

15.13 Further details of Mr Baer’s accounts at interview and the relevant index cards (which are produced in the appendix) are contained in the consideration section below.

Enquiries with D&G and the Security Service

15.14 The Commission requested from D&G all information (including intelligence) relating to each of Mr Baer’s claims. As well as providing its own responses, D&G referred many of the requests to the Security Service. The results of these enquiries are set out below.

15.15 During the examination of D&G intelligence materials and Security Service items, members of the enquiry team sought to identify materials of potential relevance to Mr Baer’s claims. As noted in chapter 4 the Commission requested consent to disclose a number of protectively marked documents viewed at Dumfries and Thames House so that reference could be made to them in the statement of reasons. Where such consent was granted reference is made to these documents in this chapter or alternatively the documents are produced in the appendix of protectively marked materials. In a number of cases this request was refused due to the fact that the Security Service considered the material concerned had originated from sensitive sources and judged its disclosure in the statement of reasons would risk damage to national security.

The applicable law

15.16 By virtue of section 106(3)(a) of the Act the High Court has the power to review an alleged miscarriage of justice based on “the existence and significance of evidence which was not heard at the original proceedings”. The tests applied by the court in assessing the significance of evidence led under that provision are set out in *Al Megrahi v HMA* 2002 SCCR 509. For present purposes it is sufficient to note that in order to hold that a miscarriage of justice has occurred in the applicant’s case the court would require to be satisfied that the new evidence is (a) capable of being regarded as credible and reliable by a reasonable court and (b) likely to have had a

material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

15.17 The Crown's disclosure obligations under *McLeod v HMA* 1998 SCCR 77 and the European Convention on Human Rights are set out in chapter 14 above.

Consideration

15.18 The approach taken in this section is to first consider the three allegations made in Mr Baer's book as detailed above. Thereafter several other allegations by Mr Baer are addressed, including those raised in the submissions.

The alleged meeting in Lebanon in July 1988

15.19 At the April interview Mr Baer repeated the claim made in his book concerning a meeting which had taken place in July 1988 between Dalkamoni, Nabil and an IRGC officer. Mr Baer reiterated that at this meeting an IRGC officer had instructed Dalkamoni and Nabil to blow up an American aircraft as revenge for the destruction of the Iranian Airbus, although he conceded that the purpose of the meeting might have been for a reason other than to plan the bombing of PA103. Mr Baer also said that the information about this meeting had "surfaced in early July 1988". At the July interview Mr Baer's position was that the CIA had "fairly conclusive evidence" about this meeting. The source of the information was what Mr Baer described as "grade A chatter", which as far as he was concerned was "100% reliable". As noted above, at the meeting which took place on the evening before the July interview Mr Baer specified the source of this information but said that he would not repeat this in his formal, recorded account.

15.20 The Commission enquired with D&G as to whether it had any information, including intelligence, about the alleged meeting. In its response dated 29 May 2006, D&G said that it had no information in relation to this matter, but provided a series of documents regarding the parties said to have attended the meeting, including Nabil.

15.21 On 29 January 2007 a member of the Commission’s enquiry team examined Security Service protectively marked material held at Thames House relating to Mr Baer’s claim. The notes taken of this material are currently in the possession of the Security Service. The Commission requested consent to disclose a number of the protectively marked documents so that reference could be made to them in the statement of reasons. Consent to disclose was not granted due to the fact that the material concerned had originated from sensitive sources and its disclosure in the Commission’s statement of reasons was judged by the Security Service to risk damage to national security. However, the material has been considered by the Commission in arriving at its conclusion.

15.22 In the Commission’s view, even if Mr Baer’s claim could be substantiated, evidence of such a meeting would not have had a material part to play in the consideration by a reasonable court of a critical issue at trial. There was a good deal of evidence at trial concerning Dalkamoni’s leadership of a PFLP-GC cell in West Germany in 1988 and the trial court accepted that in October of that year this cell had the means and intention to destroy civil aircraft (see paragraphs 73 and 74 of the judgment). In the Commission’s view, evidence of the alleged meeting described by Mr Baer could, at its highest, be viewed as a precursor to those activities: it is not capable of undermining the factors relied upon by the court in rejecting the incrimination defence.

15.23 In any event, the Commission considers Mr Baer’s account of this alleged incident to be inadmissible hearsay.

The alleged payment to the PFLP-GC of \$11m

15.24 At all three interviews Mr Baer reiterated that an \$11m payment had been made to a PFLP-GC bank account in Lausanne on 23 December 1988 and was thereafter moved to other PFLP-GC accounts. According to Mr Baer the number of one of those accounts was found in Dalkamoni’s possession when he was arrested in West Germany. No evidence was led about these alleged transactions at trial or appeal and it does not appear that the defence was aware of evidence in this connection (see Mr Keen’s submissions at p 48 of the first “chambers hearing” and

the accounts given by the applicant's former representatives at interview: appendix of Commission interviews).

15.25 However, after the appeal the allegation was the subject of a parliamentary question by Tam Dalyell, formerly MP for Linlithgow. In his response on 23 July 2002, Mike O'Brien, then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, stated:

"First, [Mr Dalyell] asked whether British security and intelligence services have any knowledge of an \$11 million payment, having been received by the PFLP-GC on 23 December 1988.

Various reports of PFLP-GC funding emerged after the bombing of Pan-Am flight 103. The intelligence agencies investigated all those reports and found none to have any relevance to the attack. I am informed that there is no connection between the payments and Lockerbie. Indeed, I have been told that the intelligence services are not aware of any payment that corresponds with the details given in the question.

I am informed that a similar amount was paid 18 months before the Lockerbie attack, but that there is no connection between the two. The Government's view is that the PFLP-GC did not carry out the Lockerbie bombing. If that payment was related to other issues, we do not know precisely what they are, but it is our view that the lapse of time between the making of the payment and the eventual outrage suggests that the two were not linked." (See Hansard Debates text for 23 July 2002, Volume No. 389, Part No. 184, Column 960.)

15.26 Initially D&G informed the Commission that there was no "evidence" in its "enquiry system" to support Mr Baer's claim but that a letter would follow to confirm the position. D&G also indicated that the matter would be referred to the Security Service for "intelligence enquiry". In order to assist in this connection the Commission supplied D&G with the following information from one of Mr Baer's index cards:

“Zaki Al-Zayn, - 23 Dec 88 - transfers \$11,000,000 to Hungarian Foreign Trade Bank”.

15.27 It is worth highlighting that the index card appears to suggest that Zaki Al-Zayn was the PFLP-GC’s treasurer.

15.28 In its response dated 29 May 2006 D&G said that it was unable to provide any information about these matters. In a further letter dated 6 April 2007 D&G confirmed that it held no evidence about payments of money by Iran.

15.29 On 18 December 2006 and 2 May 2007 a member of the Commission’s enquiry team examined a number of protectively marked documents held at Thames House relating to Mr Baer’s claim. Notes were taken of these items which are currently in the possession of the Security Service. The materials show that while initial reports suggested that \$11m may have been deposited in a PFLP-GC account on 23 December 1988 it was later revealed that the payment was in fact one of \$10m made in June 1987. According to the materials examined by the Commission the source of the payment was not established. The relevant Security Service file containing this information was examined by the Crown on 3 September 1999.

15.30 As with his claim about the meeting in July 1988, the Commission considers Mr Baer’s allegation about the payment to be inadmissible hearsay. More importantly the results of the Commission’s enquiries refute the allegation that a payment of \$11m was made to a PFLP-GC account on 23 December 1988. In addition the Commission has found no evidence to support the contention that the number of one of the accounts was found in Dalkamoni’s possession at the time of his arrest.

Alleged payment to Abo Talb of \$500,000

15.31 As noted above Mr Baer claimed in his book that Talb had received a payment of \$500,000 on 25 April 1989. He repeated that claim at interview. There was no reference to this allegation at trial or appeal and, in terms of the accounts given to the Commission by the applicant’s former representatives, the defence was not aware of any evidence in this connection. Moreover, in the parliamentary

response of 23 July 2002 (referred to above) Mr O'Brien stated that the "security and intelligence services" had no knowledge of such a payment.

15.32 Talb presented himself in evidence as a man of limited means (68/8310, 8352, 8355) and was questioned extensively by counsel for both the applicant and the co-accused as to how, in these circumstances, he was able to fund various foreign trips including ones to Cyprus and Malta in October 1988. For example, there was reference to a loan of 45,000 Swedish Kronor ("SEK") (said in evidence to be worth about £4100 at the material time) which Talb had obtained from Uppsala Sparbank in mid-1988 (68/8310). He was also asked about deposits totalling 85,000 SEK made to his bank account in 1988. Talb explained that 45,000 SEK of this sum represented the money he had borrowed from Uppsala Sparbank but he was not sure where the remaining 40,000 SEK had come from. He said he had "lent some money to some people" who had paid him back and that he had deposited these sums in the bank. Asked where he had obtained the 40,000 SEK to lend other people, Talb's only response was that he did not remember depositing this sum. He was also unable to explain the source of a further 16,000 SEK which the police had recovered from his home during a search in 1988 (69/8505-8507). Viewed in that context the suggestion that he was paid \$500,000 on 25 April 1989 would no doubt have been deployed by the defence in cross examination.

15.33 The Commission asked D&G to provide all information in its possession regarding Mr Baer's allegation. In order to assist in this the Commission supplied D&G with the following information taken from one of Mr Baer's index cards:

"Muhammad Abu Talib, #560-200, Degussa Bank, Frankfurt, 25 April 89: this acct received \$500,000 from an account in Paris known to belong to senior members of PFLP-GC."

15.34 By letter dated 29 May 2006 D&G provided a number of items relative to this request, namely:

- several documents with police reference DM/103 comprising handwritten notes outlining transactions in an account numbered 20551 held by Joseph and Boulos Ariss at the Indosuez Bank, Lausanne, Switzerland (see appendix); and
- a document with the HOLMES reference D8003 consisting of a report by Detective Sergeant James Russell dated 22 March 1990 regarding bank statements for the Indosuez Bank account 20551 (see appendix).

15.35 Although the HOLMES system indicates that the notes in DM/103 were obtained from the FBI, according to D&G their provenance is unclear in that there are no statements on the system which might account for them. DM/103 contains the following information:

- on 24 April 1989 \$490,000 was transferred from account 20551 to the Indosuez Bank in Paris;
- on 25 April 1989 \$490,000 was transferred back into account 20551 from the Indosuez Bank in Paris; and
- on 25 April 1989 \$500,017.70 was paid from account 20551 to account 560200 at the Degussa Bank.

15.36 According to DS Russell's report, account 20551 was known to have been used on occasions for laundering large sums of money. His report also states the following:

- on 21 April 1989 \$500,000 was transferred to account 20551 by individuals named Al Zein Zaki and Shihabi Omar Ali;
- on 24 April 1989 \$490,000 was transferred from account 20551 to the Indosuez Bank in Paris and was returned the same day; and

- on 25 April 1989 “the money” was transferred to an account numbered 560200. However, unlike the notes in DM103 which indicate that this account was held at the Degussa Bank, according to DS Russell’s report the account was “almost certainly” held at the Indosuez Bank.

15.37 The information in DM/103 appears to confirm Mr Baer’s allegation that a payment of \$500,000 was made to Degussa Bank account number 560200 on 25 April 1989. However, according to DS Russell’s report 560200 was almost certainly an Indosuez Bank account. The Commission enquired with D&G as to whether a link had been established between Talb and account 560200 or any of the other accounts mentioned in the documents. On 2 June 2006 D&G informed the Commission that no such links had been discovered.

15.38 During a visit to Thames House on 2 May 2007 a number of protectively marked documents were examined, one of which was considered relevant to Mr Baer’s claim. The notes taken of this item are currently in the possession of the Security Service. The Security Service file which contained the document was examined by the Crown on 16 July 1999.

15.39 The Commission sought the consent of the Security Service to disclose the item in question in order that reference could be made to it in the statement of reasons. However, on 25 June 2007 this request was refused on the basis that the Security Service considered the information had originated from sensitive sources and judged that its disclosure in the Commission’s statement of reasons would risk damage to national security.

15.40 It is worth highlighting, however, that the Commission saw nothing in the materials viewed by it to suggest that Talb had access to an account numbered 560200 held at the Degussa Bank or any other bank.

15.41 In the Commission’s view the information from Mr Baer connecting Talb to the Degussa Bank account is not admissible evidence. Mr Baer himself accepted that the source of his information was CIA telexes, the contents of which were not necessarily reliable. Given the position Talb adopted when questioned about his

finances in cross examination, it is unlikely that he would simply have accepted the suggestion that he was paid \$500,000 on 25 April 1989. In any event the court acknowledged that there was “a great deal of suspicion” as to the actions of Talb and his circle but did not consider there to be any evidence to indicate that they had either the means or the intention to destroy a civil aircraft in December 1988 (paragraph 82 of the judgment).

15.42 In these circumstances the Commission does not consider the fact that the defence was unaware of any of the above information indicates that a miscarriage of justice may have occurred.

15.43 In any other circumstances the Commission would have explained in more detail its reasons for rejecting this ground. However, in light of the restrictions placed upon its disclosure of the item in question it is unable to do so.

Other allegations made by Mr Baer

15.44 The Commission has also examined the following further claims by Mr Baer.

The Iranian “roll of honour”

15.45 It is alleged in the submissions that Talb and Dalkamoni featured on the Iranian roll of honour in 1990 for “great service” to the Iranian revolution. At the April interview Mr Baer accepted that the names of both individuals might have appeared on the list for “anything”, although he thought the fact that their names were placed on the list together was significant. At the July interview Mr Baer said that the inclusion of their names on the same roll indicated that the Iranian Government had granted them the “equivalent of martyr status” for an “enormous act” that they had performed. He explained that he had seen this information on the database of the CIA’s Directorate of Intelligence in 1995 or 1996. According to Mr Baer no details were provided of the act which had resulted in this alleged award. However, in Mr Baer’s view it must have been on a larger scale than the bombings in 1985 for which Talb was convicted and the bombings in 1987 and 1988 for which Dalkamoni was convicted (see joint minute number 16 for details of these convictions). According to

Mr Baer the information on the CIA database about this originated from “chatter”, which in his view was of similar value to evidence obtained from a telephone tap.

15.46 By letter dated 5 September 2006, D&G confirmed to the Commission that it holds no information regarding this allegation. The Commission also found nothing in its examination of the protectively marked materials held by D&G and the Security Service that would support the allegation that Talb and Dalkamoni featured on an Iranian roll of honour for “great service” (or similar) to the Iranian revolution.

15.47 In the Commission’s view, even if it could be established that the names of these individuals appeared on the Iranian roll of honour, there is nothing in the information provided by Mr Baer that might link this to the bombing of PA103. In any event, Mr Baer’s account of this matter, like all the information provided by him at interview and in his index cards, amounts to inadmissible hearsay. For these reasons the Commission does not consider it capable of being regarded as material in terms of the test set out above.

Alleged Iranian efforts to secure the release of Talb and Dalkamoni

15.48 At the July interview Mr Baer informed members of the enquiry team that efforts had been made by the IRGC to secure the release of Talb and Dalkamoni from custody. At the meeting on the evening before the interview Mr Baer provided details about the source of this information but explained that he would not refer to this during his formal interview.

15.49 No evidence was led in respect of this matter either at the trial or appeal and it does not appear from their files that the defence was aware of the allegation. By letter dated 5 September 2006, D&G explained that it held no information in this connection.

15.50 On 29 January 2007 a member of the Commission’s enquiry team examined Security Service protectively marked material held at Thames House relating to Mr Baer’s claim. The notes of this material are currently in the possession of the Security Service. The Commission requested consent to disclose a number of the protectively

marked documents so that reference could be made to them in the statement of reasons. Consent to disclose was not granted due to the fact that the material concerned had originated from sensitive sources and its disclosure in the Commission's statement of reasons was judged by the Security Service to risk damage to national security. However, the material has been considered by the Commission in arriving at its conclusion.

15.51 In the Commission's view, even if there were admissible evidence to substantiate this allegation, it falls into a similar category to Mr Baer's claims concerning the roll of honour, in that there is nothing to link it with the bombing of PA103.

Alleged telephone intercepts

15.52 According to the submissions Mr Baer has details of telephone intercepts implicating various Palestinian terrorists, including Talb, in the bombing of PA103.

15.53 At the meeting which took place on the evening prior to the July interview Mr Baer informed members of the enquiry team that he was aware of intercepts of telephone calls between "Dalkamoni's gang" and Damascus. According to Mr Baer the calls indicated that Dalkamoni and his associates knew about the operation in respect of PA103 before the bombing took place. There was, Mr Baer claimed, a reference made in one of the intercepts to a "special birthday present for Jibril".

15.54 Mr Baer was asked to provide further details of these claims at a subsequent meeting on 24 March 2006. At that time Mr Baer said that he had also seen information regarding intercepted telephone calls to Syria in which the callers had claimed credit for the bombing. Mr Baer explained, however, that individuals would frequently "brag" about carrying out operations for which they had not been responsible.

15.55 By letter dated 5 September 2006 D&G provided a series of documents relative to the Commission's request for materials in this connection. The documents concern television programmes and police interviews of journalists in which reference

is made to telephone intercepts. None of the documents refers to evidence obtained from telephone intercepts during the investigation.

15.56 The Commission found nothing in its examination of the protectively marked materials held by D&G and the Security Service which would support the allegation that evidence was obtained from telephone intercepts implicating any person or organisation or country in the bombing of PA103. Likewise, the Commission has found no such evidence as a result of any of its other enquiries.

Abu Elias

15.57 According to the submissions Mr Baer alleged that Abu Elias was the main focus of the investigation and that the fifth device made by Khreesat was that used in the PA103 bombing. In the Commission's view, however, any suggestion that the fifth device was the one used in the bombing of PA103 is undermined by information given by Khreesat to the FBI, the terms of which were led in evidence at trial (Edward Marshman at 76/9240 et seq). Khreesat told the FBI that the fifth device was contained in a single-speaker Toshiba cassette player which looked exactly like an RT-F423 model, and that he had never worked on a circuit board of the type used in the twin-speaker RTSF-16 model (ie the model employed in the bombing of PA103). In any event there was no evidence that the fifth device contained an MST-13 timer and, in terms of his accounts to both the FBI and the defence, Khreesat indicated that he did not use digital timers (of which the MST-13 is a type).

15.58 In the Commission's view, even if Mr Baer's claims amounted to admissible evidence they add little, if anything, to the information available to the defence at trial.

Edwin Bollier

15.59 According to the submissions Mr Baer claimed that the CIA knew of Mr Bollier long before the US Government claimed to have discovered him in the investigation. The same point was made by Major Owen Lewis, an expert instructed by MacKechnie and Associates, and is addressed in detail in chapter 8. It is sufficient

to note here that in terms of a CIA technical report lodged as a production a trial, the CIA was aware of Mr Bollier's identity in at least 1985 (CP 285). Accordingly, the allegation adds little if anything to the information known to the defence at trial.

15.60 At interview with the Commission Mr Baer did not provide any other information about Mr Bollier which was not already known to the defence at trial.

MST-13 timers/Udo Schaeffer

15.61 At the July interview Mr Baer maintained that the MST-13 timers obtained by the Stasi could have ended up in the PFLP-GC's hands because of the links between those organisations. Although there was no evidence at trial to suggest that MST-13 timers were supplied to the PFLP-GC, the court accepted that the Stasi was provided with two such timers in 1985 (paragraph 49 of the judgment).

15.62 During a subsequent discussion on 6 February 2006 Mr Baer informed a member of the enquiry team that the two MST-13 timers in the possession of the Stasi had been supplied to a man named Udo Schaeffer. Later, on 3 March 2006, Mr Baer said that he had information to the effect that Mr Schaeffer met Dalkamoni in October 1988. However, Mr Baer did not think it had been established that Mr Schaeffer supplied MST-13 timers to the PFLP-GC or that the latter had obtained such timers.

15.63 Mr Baer's allegation is reflected by the terms of one of his index cards which contains the following entry:

"Udo Schaefer, -Dalqamuni met 17, 18, 22 Oct, -22 Oct may have delivered Abu Ilyas device".

15.64 The reference to the "Abu Ilyas device" appears to be the fifth device because one of Mr Baer's other index cards contains an entry to the effect that the fifth device was "made by Abu Ilyas". As stated above there is no evidence that this device contained an MST-13 timer.

15.65 The Commission enquired with D&G as to whether it knew of any claim, including anything contained in intelligence materials, that the MST-13 timers in the possession of the Stasi were supplied onwards to any other party. The Commission also requested any information in D&G's possession concerning Mr Schaeffer. By letter dated 12 June 2006, D&G provided a series of HOLMES documents in which reference was made to the Stasi. However, none of them refers to the alleged involvement of the Stasi in the distribution of MST-13 timers.

15.66 The Commission also found nothing in its examination of the protectively marked materials held by D&G and the Security Service which would support the allegation that a person called Udo Schaeffer or Schaefer was supplied with MST-13 timers or that he had any involvement at all in the bombing of PA103.

15.67 In the Commission's view, the terms of Mr Baer's index card suggests that he received information linking Mr Schaeffer with the fifth device rather than MST-13 timers. In any event the Commission has come across nothing to link Mr Schaeffer with the Stasi or with the distribution of such timers. Indeed, as noted above, Mr Baer himself accepted that such a link had not been established. In these circumstances, there is nothing in Mr Baer's account to support the allegation that the PFLP-GC was provided with MST-13 timers by the Stasi.

Alleged forensic evidence regarding Talb

15.68 Finally, Mr Baer claimed at interview that there were "forensics which traced a device to Talb". However, he was unable to expand on this allegation.

15.69 The Commission notes that one of Mr Baer's index cards indicates that "[a]luminium was found in Talb's car along with Imandi's". According to a police statement by Mahmoud Mougrabi (S5050, see appendix) aluminium powder was an ingredient in the bombs he and Talb had made in 1985. In the Commission's view it is possible that this information forms the basis of Mr Baer's claim. Whatever the source of Mr Baer's account, the Commission has found nothing to suggest that forensic evidence exists linking Talb to the bomb used to destroy PA103.

Conclusion

15.70 Although in some instances the reliability of Mr Baer's recollections might be open to question, the Commission has no reason to doubt his credibility. However, as he himself acknowledged, he has no direct knowledge of any of the information in his possession, which came largely from CIA telexes. As with all intelligence, the validity of that information was very much dependent upon the reliability of its source which in many cases Mr Baer was unable to vouch.

15.71 For these reasons, as well as those given under the specific headings above, the Commission is satisfied that there is nothing in Mr Baer's allegations which suggests that a miscarriage of justice may have occurred.

CHAPTER 16

“OPERATION BIRD”

Introduction

16.1 In volume A of the application (chapter 16.7) reference is made to what is described as new and potentially important information obtained by Forensic Investigative Associates (“FIA”), a firm of private investigators, during enquiries conducted under the codename “Operation Bird.” The enquiries were instructed on behalf of the applicant by Eversheds solicitors and most were carried out post-trial but prior to the conclusion of the appeal hearing. None of the information obtained as a result of the Operation Bird enquiries was led at trial or appeal.

The applicant’s submissions

16.2 According to volume A information was obtained by Operation Bird which suggested:

- that in March 1988 Abo Talb (“Talb”), Mohamed Al Mougrabi, the incriminee Abu Nada of the Miska Bakery and an unnamed Iranian were present at a meeting in Malta arranged by the Iranian secret service to plan an operation against the US;
- that the leader of the PFLP-GC Ahmed Jibril (“Jibril”) was in control of terrorist cells in Malta, Germany and London;
- that Talb met with a member of the PFLP-GC, Haj Hafez Kassem Dalkamoni (“Dalkamoni”), in Malta in October 1988;
- that Talb returned to Malta at the end of November 1988; and
- that PFLP-GC operatives purchased the items from Mary’s House which were established to have been inside the primary suitcase.

16.3 Reference is made in volume A to four reports dated 3, 9, 20 and 31 December 2001 which set out some of the results of the Operation Bird investigations.

The submissions point out that although further enquiries might discover more information, MacKechnie and Associates had been unable to pursue these due to financial constraints.

Materials relevant to Operation Bird

16.4 The following is a summary of the principal materials relating to Operation Bird, including the four reports referred to above and two other documents the Commission obtained from the defence papers.

(1) Eversheds attendance note

16.5 The first document of relevance is an attendance note prepared by Eversheds dated 9 January 2001 (see appendix). According to the note an unnamed source had informed FIA that before Anthony Gauci picked out the applicant from a photo-spread on 15 February 1991, he had been shown another photo-spread containing photographs of both the applicant and the co-accused. The source suggested that Mr Gauci had failed to pick out the applicant or the co-accused on that earlier occasion. The source claimed that a Maltese police officer may have been present on this occasion along with British, American and German officers. According to the note FIA was authorised by the defence to attempt to trace the Maltese officer.

16.6 However, on page 17 of the final Operation Bird report (19 January 2002, referred to below) it is stated that an unnamed source had said that this information was received from a member of the “Lockerbie investigative team”. It was said that the nationality of the individual who had reported this to the source was not known but it was not believed that the person was a participant in the “identification sub-group” (the nature of this body is not made clear in the report). According to the report FIA had not attempted to check this information because they were uncertain about its reliability and did not want to disrupt other more important investigations.

(2) Operation Bird Report, Phase 1 (3 December 2001)

16.7 There are two versions of the “phase 1” report, namely a “corrected” version and an earlier version (see appendix). According to both versions FIA had interviewed an individual in the Middle East who is referred to in the report only as “S1”.

16.8 The report states that S1 had long been active in the Palestinian Liberation Organisation (“PLO”) and appeared to have reliable information about the groups, but not about the individuals, responsible for the bombing of PA103. According to the report S1 believed that Libya, Iran and Syria would all have needed the help of the PFLP-GC and Jibril to carry out such an attack because none of those countries was capable of such an act themselves. According to the report S1 said that all of the information which had been gathered by the PLO suggested that Jibril and Imad Moughnieh (of Hezbollah) were responsible for the PA103 attack and that it was sponsored by Iran. However, the report also states that S1 claimed not to be privy to direct intelligence in support of the PLO’s finding. On the other hand, S1 was also reported as saying that almost everybody agreed that Iran was behind the bombing and that Libya and Ahmed Jibril had carried it out.

(3) Operation Bird Report, Phase 2 (9 December 2001)

16.9 The second Operation Bird report (see appendix) states that on 6 December 2001 a different, unnamed individual, referred to as “SII”, had informed FIA that he had intelligence about the case which could not be discussed over the telephone. On 8 and 9 December investigators met SII in an unidentified Middle Eastern country. SII was described as the head of an “external country station” for the intelligence service of a liberation organisation in the Middle East. The organisation in question was referred to in the report as “Alpha”. According to the report Alpha received financial and other support from Iran and worked with other militant Middle Eastern liberation organisations including the PFLP-GC.

16.10 According to SII a member of the Iranian secret service convened a meeting in Malta in March 1988 which was attended by eight people. They included Talb and

an Alpha representative referred to in the report as “Ivan”. The purpose of the meeting was to agree and plan an operation against the US. SII said that Iran was the “proponent” of the operation and would be the paymaster. The precise target of the operation was not specified at the meeting. SII said that Ivan had told Alpha headquarters about the meeting on the day after it had taken place. About 15 days later Alpha headquarters responded saying that it did not want to be officially involved in the operation against the US, but that if individual Alpha members wanted to be involved then that would be up to them.

16.11 The report went on to say that SII was informed that around 20 October 1988 Ivan attended another meeting in Malta. Two Palestinians with Swedish passports, namely Talb and Dalkamoni, were present at that meeting. Dalkamoni, who was said to be very close to Jibril, was described as being over 50 years old and as having had a leg amputated. It was said that Dalkamoni went to Neuss, West Germany, after the meeting.

16.12 According to the report SII was told that Talb travelled to Malta in December 1988 and later flew from there to Frankfurt. SII said that one of Ivan’s people drove Talb to the airport. SII said he believed from what he had heard that Talb headed the operation to destroy PA103 and that the bomb was loaded in London. SII was of the view that he could obtain the name and the nationality of the passport which Talb had used to travel to Malta in March and December 1988. SII could also obtain the same for Dalkamoni’s visit to Malta in October 1988. He believed he could also obtain intelligence as to how Jibril’s people had managed to obtain an MST-13 timer and how the bomb was loaded in London.

16.13 The report concludes by stating that those carrying out the investigations had a three-step operational plan. Stage 1 involved meeting Ivan’s brother to verify that the information obtained so far by Ivan was correct and to obtain more information from Alpha intelligence files. If all went to plan, Ivan’s brother would provide an assurance that Ivan would be “receptive” and that it would be safe for SII to proceed to the next phase. Stage 2 included a 3-4 day trip to Malta to meet Ivan and two other individuals (said probably to be Palestinian). One of these individuals was said to

have driven Talb to the airport in December 1988 when he flew from Malta to Frankfurt. Stage 3 included a trip to Syria to gain further information.

(4) Operation Bird Report, Phase 2 (20 December 2001)

16.14 The third Operation Bird report (see appendix) states that FIA had obtained a verbatim copy of a report written on 14 March 1988 by Ivan. The investigators considered that it was a reliable transcript of Ivan's original report. That report described the meeting in Malta on 13 March 1988 said to have been attended by Ivan, Talb and Dalkamoni. The transcript of the report suggested that a person named Abd Al Salam had invited Ivan to the meeting. The investigators suggested that this was in fact the incriminee Abu Nada of the Miska Bakery.

(5) Operation Bird Report (31 December 2001)

16.15 The fourth Operation Bird report (see appendix) sets out the results of enquiries in Malta as at 31 December 2001. It does not identify any of the sources of the information but states that on 13 March 1988 Abu Nada met members of the PFLP-GC and the PPSF (the organisation of which Talb was said to be a member). According to the report Abu Nada was no longer resident in Malta at the time of FIA's investigations. The report also said that Talb and various others attended the meeting on 13 March 1988 and that Talb and Dalkamoni knew each other. According to the report Talb was in Malta in March, October and at the end of November 1989 and used a different name on each occasion. The report goes on to say that during his visit to Malta in October 1988 Talb met Dalkamoni. The report adds that two MST-13 timers had been stolen from the Libyans.

(6) Operation Bird Report (19 January 2002)

16.16 The final report (see appendix) contains information said to have come from more than six sources. However, for "security reasons" the report does not attribute information to specific sources except where to do so was essential.

16.17 In the report it is stated that Libya was not involved in the bombing of PA103 which it is said was funded by Iran and planned and executed by individuals representing the PFLP-GC, the PPSF, Hezbollah and Fatah. According to the report Dalkamoni was in charge of the operation and Talb was his deputy. However, after Dalkamoni's arrest in Germany on 26 October 1988, Talb became the leader of the operation. According to the report the MST-13 timer was obtained from the Russian mafia and provided to Iran via Hezbollah.

16.18 The report reiterates that Talb attended a meeting in Malta in March 1988 to discuss and plan an operation against the US. According to the report Talb arrived in Malta on 11 March 1988 and departed on 15 March 1988. It is said that Talb used a Swedish passport in the name "Fred Edwards" to enter Malta on this occasion. The report narrates that Ivan had become a resident of Malta, had seen Talb at the meeting in March 1988 and had also seen Dalkamoni and Talb at a "safe house" in Malta in October 1988. Furthermore, Ivan suggested that Abu Nada had admitted to him his involvement in the Lockerbie bombing. The report suggests that Ivan could be a witness, but says that he could not be recruited without the assistance of the authorities who would have to provide protection for him. The report reveals that Ivan had been paid as an "operative to develop critical intelligence." The report does not specify who made this payment.

16.19 The report repeats the claim that there was a meeting on 20 October 1988 in Malta attended by Dalkamoni and Talb to discuss the plan for the bombing. According to the report Talb was in Malta from 19-26 October 1988. The report alleges that Talb had intended to use a false passport to enter Malta but for unknown reasons was unable to do so. Accordingly he travelled with a Swedish travel document in the name of "Hassan Abu Talb". The report goes on to state that Talb stayed at the home of Abu Nada for two days [REDACTED] in Malta. However, according to the report he did not stay there and instead stayed at a safe house. The report alleges that [REDACTED] this arrangement which was intended to deceive the police and divert attention away from the safe house which was where the bomb was kept. The report names [REDACTED] and suggests that he may have known Talb and Dalkamoni. According to the report [REDACTED] was a witness to other key

events including the corruption of a police officer and an Air Malta employee “for the purpose of loading the bomb at Malta Airport”.

16.20 The report states that Dalkamoni arrived in Malta on 20 October 1988 and met Talb and others that evening. He stayed for two days and departed on 21 or 22 October 1988 travelling under a false East German passport.

16.21 The report narrates that at the meeting on 20 October there were discussions about diverting the blame for the bombing to Libya which, after the US and Israel, was regarded as Jibril’s chief government enemy because it had forced out Jibril’s cadres in a degrading and humiliating manner in 1987. The report states it was agreed at the meeting that wherever the bomb was launched they would place it in a suitcase which through its contents would be traced to Malta in the event that the bomb was discovered before it exploded. According to the report no one anticipated that any clothing in the suitcase would be identified after the explosion. The report alleges that the conspirators knew at the meeting that the applicant was a member of the Libyan ESO (formerly named the JSO) and also a manager of “Libyan Airways” and that therefore he would be a likely suspect. He also resembled Talb and accordingly it was decided at the meeting that Talb should buy the clothing from Mary’s House.

16.22 According to the report Talb arrived in Malta on 25 November 1988 using the passport in the name of Fred Edwards and departed on either 1 or 2 December 1988. During this visit he purchased the items of clothing from Mary’s House. The report states that this information was obtained from a “participant to this aspect of the operation”. The purchase was made just before lunchtime on an unknown date between 25 November and 1 or 2 December. Abu Nada and one other person drove Talb to the shop in a bakery van and Talb entered the shop alone. According to the recollection of the unnamed driver of the vehicle, Talb purchased a pair of trousers, a winter shirt, a bath towel or a sheet and an umbrella. Talb and the driver then went to Abu Nada’s house and put the clothing into the suitcase which contained the bomb. The report states that while ideally one would want the driver of the bakery van as a witness to Talb’s purchase of the clothing, this was not possible. According to the report Abu Nada may be dead.

16.23 The report goes on to say that before Talb bought the clothing it was mentioned that Mary's House was near to the Holiday Inn and that the applicant had a mistress whom he sometimes took to the Holiday Inn.

16.24 The report also states that [REDACTED] was present at the meeting on 20 October 1988 and that he helped to put the bomb together. It is alleged that [REDACTED] had a Maltese girlfriend [REDACTED] where the meeting had taken place and so could have met Dalkamoni and Talb there. According to the report FIA was in the process of obtaining her name and address. The report states that Ivan was aware that Talb was present in Malta after October 1988 because Abu Nada had informed him about this. However, Ivan did not actually see Talb after October 1988.

16.25 It is alleged in the report that the bomb was loaded at Heathrow airport and that Talb was in London from 20-22 December 1988 to ensure that it was placed on board PA103. Imad Chabaan and Abu Elias assisted him in this. In the early morning of 21 December Talb and Imad Chabaan arrived in London by merchant ship (the inconsistency between this and the earlier claim in the report that Talb was in London from 20 December is not explained). When the suitcase containing the bomb arrived in London Talb, Chabaan and Abu Elias were waiting for it. They had already agreed to pay a British Airways employee to load it onto PA103 without it being opened or inspected or passing through the x-ray machines.

Further enquiries

16.26 The Commission raised the issue of the Operation Bird enquiries with the applicant's former representatives at interview.

16.27 Mr Beckett said at interview (see appendix of Commission's interviews) that there was no evidence to back up what the Operation Bird reports claimed. He said that he was extremely sceptical about the results of the investigations and that they looked like a concoction based on the submissions at trial. When asked if any of the individuals were precognosed in advance of the appeal he explained that the reports came in very late and there was little pointing to any evidential basis for the claims in

them. He did not have any recollection of precognitions being taken from the informant named Ivan or the individuals designated S1 and SII.

16.28 Mr Duff said that in his view the reports all remained at the level of gossip but that the defence had nevertheless allowed the private investigators to continue with their enquiries (see appendix of Commission's interviews). When asked whether Ivan was precognosced, Mr Duff replied that this was not done to his knowledge. Mr Duff also did not recall issuing instructions for [REDACTED] to be precognosced.

The applicable law

16.29 By virtue of section 106(3)(a) of the Act the High Court has the power to review an alleged miscarriage of justice based on the existence and significance of evidence which was not heard at the original proceedings. The tests applied by the court in assessing the significance of evidence led under that provision are set out in *Al Megrahi v HMA* 2002 SCCR 509. For present purposes, it is sufficient to note that in order to hold that a miscarriage of justice has occurred in the applicant's case the court requires to be persuaded that the evidence not heard in the original proceedings is: (a) capable of being regarded as credible and reliable by a reasonable court; and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

Consideration

16.30 Bearing in mind that it requires to be satisfied only that a miscarriage of justice may have occurred, the Commission has considered whether the results of the Operation Bird investigations as set out in the various reports referred to above could meet the criteria of section 106(3)(a) and *Al Megrahi*.

16.31 The first issue is whether the reports constitute admissible evidence which the court may hear under section 106(3)(a). In the Commission's view the contents of the reports are generally inadmissible because they contain only hearsay evidence to

which none of the exceptions under section 259 of the Act or under the common law apply.

16.32 In any event, the Commission considers that certain of the allegations made in the reports are implausible. In particular, the allegation that Talb bought the clothing from Mary's House in order to implicate the applicant appears wholly incredible.

16.33 As regards the suggestion that Anthony Gauci was shown a photograph of the applicant prior to 15 February 1991, a similar allegation was made in a separate submission to the Commission which was based on accounts attributed to the Golfer (see chapter 5). At interview the Golfer distanced himself from that allegation. However, as stated in chapter 26 the Commission has found no evidence to suggest that the police showed Mr Gauci a photograph of the applicant on any occasion other than 15 February 1991. Furthermore, it is suggested in the final report that the purchase took place just before lunchtime which is clearly at odds with Mr Gauci's account that it occurred at around 6.30 pm.

16.34 The reports also refer to a meeting in Malta on 20 October 1988 said to have been attended by *inter alia* Dalkamoni and Talb. While Talb accepted at trial that he was in Malta from 19-26 October 1988, there is no evidence that Dalkamoni was present in Malta on 20 October 1988.

16.35 It is also said in the reports that Talb was in London from 20-22 December 1988 to ensure that the bomb was placed on board PA103. However, there is no evidence to suggest that Talb travelled to London at any point in 1988. Nor is the Commission aware of any evidence to support the claim that Talb was in Malta in March 1988 when a meeting is said to have taken place there.

16.36 Moreover the first report also suggests that Libya was involved in the bombing which clearly would not have been helpful to the defence even if any of the information in the reports could have been converted into evidence.

Conclusion

16.37 In the Commission's view, the information in the reports constitutes inadmissible hearsay and as such does not meet the requirements of section 106(3)(a). Furthermore, in terms of *Al Megrahi* the Commission considers that many of the central claims in the reports are incapable of being regarded as credible and reliable by a reasonable court. In these circumstances the Commission does not believe that a miscarriage of justice may have occurred in this connection.