

CHAPTER 24

THE DATE OF PURCHASE

Introduction

24.1 As well as accepting Anthony Gauci's evidence that the applicant resembled the purchaser, the trial court found that the purchase itself had taken place on 7 December 1988. As explained in chapter 21 this finding was important to the applicant's conviction because, although the applicant had visited Malta on a number of other occasions in December 1988, in terms of the evidence 7 December was the only date on which he would have had the opportunity to purchase the items. The evidence showed that on that date he was staying at the Holiday Inn in Sliema located close to Mary's House.

24.2 Although the defence made significant efforts to undermine this aspect of the Crown case, there was no dispute that the purchase had taken place on a weekday between 18 November (the date on which an order of Yorkie trousers was delivered to Mary's House) and 20 December 1988 (the day prior to the bombing). It is worth noting again the factors on which the trial court relied in narrowing the range of possible dates to 7 December:

- Mr Gauci's evidence that his brother, Paul Gauci, did not work in the shop that afternoon because he had gone home to watch a football match on television; and the terms of joint minute number 7 which, according to the trial court, agreed that whichever football match or matches Paul Gauci had watched would have been broadcast by Radio Televisione Italiana ("RAI") either on 23 November or 7 December 1988;
- Mr Gauci's evidence that before the purchaser left the shop there was a light shower of rain just beginning; and the evidence of the former Chief Meteorologist at Luqa airport, Major Joseph Mifsud, to the effect that there

was a 10% probability of rain in Sliema at the material time on 7 December 1988;

- Mr Gauci’s evidence which, according to the trial court, was that the purchase was “about the time when the Christmas lights would be going up” in Tower Road; and
- Mr Gauci’s evidence that the purchase “must have been about a fortnight before Christmas”.

24.3 The outcome of the Commission’s enquiries into the evidence of the football broadcasts is described in chapter 4. The following section details the Commission’s findings regarding the erection and illumination of the Christmas lights in Tower Road. Thereafter a further issue concerning the date of purchase is addressed, namely a failure by the Crown to disclose to the defence a passage within Anthony Gauci’s Crown precognition.

(a) The Christmas lights in Tower Road

The applicant’s submissions

24.4 Although it did not feature prominently in the judgment, in determining the date of purchase the trial court relied in part upon Mr Gauci’s evidence concerning the Christmas lights in Tower Road. In the further submissions made by MacKechnie and Associates concerning Anthony Gauci (see chapter 17), reference is made to “new” evidence concerning the Christmas lights in Tower Road which was obtained by the applicant’s former representatives during the appeal. According to the submissions, although no attempt was made to lead it at appeal, this evidence would have cast doubt upon the date of purchase established by the trial court.

24.5 Before setting out the new evidence it is important to consider the passages of Mr Gauci’s statements and evidence relating to the Christmas lights, the

approaches taken to this issue by the trial and appeal courts and the results of enquiries undertaken by the police in this connection in 1990/91.

Mr Gauci's statements and evidence

Statement: 19 September 1989 (CP 454)

"At Christmas time we put up the decorations about 15 days before Christmas, the decorations were not up when the man bought the clothing. I am sure it was midweek when he called."

Statement: 10 September 1990 (CP 469)

"I have been asked again to try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday, there were no Christmas decorations up as I have already said, and I believe it was at the end of November."

Crown precognition: 18 March/25 August 1999

"I told [the police] that this Libyan man had come into the shop one midweek night in the winter before the Christmas lights were on."

Examination in chief

Q. I wonder if we can try and approach [the date purchase] then from a slightly different angle. Did the Tower Road in Sliema put up Christmas lights?

A. Yes. Yes.

Q. How long before Christmas, generally, was that?

A. I wouldn't know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I'm sure. I

can't say exactly.

Q. I would like you to think carefully about that, Mr Gauci, if you can, whether at the time when you sold to the Libyan the Christmas lights were on or not.

A. Yes, they were putting them up. Yes.

Q. Do you remember being asked about that by the police when they came to see you?

A. Yes, they had said. And I had said the lights were there when they came to buy.

Q. Am I right in thinking that you, from the time when the police came first to see you, at the beginning of September, were seen by the police on quite a large number of occasions?

A. Yes, they came a lot of times. They used to come quite often, didn't they.

Q. And that would be in the months after they came first to see you, was it?

A. Yes. Not months after. They used to come after. I don't know exactly when they used to come, but I did not take notes when they used to come. But they used to come quite often to see me. They used to come and ask questions, and they used to take me to the depot and things like that.

Q. And when you were interviewed by the police on these occasions, was your memory of the sale to the Libyan better than it is now?

A. Yes, of course. That is 12 years – 11 years after. I mean, 11 years are a long time for me, but in those days I told them everything exactly, didn't I?

Q. And if you told them, in one of these interviews, that the sale was made before the Christmas decorations went up, might that be correct?

A. I don't know. I'm not sure what I told them exactly about this. I believe they were putting up the lights, though, in those times.

Q. But in any event, you explained that you thought it was about a fortnight before Christmas?

A. Something like that, yes, because I don't remember all these things, do I, when they put the lights on and when they turned them on. I'm not really interested so much because I don't even put decorations, Christmas decorations myself in my shop (31/4739-4741).

Cross examination

Q. [referring to Mr Gauci's statement of 10 September 1990]... And then about the middle of the page, Mr. Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date, because what he's written down is this: I've been asked to again try and pinpoint the day and date that I sold the man the clothing. I can only say it was a weekday. There were no Christmas decorations up, as I have already said, and I believe it was at the end of November.

Now, I am going to come back to that, in view of what you said in your evidence in chief, Mr. Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr. Bell, in September of 1990, that it was a weekday --

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date.

Q. I understand that. And I promise you, I am not trying to catch you out. You and I have agreed, Mr. Gauci, that --

A. -- yes, yes, of course I understand. But I want to speak fair. I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas

decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies.

Q. But if a policeman was coming to get you, that would be during the period you were being interviewed.

A. Yes, of course, to tell them about these description [sic].

Q. Yes. And no doubt there were Christmas lights at such occasions, but we are looking at Christmas lights in the context --

A. I remember that there were Christmas lights.

Q. Well, so you say. But we'll examine together in detail what it was you said to the police on the subject of Christmas lights at the time, 10 and 11 years ago.

Now, I want you to look at another statement, please. This is Production 454 [Mr

Gauci's statement of 19 September 1989]...

Q. Now, without going into it again, the first paragraph deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci'.

A. Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that.

Q. Undoubtedly. Now, let's deal with two aspects of that last paragraph. One is we can see that the statement was given by you to Mr. John Crawford, Detective Constable John Crawford, about ten to 1.00 on the 19th of September 1989. Is that right? Do you see that?

A. Yes, yes.

Q. And what you say is that the Christmas decorations were not up when the man bought the clothes. So would I be right in thinking that on the 19th of September of 1989, you believed that there were no Christmas decorations up when the man bought the clothes, and you told that to DC Crawford?

A. Maybe (31/4802-4810).

The trial court's approach

"... Mr Gauci's evidence was that he was visited by police officers in September 1989. He was able to tell them that he recalled a particular sale about a fortnight before Christmas 1988, although he could not remember the exact date. His recollection was that the Christmas lights were just being put up" (paragraph 12).

“In his evidence in chief, Mr Gauci said that the date of the purchase must have been about a fortnight before Christmas. He was asked if he could be more specific under reference to the street Christmas decorations. Initially, he said ‘I wouldn’t know exactly, but I have never really noticed these things, but I remember, yes, there were Christmas lights. They were on already. I’m sure. I can’t say exactly’. In a later answer when it had been put to him that he had earlier said that the sale was before the Christmas decorations went up, he said ‘I don’t know. I’m not sure what I told them exactly about this. I believe they were putting up the lights though in those times’” (paragraph 56).

“... The position about the Christmas decorations was unclear, but it would seem consistent with Mr Gauci’s rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas... Having carefully considered all the factors relating to this aspect, we have reached the conclusion that the date of the purchase was Wednesday 7 December” (paragraph 67).

The appeal court’s approach

24.6 In terms of the applicant’s ground of appeal A1(e), it was submitted that in relying upon Mr Gauci’s evidence that the purchase was about the time that the Christmas lights were going up the trial court had ignored or failed to have proper regard to the following factors (see paragraph 328 of the opinion):

- (i) that Mr Gauci gave conflicting evidence as to whether the Christmas lights were up or being put up at the time of the purchase;
- (ii) that in statements given to the police in September 1989 and September 1990 he had said that the lights were not up at the time of purchase;
- (iii) that there was no evidence, apart from a prior statement from Mr Gauci, as to when Christmas lights were put up in Sliema; and

(iv) the confusion in Mr Gauci's evidence as to whether his recollection of the Christmas lights related to the date of purchase or to occasions when he had been interviewed by the police.

24.7 At appeal, counsel for the applicant argued that the trial court had a duty to record the contradiction between Mr Gauci's police statements and his evidence that the lights had been going up and, in general, to give reasons for preferring the latter. In counsel's submission the trial court's failure to recognise the materiality of prior inconsistent statements by a witness giving evidence 11 years after the event amounted to a material misdirection (paragraph 330).

24.8 In reply the advocate depute said that the court had set out in paragraphs 12 and 56 of its judgment the different accounts which Mr Gauci had given in evidence and to the police. Although not expressly referred to in the judgment, the court was conscious of the confusion in Mr Gauci's evidence between the position on the date of purchase and at the times when the police came to collect him. In any event, the advocate depute submitted, the court's conclusion on the issue of Christmas lights was expressed in a very tentative manner (paragraph 331).

24.9 In the appeal court's view the trial court was fully justified in finding that the position about the Christmas lights was unclear and that Mr Gauci's recollection was confused. However, the appeal court was not satisfied that the trial court had been shown to have ignored material factors in respect of that evidence. The trial court had recognised that Mr Gauci's evidence was confused but in the circumstances was entitled to say that it seemed consistent with his recollection that the purchase was about the time when the lights would be going up which, in turn, was consistent with his recollection that it had taken place about two weeks before Christmas. In the appeal court's view evidence as to the Christmas lights was only one of the factors taken into account by the trial court in determining the date of purchase and appeared not to have been one given a great deal of weight (paragraph 332).

The police enquiries in 1990/91

24.10 Although not evidence at trial, in 1990 the police conducted various enquiries to establish the date on which the Christmas lights in Tower Road were erected and illuminated in that year. The outcome of these enquiries is detailed in statements given by various officers, copies of which are contained in the appendix.

24.11 According to Mr Bell's statement (S2632AM) during November and December 1990 he instructed daily checks to be made of Tower Road in order to establish the day and date on which the Christmas lights were erected and illuminated. Mr Bell had given these instructions in light of Mr Gauci's statement of 10 September 1990 in which he said that there were no Christmas decorations in Tower Road at the time of the purchase. Mr Bell hoped that, taken together with that account and interviews with any organisers of the decorations, the daily checks would clarify the purchase date. According to his statement Mr Bell was aware at this time that Paul Gauci had identified 7 December 1988 as the "probable" date of purchase.

24.12 On Wednesday 5 December 1990 Mr Bell visited Tower Road in the company of Ch Insp John McLean (S5320D) and noted that the Christmas lights had been erected to a point past Mary's House. Mr Bell learned from Ch Insp McLean that this was the first time during the daily checks that the lights had appeared. The lights were not illuminated at that time.

24.13 On 6 December 1990 Mr Bell returned to Tower Road, this time accompanied by FBI Special Agent Phillip Reid (S5486). Mr Bell noted that although it appeared that the Christmas lights had been fully erected they had not yet been illuminated.

24.14 The following evening, 7 December 1990, Mr Bell noted that the Christmas lights outside Mary's House in Tower Road were switched on and fully illuminated.

24.15 In 1991 DS Peter Avent was instructed by Mr Bell to make enquiries as to when the Christmas lights were erected and illuminated in Tower Road in 1988. According to DS Avent's statement (S5388BC), however, "all lines of enquiry which

the Maltese were willing and able to pursue failed to pin point the exact date of illumination in 1988.”

The evidence obtained in 2002

Background

24.16 The background to the additional evidence is contained in a precognition given during the appeal proceedings by Dr Giannella Caruana Curran, one of the Maltese lawyers instructed by the defence (see appendix). In this, Dr Curran explained that despite a number of enquiries prior to the trial she had been unable to establish the dates on which the Christmas lights in Tower Road were erected and illuminated in 1988. In May 2001, however, the applicant’s solicitor Mr Duff asked her to revive these enquiries. As a result she had established that the Maltese energy provider Enemalta supplied temporary meters to monitor the consumption of electricity by Christmas lights installations throughout the country.

24.17 According to her precognition Dr Curran thereafter made contact with the finance manager of Enemalta, Tarcisio Mifsud, who confirmed that such a meter had been supplied and fitted in respect of the Christmas lights in Tower Road in 1988. Mr Mifsud later provided Dr Curran with copies of various records held by Enemalta (see appendix). These showed that an application (reference T/1938/88) was made to Enemalta for a temporary meter for the period 30 November 1988 to 10 January 1989 in respect of Christmas lights in Tower Road. According to the records the meter was installed by Enemalta on 30 November 1988 and removed on 22 February 1989.

24.18 Mr Mifsud also provided Dr Curran with a letter dated 22 January 2002 (see appendix) in which he informed her that the person responsible for making the above application was a James Busuttil.

24.19 Following Dr Curran’s enquiries, on 28 January 2002 Mr Duff obtained precognitions from a number of witnesses (see appendix). Summaries of their accounts are given below.

Tarcisio Mifsud

24.20 Mr Mifsud explained that the records which he had passed to Dr Curran formed part of a workbook kept by Charles Tabone who in 1988 was employed in the temporary meter section of Enemalta. He explained that in the case of Christmas lights, an application for a temporary meter would not be submitted until the lights had been erected. According to Mr Mifsud the records he had obtained showed that an application for a temporary meter in Tower Road in the name of James Busuttil was received on 29 November 1988. The reference number of that application (T/1938/88) corresponded with the entry in Mr Tabone's register relating to Christmas lights in Tower Road.

24.21 Mr Mifsud confirmed that the meter to which Mr Busuttil's application related was installed in Tower Road on 30 November 1988. The meter would be installed by a member of staff who would then test the whole set up. According to Mr Mifsud it was therefore "absolutely necessary" that the lights were erected before the meter was fitted.

24.22 As far as Mr Mifsud knew the lights would be officially illuminated on the same day as the meter was fitted and the installation tested. In respect of the Christmas lights in Tower Road in 1988, the supply was due to commence from 30 November and, as far as Mr Mifsud knew, the consumer would start using it immediately.

24.23 Mr Mifsud confirmed that he had never been questioned by the police in respect of this matter.

Charles Tabone

24.24 Mr Tabone informed Mr Duff that in 1988 he was responsible for record keeping within the temporary meter section of Enemalta. He explained that temporary meters would be installed whenever a temporary electricity supply was needed. In order to obtain such a meter, contractors would submit to Enemalta an

application form giving details as to the location of the supply, its purpose and the period for which it was required.

24.25 In respect of Christmas lights Mr Tabone said that meters would not under any circumstances be fitted until the lights themselves had been erected. According to Mr Tabone having fitted the meter and connected the supply it was Enemalta's duty to test the system, something which could not be done until the lights were up. Assuming the system worked, it would be switched off and it was then up to the contractor or the person who required the supply to switch it on "that night". Mr Tabone could not say exactly when the lights would be switched on by the contractor, but he always assumed that this would be done on the date specified in the application form.

24.26 Like Mr Mifsud, Mr Tabone claimed never to have been interviewed by the police about this matter.

James Busuttil

24.27 Mr Busuttil said that in 1988 he worked in a jeweller's shop owned by his father which was located at 43 Tower Road. In 1988 and 1989, he organised the erection and illumination of the Christmas lights in Tower Road on behalf of the shopkeepers there. This involved negotiating a deal with a contractor with whom a starting date would be agreed. The shopkeepers would want the bulk of the use to be in December, before Christmas.

24.28 Mr Busuttil recalled "people from the electricity supply company" coming to connect the supply, fit the meter and "test the whole thing." On being informed by Mr Duff that the meter in Tower Road had been installed on 30 November 1988, Mr Busuttil said that the lights would not have been erected long before this date as the contractors would not want the lights to be unused for long in case of storm damage. The lights, he said, would have been officially illuminated not long after 30 November, although there might have been a delay of a few days. He felt sure that in 1988 the lights would have been switched on after 30 November but before 7 December as, in his view, the latter date "just sounds too late."

24.29 According to Mr Busuttil, he had arranged for the then Minister of Tourism, Michael Refalo, to switch on the lights.

Memorandum

24.30 A memorandum prepared by Mr Duff dated 28 January 2002 confirms that after obtaining Mr Busuttil's precognition, he and Dr Curran met Dr George Hyzler, Parliamentary Secretary for the Ministry of Economic Services in Malta. At Mr Duff's request Dr Hyzler telephoned Michael Refalo who checked his diary for 1988 and confirmed that on 6 December of that year he had an engagement to switch on the Christmas lights in the Tower Road area. According to the memorandum the ceremony was performed at "the Ferries", an area located at the foot of the "Mary's House section" of Tower Road. A copy of the memorandum is contained in the appendix.

Summary

24.31 The evidence obtained by Mr Duff in 2002 can be summarised as follows:

- Applications for temporary meters in respect of Christmas lights are submitted to Enemalta once the lights themselves have been erected;
- The Christmas lights must be erected before the temporary meter is fitted, to allow the fitter to test the installation;
- On 29 November 1988 Enemalta's district office in Sliema received an application in the name of James Busuttil for a temporary meter in respect of Christmas lights in Tower Road;
- On 30 November 1988 the meter to which Mr Busuttil's application related was fitted in Tower Road;

- In 1988 the Christmas lights in Tower Road were erected during the night over two nights and would not have been erected long before 30 November;
- In 1988 the Christmas lights in Tower Road were officially illuminated by Michael Refalo on 6 December at a ceremony which took place close to Mary's House at a location known as the Ferries.

24.32 Accordingly, on a literal reading of Mr Gauci's evidence that the lights were being put up at the time of the purchase (ie the account which the trial court accepted) the evidence obtained by Mr Duff would suggest that the purchase took place on or prior to 29 November 1988 (the date on which a copy of Mr Busuttil's application was received at the district office); or, at the very latest, on or prior to 30 November 1988 (the date on which the meter was installed). Either way, since there was no evidence at trial that the applicant had visited Malta in November 1988, the evidence obtained by Mr Duff was capable of undermining the court's conclusion that the applicant was the purchaser.

The decision not to lead the evidence at appeal

24.33 It is clear that a good deal of consideration was given as to whether the above evidence should be led at appeal. Included within the materials submitted to the Commission by MacKechie and Associates were notes on the subject prepared by two of the applicant's counsel, David Burns QC and John Beckett QC (see appendix). While the evidence was considered to be of value, both counsel were concerned that it might be construed by the appeal court in such a way as to undermine the defence position. Mr Burns, for example, believed that were the new evidence to be led, the appeal court would "view it as supporting [Mr Gauci's] first position in evidence, that the sale took place when the lights were on and supporting his evidence that it took place about a fortnight before Christmas." In Mr Burns' view, both of these factors supported 7 December 1988 as the purchase date. Mr Burns also believed that, because the new evidence directly contradicted Mr Gauci's prior statement of 19 September 1989 in which he said that the decorations were put up about 15 days before Christmas, the trial court would be seen to have been justified in rejecting his prior statements to the effect that there were no Christmas decorations up at the time

of the purchase. Furthermore, Mr Burns considered that if the appeal court were to view the choice of dates as narrowed to 23 November and 7 December 1988, the new evidence would not support the former.

24.34 According to Mr Beckett’s note, if the new evidence had been known about at the time of trial the defence would have lodged it as a production. This was on the basis that prior to the trial the defence had reason to think that the court would accept the version of events given by Mr Gauci in his police statements. Had the court done so then, in Mr Beckett’s view, the new evidence would have excluded 7 December 1988 and indeed any date after 30 November of that year. At the same time, however, the defence would have been in difficulty with Mr Gauci’s initial position in evidence in which he said that the Christmas lights were on at the time of the purchase. According to Mr Beckett, had the court accepted that evidence, 7 December 1988 would have been a perfect candidate for the date of purchase and any date prior to 6 December would have been excluded.

24.35 Mr Beckett considered that, viewed in terms of the court’s finding that the purchase took place “about the time the Christmas decorations would be going up”, the new evidence suggested that the purchase took place circa 30 November 1988. The attraction of the evidence for Mr Beckett was that it would enable the appeal court to quash the applicant’s conviction without criticising the trial judges. Like Mr Burns, however, Mr Beckett was concerned about the impact of the new evidence in the event that the appeal court viewed the choice of dates as narrowed to 23 November and 7 December 1988. If so, then according to Mr Beckett’s note “23 November is excluded and 7 December is not necessarily excluded.”

24.36 Mr Beckett also considered that by leading the new evidence the defence “would be introducing a reference point which is presently absent.” The position, he noted, was that:

“we have argued and possibly demonstrated that the finding that there was consistency between the fortnight before Christmas spoken to in evidence and the decorations being up depended upon a prior statement which said that the decorations were not up at the time of the purchase. There is a possible, we have

argued otherwise, construction of chief against us although this is not advanced in the Crown skeleton.”

24.37 Mr Beckett concluded his note with the following observations:

“Given the various positions which can be taken, it is far from certain that even if permitted this evidence would persuade the court that there has been a miscarriage of justice... If the evidence is not advanced now there will be no other opportunity to do so. We cannot be confident that we are presently winning the appeal.”

24.38 At interview with the Commission’s enquiry team Mr Beckett maintained that there were pros and cons to leading the new evidence but said that ultimately it was the applicant himself who did not wish it to be led. Support for Mr Beckett’s position is contained in a handwritten file note dated 1 February 2002 extracted by the Commission from the defence files (see appendix). The note contains details of a meeting on that date between the applicant and his representatives in which a “possible new ground of appeal” was discussed. Towards the end of the note appear the words, “Baset says we should not use the evidence” and “unanimous”. At interview Mr Duff confirmed that the note was in his handwriting and that it related to the evidence he had obtained concerning the Christmas lights.

The Commission’s enquiries

24.39 As an initial step the Commission obtained from Dr Curran copies of the records passed to her by Mr Mifsud at the time of the appeal. Further records were obtained by the Commission following a visit to Enemalta’s headquarters in Malta in December 2005 (see appendix). Thereafter a number of witnesses were interviewed by the Commission, including several members of staff at Enemalta and Dr Michael Refalo, now Malta’s High Commissioner to the UK. The Commission also traced the individual who had installed the temporary meter in Tower Road in 1988, Carmel Vella, and obtained a statement from him in which he described his working practices at that time. Although attempts were made to trace Reno Cianter, the contractor who had erected the Christmas lights in Tower Road in 1988, the Commission was

informed by other witnesses that he is now deceased. The witness Charles Tabone was too ill to be interviewed. The Commission was unable to trace James Busuttil.

24.40 Copies of all statements obtained by the Commission as a result of its enquiries in this area are contained in appendix of Commission interviews. The following is a summary of those considered to be of significance.

Dr Michael Refalo

24.41 At interview Dr Refalo produced his Ministerial diary for 1988. The final entry on the page relating to 6 December is as follows:

“5.30 Xmas lights (Ferries)”

24.42 According to Dr Refalo the entry referred to an invitation received from shop owners in Sliema to perform the Christmas illuminations ceremony and was inserted in his diary by his personal assistant at the time, Manuel Darminin, who is now deceased. Dr Refalo’s impression was that in 1988 the lights were located in Bizazza Street (which runs parallel to the lower section of Tower Road: see CP 865), the lower section of Tower Road itself (where Mary’s House is situated) and possibly part of “the Ferries” (a section of the Strand located at the foot of Tower Road). He could not recall who had requested him to perform the ceremony but it was normally a shopkeeper from the area. Although Dr Refalo did not know anyone by the name of James Busuttil, he knew Robert Busuttil who he recalled owned a jewellers in Tower Road.

24.43 Dr Refalo recalled having performed the Christmas illuminations ceremony in Sliema about 2 or 3 times. He had some recollection that on 6 December 1988 the ceremony had taken place in Bizazza Street, although he accepted that he might be wrong about this. Given that his diary entry referred to the Ferries area, in Dr Refalo’s view this suggested that he had switched on the lights at a ceremony held there. Whatever the location of the ceremony in 1988 the illuminations would, he said, have included the lower part of Tower Road. He was certain that he was not

involved in the illumination of Christmas lights in more than one area in the same year.

24.44 Dr Refalo confirmed that his diary was “very reliable” and that he definitely would have conducted the official ceremony to which the entry of 6 December 1988 relates.

24.45 A certified copy of the relevant page of Dr Refalo’s diary is contained in the appendix.

Paul Portelli

24.46 Mr Portelli has been employed by Enemalta since 1979 and in 1988 was a meter fitter. He explained that in 1988 applications for temporary meters in respect of Christmas lights would be submitted to Enemalta by contractors. The normal procedure was for applications to be made some time before the power supply was required. Although it was supposed to be the case that meters would not be fitted until the lights were erected, according to Mr Portelli “in fact it would never be like that.” When shown the records indicating that in 1988 the meter in respect of Christmas lights in Tower Road was fitted on 30 November 1988, Mr Portelli replied: “it was normally the case that the lights would require to be erected by this date, but in 99% of cases this was not done.” According to Mr Portelli the fact that the lights were not officially illuminated until 6 December 1988 would have given the contractor a period of time to erect the lights after the meter had been fitted.

Tarcisio Mifsud

24.47 Mr Mifsud’s initial position at interview was the same as that adopted by him at defence precognition, ie that in the case of Christmas lights these would require to be erected before a temporary meter was installed. He explained that prior to 1993, when new regulations came into force, meter fitters employed by Enemalta were responsible for carrying out safety tests to installations. According to Mr Mifsud there were “no situations” in which a meter would be installed before Christmas lights were erected.

24.48 Mr Mifsud was informed that according to Mr Portelli, while it was proper procedure to fit meters before lights were erected, in fact in the vast majority of cases this was not followed. In reply Mr Mifsud said that if meter fitters were not following procedure this was not something he would know about. The rules, he said, were clear: the meter was to be installed only once the lights had been erected. In Mr Mifsud's view Mr Portelli was confusing the position which applied before and after 1993, when responsibility for testing the installation was transferred from the meter fitter to the contractor. He added, however, that if a fitter wished to shoulder responsibility for someone being electrocuted "then he could effectively do what he liked."

24.49 Mr Mifsud was referred to an excerpt of the Enemalta meter room workbook from 1990 (see appendix). This showed that the meters in respect of the Christmas lights in the upper and lower sections of Tower Road were installed on 4 December of that year. Mr Mifsud's attention was also drawn to the statements given by Mr Bell and other police officers which indicated that in 1990 the first sign of any Christmas lights in Tower Road was on 5 December 1990. Asked whether, taken together, these sources suggested that in 1990 the meters in Tower Road were installed before the lights were erected Mr Mifsud replied that he could not say either way.

Carmel Vella

24.50 In terms of the records obtained by the Commission from Enemalta (see the extract from the meter room work book in the appendix) Mr Vella was responsible for installing temporary meters in connection with Christmas lights in the upper and lower sections of Tower Road on 30 November 1988. He has since retired from the company.

24.51 At interview Mr Vella confirmed that as his name appeared on the records he could say that he had definitely fitted the meters in question. According to Mr Vella it was not necessary for Christmas lights to be erected before meters were installed as sometimes contractors would add more lights once the meter was in place. It would only be on rare occasions, however, that a fitter would install a meter without the

lights being erected. According to Mr Vella there would have to be at least some lights erected as this was necessary in order for the fitter to test the system. The testing would entail the fitter checking that the meter was running which would require him to switch on the lights.

24.52 Mr Vella could not remember ever fitting a meter when there were no lights erected. Asked whether it was possible that he might have done so on occasion, he replied “I do not think so.” He repeated that it was not necessary for all the lights to be erected, adding “in almost all the sites I attended the Christmas lights would almost always be erected.” Likewise, he could not remember any occasion in which he did not test a meter he had installed. In response to the suggestion that although this was proper procedure it was rarely followed in practice, Mr Vella replied “I always followed the procedure.”

Charles Pace

24.53 Mr Pace worked in the meter room at Enemalta and in 1990 was a meter fitter. He confirmed that in 1988 fitters were responsible for carrying out general safety checks to Christmas lights installations and would require to sign papers confirming that these had been completed. Most of the time, he explained, the lights would be up by the time the meter was fitted. On very rare occasions, however, the meter was installed before the lights were erected. According to Mr Pace different fitters would take different approaches. If a meter was installed without the lights being erected the fitter would not be able to test the installation. If he did not test the installation then he would be in the wrong, even though it was really the contractor’s fault for not putting up the lights in the first place.

24.54 According to Mr Pace most fitters would be unwilling to install a meter without the lights having been erected. This was because the fitter was required to guarantee the safety of the installation. However, there were rare cases when the meter was fitted before the lights were erected. According to Mr Pace it would depend on the relationship between the particular contractor and the meter fitter involved.

24.55 Mr Pace was referred to an excerpt of the meter room workbook from 1990 (see appendix) which records that on 4 December of that year he installed the meter in respect of Christmas lights in the lower section of Tower Road. He was also informed that, in terms of statements given by several police officers, the Christmas lights in that area did not appear until 5 December 1990. It was suggested to Mr Pace that, taken together, these items indicated that on this occasion he had installed the meter before the lights were erected. Mr Pace accepted that he had probably installed the meter in question but maintained that he was unclear as to whether the records suggested that the lights were erected the following day. He added, however, that the contractor who erected the lights would normally be a friend and that it was possible that the meter was fitted before the lights were erected.

Peter Micallef

24.56 Mr Micallef is employed as a senior meter fitter with Enemalta and would have been a meter fitter in 1988. According to him it would not always be necessary to have Christmas lights erected prior to installation of the meter. He did not know how many times he had installed a meter without any lights having been erected. Although the lights were all supposed to be up when the meter was installed, sometimes contractors would fit more lights after this was done. If there were no lights up then, according to Mr Micallef, the fitter would not install the meter as in 1988 it was necessary for him to carry out safety checks. Mr Micallef did not know about any other fitter but he himself would always carry out these checks.

Potential significance

The relevant tests

24.57 The tests applied by the High Court in assessing the significance of evidence led for the first time at appeal are set out in *Al Megrahi v HMA* 2002 SCCR 509 (see chapter 22). It is sufficient to note for present purposes that in order to hold that a miscarriage of justice has occurred in the applicant's case, the court will require to be persuaded that the additional evidence is: (a) capable of being regarded as credible

and reliable by a reasonable court; and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a court of a critical issue at trial.

Evidence as to the erection of the Christmas lights

24.58 As noted earlier the evidence obtained by Mr Duff in 2002 indicated that in 1988 the Christmas lights in Tower Road were erected on or before 30 November at the latest. Accordingly, viewed alongside Mr Gauci's account that the lights were "going up" at the time, the evidence was capable of demonstrating that the purchase had taken place at a time when there was no evidence that the applicant was in Malta.

24.59 In the Commission's view the results of its own enquiries undermine that evidence. In particular while there is little doubt that in 1988 Enemalta required that meters be installed only once Christmas lights were erected, it seems that adherence to this procedure was dependent upon the attitude of individual fitters and that often meters would be fitted prior to the erection of the lights. In other words, whether or not the Christmas lights in Tower Road were erected prior to the installation of the meter on 30 November 1988 depends upon the extent to which Mr Vella followed proper procedure.

24.60 At interview Mr Vella claimed always to have followed procedure and did not think he had ever fitted a meter when no lights were erected. To some extent this was vouched by certain comments made by Mr Pace at interview and by Mr Busuttil who in his defence precognition recalled representatives of the electricity company connecting the supply, fitting the meter and testing "the whole thing." On the other hand, given that the installation of meters in breach of procedure is tantamount to a failure to perform safety checks, Mr Vella might simply have been reluctant to admit to having done this. In any event, even if Mr Vella adhered to proper procedure it is clear in terms of his own account and that of Mr Micallef that only some lights needed to be in place for this purpose, and that the contractor might add more after the meter was installed. If that is correct then, notwithstanding that the meter in Tower Road was installed on 30 November 1988, it cannot be ruled out that from the perspective of passers-by such as Mr Gauci the Christmas lights in Tower Road might still have been "going up" after this date.

24.61 Given this element of doubt, had the Commission been faced only with evidence relating to the erection of the Christmas lights in Tower Road it might have been difficult to determine whether this warranted inclusion as a ground of referral. However, when viewed alongside evidence concerning the illumination of the lights the Commission considers a reference on this ground to be fully justified.

Evidence as to the illumination of the Christmas lights

24.62 While it may not be possible to identify the date on which the Christmas lights in Tower Road were fully erected in 1988, in the Commission's view there is little doubt that they were officially illuminated at a ceremony performed by Dr Refalo on 6 December 1988. Although there is perhaps some uncertainty as to whether the ceremony in that year took place in Bizazza Street or the Ferries, given the proximity of both locations to Mary's House this is not important. As Dr Refalo said at interview, whatever the location of the ceremony in 1988 the illuminations extended to the lower section of Tower Road in which Mary's House is located.

24.63 In the Commission's view it can be inferred from Dr Refalo's account that prior to 6 December 1988 the Christmas lights in the lower section of Tower Road were not illuminated. While it is possible that the lights, or some of them, were switched on temporarily in order to test the installation, it seems reasonable to assume that any such period was brief and therefore unlikely to have confused observers into thinking that the lights had been officially illuminated.

24.64 It is also reasonable to assume that the lights in the lower section of Tower Road remained illuminated from the evening of 6 December 1988 until the end of the festive season. Although records obtained from Enemalta (see appendix) suggest that the power supply to the Christmas lights in an upper segment of Tower Road (known as "Joinwell") was interrupted at some point prior to 14 December 1988, in terms of the accounts given by several witnesses (see eg the statements by Mr Portelli, Mr Mifsud and Mr Vella) this would not have affected the illuminations elsewhere.

24.65 In assessing the significance of Dr Refalo's account it is worth highlighting again the court's conclusions in respect of the Christmas lights evidence which was led at trial:

"... The position about the Christmas decorations was unclear, but it would seem consistent with Mr Gauci's rather confused recollection that the purchase was about the time when the decorations would be going up, which in turn would be consistent with his recollection in evidence that it was about two weeks before Christmas" (paragraph 67).

24.66 Whatever may have been unclear about the Christmas decorations, the reference in the above passage to them "going up" indicates that the court was prepared to accept Mr Gauci's evidence that "they were putting up the lights" at the time of the purchase. Viewed literally, however, if the purchase was "about the time when the lights would be going up" then in terms of Dr Refalo's diary the date is unlikely to have been 7 December 1988 as by that time the lights were illuminated. Given that on the evidence led at trial 7 December 1988 is the only date on which the applicant would have had the opportunity to purchase the items, it follows that Dr Refalo's account is capable of undermining the court's conclusion that the applicant was the purchaser.

24.67 As noted at the beginning of this chapter Mr Gauci's position in his statements of 19 September 1989 and 10 September 1990 was that the Christmas lights were "not up" when the purchase took place. At trial, both in chief and in cross examination, he accepted that his memory of events was more likely to be accurate at the time when he gave these statements. Furthermore when asked by counsel for the applicant whether on 19 September 1989 he believed that there were no Christmas lights up when the man bought the clothing and that he had informed DC Crawford of this, Mr Gauci replied "Maybe" (31/4810). Despite this, the trial court was prepared to rely upon the confused and contradictory account given by him in evidence. As explained in chapter 21 the approach taken by the court to this aspect of Mr Gauci's evidence is one of the factors which has led the Commission to doubt the reasonableness of the verdict. In light of that finding the Commission considers it appropriate to assess the significance of Dr Refalo's account not only in terms of Mr

Gauci's evidence as accepted by the court, but also his accounts to the police which the trial court impliedly rejected.

24.68 Viewed against Mr Gauci's more contemporaneous (and clear) recollections in 1989 and 1990, Dr Refalo's evidence would again exclude 7 December 1988. If one accepts that the Christmas lights were not up at the time of the purchase, evidence that the lights were illuminated as of 6 December 1988 indicates that the transaction took place on or before that date. Unlike the trial court, the police attached some weight to these early accounts in that Mr Gauci's recollection in his statement of 10 September 1990 was the motivation for the daily checks undertaken by officers in Tower Road in November and December of that year. In the Commission's view it is reasonable to conclude that had the police recovered Dr Refalo's diary during the course of those enquiries it would have cast significant doubt upon the prevailing view at that time that 7 December 1988 was the "probable" date of purchase.

24.69 On the other hand, as Mr Beckett suggests in his note, Dr Refalo's diary entry might have placed the defence in some difficulty in relation to Mr Gauci's initial evidence that the Christmas lights were "on" at the time of the purchase. In the Commission's view there is little doubt that if the court had accepted Mr Gauci's evidence that the lights were on at the time of the purchase, the entry in Dr Refalo's diary would have provided support for the Crown's contention that the date of purchase was 7 December 1988. Indeed, by excluding any date prior to 6 December 1988, Dr Refalo's entry would also have undermined defence efforts to show that 23 November 1988 was a better candidate.

24.70 However, in order to accept this aspect of Mr Gauci's evidence the trial court would require to have ignored not only the general confusion in his account but also the terms of his prior statements in which his position was different. In the Commission's view, for the same reasons as stated in chapter 21, this would not have constituted a reasonable approach to Mr Gauci's evidence.

24.71 Mr Burns appears to suggest in his note that had the evidence obtained by Mr Duff been led at appeal the court would have been entitled to view this as supporting Mr Gauci's evidence that the lights were on at the time of the purchase. In the

Commission's view, however, given that there were no grounds of appeal based on section 106(3)(b) of the Act the appeal court would require to have assessed the new material in light of the evidence as accepted by the trial court, namely that the Christmas lights were "going up" at the time of the purchase.

Admissibility

24.72 In the Commission's view there can be no criticism of the applicant's former representatives for not leading Dr Refalo's evidence at appeal. While nothing in the notes by Mr Burns and Mr Beckett alters the Commission's decision to refer the case on this ground, it appears that ultimately the decision not to lead the evidence was based upon the applicant's instructions, albeit these were possibly influenced by any advice he was given.

24.73 In terms of sections 106(3)(a) and (3A) of the Act, evidence not heard "at the original proceedings" may found an appeal only where there is a reasonable explanation "of why it was not so heard." In *Campbell v HMA* 1998 SCCR 214 the court held that in assessing the reasonableness of any explanation proffered under section 106(3A) much might depend on the steps which the appellant could reasonably be expected to have taken in the light of what was known at the time. The underlying intention of the provision, it was observed, was that the court should adopt a broad approach in taking into account the circumstances of the particular case (Lord Justice Clerk (Cullen) at p 242). The test was intended to be applied flexibly, and the court should order the new evidence to be heard if it considered it necessary or expedient in the interests of justice (Lord McCluskey at p 262). The test would not be satisfied, however, where the reasonable explanation was simply that a tactical decision had been made not to lead the evidence at trial (Lord Justice Clerk at p 242; Lord Sutherland at p 270; *R v Shields and Patrick* [1977] Crim LR 281).

24.74 In the Commission's view the explanation as to why Dr Refalo's evidence was not heard at trial is simply that, despite what appear to have been reasonable enquiries by both the police (in 1990/91) and the defence (in 1999/2000), it did not come to light until the appeal hearing itself. The Commission considers that such an

explanation is capable of being seen as reasonable by the court in terms of section 106(3A).

24.75 While in most cases a reasonable explanation for the absence of evidence at trial will be sufficient to satisfy the statutory provisions, it is unclear how these apply in cases in which an appellant who has opted not to lead evidence at appeal seeks to do so at subsequent appeal proceedings (ie in the event of a reference by the Commission). In particular, given that the provisions require an explanation for the absence of the evidence “at the original proceedings”, at any future appeal the applicant might need to explain not only why Dr Refalo’s evidence was not heard at trial, but also why it was not heard at his previous appeal. If so, then standing the approach in *Campbell* the tactical nature of the decision not to lead Dr Refalo’s evidence at that time would be significant in determining its current admissibility. As the correct interpretation of the legislation is unsettled on this point, the Commission has not considered it necessary to address the matter.

Conclusion

24.76 For the reasons given the Commission considers that Dr Refalo’s account is capable of being considered as credible and reliable by a reasonable court, and is likely to have had a material part to play in the determination by such a court of a critical issue at trial, namely the date on which the items were purchased from Mary’s House.

(b) Anthony Gauci’s Crown precognition

Introduction

24.77 Although in his police statements and in evidence Mr Gauci was unable precisely to say when the purchase had taken place, this was not the position he adopted when precognosed by the Crown and defence in 1999 (see appendix). In both precognitions he suggests that the purchase took place on a specific date and in his Crown precognition he provides a basis for this recollection.

24.78 By letter dated 24 August 2006 Crown Office confirmed to the Commission that the contents of Mr Gauci's Crown precognition were not disclosed to the defence. According to the letter this was consistent with the Crown's practice at the time and its obligations under *McLeod v HMA* 1998 SCCR 77.

24.79 Before setting out the relevant passage in Mr Gauci's Crown precognition it is important to consider what he said in evidence when asked about the day and date of purchase (some of this evidence is also quoted in the first part of this chapter). As a number of passages in Mr Gauci's police statements were put to him in evidence there is no need to detail these separately. However, it is worth noting that in several statements not referred to in evidence Mr Gauci makes passing reference to the purchase having taken place in "November or December 1988" (see eg his statement of 13 September 1989; CP 455); "December 1988" (see eg his statement of 13 September 1989; CP 457); "during 1988" (statement of 31 August 1990; CP 468); and "November *and* December 1988" (undated statement relating to an interview which took place on 2 October 1989; CP 463).

Mr Gauci's evidence

Examination in chief

Q. The police came to see you at the beginning of September 1989. Were you able to remember when this particular sale had taken place?

A. No. Exactly, I couldn't remember the date, but I remember all the clothes I had sold.

Q. Were you able to tell them that it was towards the end of 1988?

A. Yes, slightly before Christmas it was. I don't remember the exact date, but it must have been about a fortnight before Christmas, but I can't remember the date (31/4730).

Q. You mentioned a little earlier on that you thought that the date that he sold - you sold the clothes to the Libyan would be about a fortnight before Christmas.

A. Something like that, yes. Not exactly, because I did not have -- possibly did not have the system we have today. Today we punch in and out and we know everything, but we didn't have that system then... We didn't know exactly when you sold an item (31/4738-39).

Q. Are you able to say which day of the week it was?

A. No, I have no idea. I can't say. I have no idea. If I said that, I wouldn't be - I would have no -- nothing to count on (31/4779).

Cross examination

Q. ... Now, turning to page 9 for my purposes at the top of the page, what you said to Mr Bell on 1 September [1989; CP 452] was this: I cannot remember the day or date that I met this man. I would think it was a weekday, as I was alone in the shop. My brother Paul did not work in the shop that afternoon, as he had gone home to watch a football match on television. He may be able to recall the game, and this could identify the day and date that I dealt with the man in the shop. Do you see that?

A. Yes. Yes (31/4792-93).

Q. ... And then about the middle of the page [page 3 of Mr Gauci's statement of 10 September 1990; CP 469] Mr Bell, I think it is, is obviously anxious to try to have you help him on pinpointing the date because what he's written down is this: I have been asked to again try and pinpoint the date that I sold the man the clothing. I can only say it was a weekday, there were no Christmas decorations up as I have already said, and I believe it was at the end of November.

Now I am going to come back to that, in view of what you said in your evidence in chief, Mr Gauci. But so far as trying to pinpoint the day is concerned, do you agree that you said to Mr Bell, in September of 1990, that it was a weekday --

A. I can't tell. I don't want to talk offhand, but if I don't have records, how can I say? How can I say yes or no? I have no records as to the date.

Q. I understand that. And I promise you, I am not trying to catch you out. You and I have agreed, Mr. Gauci, that --

A. -- yes, yes, of course I understand. But I want to speak fair. I remember that they were already starting to put up the Christmas decorations, because when the police used to come and get me at 7.00, there used to be these Christmas decorations up. I'm sure there used to be the lights on, so I'm not sure whether it was a couple of weeks before or whether it was later. I don't know about dates, because I've never had -- I've never taken records of these things. So I can't say -- I can't speak offhand. It's not fair if I did.

Q. It's for that reason, Mr. Gauci, that I am looking at statements that you made to police officers a considerable number of years ago, more than ten years ago, because we have all agreed that --

A. Yes, of course.

Q. -- it's common sense that things would be fresher in your mind then, and you would be more likely to be accurate then?

A. Of course. Certainly. Certainly. I used to be certain then. My memory then ten years ago, but I remember a policeman used to come and get me and wait for me and take me to the police headquarters, and there used to be Christmas lights. I don't know whether it was a week or two weeks before Christmas, but I can't remember. I can't remember all the dates because I don't want to tell lies (31/4802-04).

Q. Now, without going into it again, the first paragraph [of Mr Gauci's statement of 19 September 1989; CP 454] deals with clothing. And I was inviting your attention to the second paragraph, which is in these terms: At Christmas time, we put up the decorations about 15 days before Christmas. The decorations were not up when the man bought the clothes. I am sure it was midweek when he called. And then you signed it 'Tony Gauci.'

A. Yes. Yes, but I seem to remember that there used to be lights, because I used to have a policeman come for me, and I remember the lights. But it could have been after the gentleman came to buy the clothes. This is 12 years ago or 11 years ago, not yesterday, and I have no records. I don't take records of these events, dates and things like that.

Q. I understand that. Now, we've covered, I think, some of this ground --

A. Because if I knew what was going to happen, I would have taken note of it, but I knew nothing. I don't know anything about dates and things like that (31/4809-10).

Q. Now, the last sentence is: I am sure it was midweek when he called.

A. Yes.

Q. When we discussed matters earlier, in terms of your normal opening hours and so on, you told me what the hours of the day were that the shop was open, and you told me it was open from Monday to Saturday?

A. Yes.

Q. So can I take it, then, that by 'midweek,' you mean not a Monday and not a Saturday?

A. No, certainly not Saturday. I believe. But I've already told you, I have nothing, no dates. I don't want to say anything about it, because if I don't know, I

don't know. It's simply that. I don't want to mention a date. Why should I say or do so when I do not know? Do you understand?

Q. I do understand. Under our procedure, Mr. Gauci, I ask the questions and you answer them.

A. Yes. Yes. But I'm trying to help.

Q. Indeed.

A. That's what I mean, I don't want to give you a date or say it's Friday. I don't want to tell lies. You understand? (31/4810-11).

A. I can't remember the dates. I don't want to say -- I don't want to give out dates if I am not that sure, sir (31/4816).

Q. When you use the word "midweek", what day of the week do you have in mind, or what days? Would it be --

A. Wednesday, I think. That's how I see it.

Q. Wednesday.

A. But I stress the point, I don't know dates. I don't know the dates (31/4819-20).

Mr Gauci's precognitions

Crown precognition: 25 August 1999

"I have been asked to go over the date [of purchase]. It was sometime at the end of November beginning of December 1988. Something makes me think it might have been 29 November 1988 (a Tuesday) because something happened that day (At this point the witness became flustered and lapsed into Maltese and a

discussion with Detective Sergeant Mario Busuttil who sat in in the precognition of 25 August 1999; through him he said that he had a row with his girlfriend that day but he doesn't want to talk about it any more). Paul was definitely at home that afternoon so it would have been a Wednesday."

Defence precognition: 8 October 1989

"The police asked me about selling these items and what I was able to tell them was the following. One day, it was not a Saturday, a man came in to the shop. I am asked when it was and I remember it was the 29th of the month. I think it was November. I am asked why it was the 29th and all I can say is that is what I think. I know it was not a Saturday."

The Commission's enquiries

24.80 Copies of the statements referred to in this section are contained in the appendix of Commission interviews.

Sergeant Mario Busuttil

24.81 At interview Sergeant Busuttil remembered Mr Gauci being asked by Mr Brisbane (the procurator fiscal who obtained the Crown precognition) about the date on which the man came to his shop, but he could not recall Mr Gauci's response. He was read the relevant passage in the precognition and recalled Mr Gauci telling him that he had had an argument with his girlfriend and that he had "split from her." Sergeant Busuttil could not recall what the argument was about but said that Mr Gauci had been upset by the break-up. Mr Gauci had only said a few words about this and did not discuss the matter again. Sergeant Busuttil knew only that Mr Gauci had a girlfriend and that it came out at precognition. He did not know the name of the girlfriend but thought that she might be living in the St Julians area of Malta. His recollection was that this was the only time during the investigation that Mr Gauci had mentioned having an argument with his girlfriend.

24.82 It is worth quoting in full the relevant passages in Mr Gauci's statement:

"I have been read [the passage in my Crown precognition]... It was not only on one occasion that I fought with my girlfriend. We had lots of arguments. I am asked whether I had a girlfriend at the time of the purchase of the clothing. I do not recall having a girlfriend in 1988 but I am always with someone. It is possible that I had an argument with my girlfriend that day. My girlfriend would cause arguments by suggesting a wedding day or suggesting that we buy expensive furniture. I did not have a fixed income at that time. It is possible that in 1988 I had a girlfriend, but I am not sure. I could have had an argument with my girlfriend on the day of the purchase.

I am told that in both my Crown and defence precognitions I am recorded as saying that the man may have come into my shop on 29th November 1988. I recall telling them the date 29th November, but I was not sure then that the purchase took place on that date. I do not remember what made me think that the purchase took place on 29th November. I used to argue with my girlfriend a lot. I am asked if I can recall the name of my girlfriend at that time. My philosophy is not to have a fixed girlfriend.

I am asked whether, if I can recall arguing with my girlfriend a lot, this suggests that I had a specific girlfriend at the time. I do not recall. I do not know why Mr Brisbane has made this note in the Crown precognition. I told him that I had many arguments with my girlfriend. It is probable that Mr Brisbane misunderstood me, and he mentioned in the report that the argument was on the day that the man came into the shop. I am asked whether I ever told the police that the purchase took place on 29th November. It is possible that I told the police this but I do not recall now what I said to them."

Paul Gauci

24.83 The passage in Mr Gauci's Crown precognition was also read to Paul Gauci at interview. In response Paul Gauci said that he would not know if Mr Gauci had a girlfriend in 1988 and that it was a matter personal to Mr Gauci.

Henry Bell

24.84 Mr Bell was asked if Mr Gauci ever informed him that he had had a row with his girlfriend on the date of purchase. Mr Bell recalled Mr Gauci having had a girlfriend whom he wanted to marry but who did not wish to marry him, or else that he had liked a girlfriend more than she liked him. According to Mr Bell, Mr Gauci could have been going out with her at the time of the purchase in 1988. However, Mr Bell said that it was possible that he was confused and that the woman to whom he was referring was actually Paul Gauci's girlfriend. As far as Mr Bell could recall Mr Gauci had never tried to pinpoint the date of purchase by reference to an argument that he might have had with a girlfriend.

John Beckett QC

24.85 Mr Beckett confirmed that Anthony and Paul Gauci's Crown precognitions were not disclosed to the defence and in general said that he would not have expected them to be disclosed then or now. According to Mr Beckett if a Crown precognition contained something exculpatory then the Crown must address this but in terms of the law one cannot cross examine about the contents of a precognition. In the present case the approach taken to the relevant passage in Mr Gauci's defence precognition was that if he was to have repeated in evidence that the purchase had taken place on 29 November 1988 this would have been helpful to the defence. However, in Mr Beckett's view he could not have been cross examined about the contents of his defence precognition. According to Mr Beckett the impression the defence had of Mr Gauci was that he was liable to say anything. Mr Beckett added that if Mr Gauci had made reference in his evidence to 29 November 1988 the Crown would no doubt have referred to his various prior statements in which his position was different.

Alistair Duff

24.86 Mr Duff did not think that the defence was aware of the contents of Mr Gauci's Crown precognition. He suspected that at the time of the trial the defence would not even have thought to ask the Crown for this as under the "old regime" they would not have been given it. Under the present system, however, Mr Duff considered that if Mr Gauci's Crown precognition contained something significant about his identification of the purchaser then it should have been disclosed.

24.87 Mr Duff was referred to the relevant passage in Mr Gauci's defence precognition and was asked whether, even though this could not have been put to Mr Gauci in evidence, it might have been possible to ask him about it in cross examination. In reply Mr Duff said that Mr Gauci could have been asked how sure he was about the date. Mr Duff accepted that Mr Gauci might also have been asked whether he had ever said that the purchase had taken place upon a particular date, but he explained that if the witness had denied having done so it would not have been possible to put the precognition to him. Accordingly, in Mr Duff's view it was arguably a pointless exercise since there was no ability to "snap the trap shut" on the witness.

William Taylor QC

24.88 Mr Taylor was referred to the relevant passage in Mr Gauci's defence precognition and was asked if any consideration was given to cross examining him about whether he had ever specified the date of purchase. Mr Taylor said that if Mr Gauci had been asked about this, and had denied having done so, one would have been stuck with his answer. According to Mr Taylor "if you do not want to be stuck with the answer, you should not ask the question." In response to the suggestion that Mr Gauci might well have accepted that he had previously specified the date, Mr Taylor replied that "it would be a brave counsel that would ask him about that."

24.89 Mr Taylor was shown the relevant passage in the Crown precognition and confirmed that it had not been disclosed to the defence. The Crown, he said, had a duty to disclose any matters which assisted the defence or undermined the Crown

case. In Mr Taylor's view, the passage in question was disclosable under both of these categories. On being reminded that Mr Gauci had also suggested in his defence precognition that the purchase had taken place on 29 November 1988, Mr Taylor replied:

"If you are trying to ascertain a date, and Gauci says that he remembers that at the end of November he had a fight with his girlfriend, you would go to the girlfriend, you would enquire with her whether she could recall the date of this argument."

24.90 It was suggested to Mr Taylor that this would assume that one could locate Mr Gauci's girlfriend or indeed that one exists. In Mr Taylor's view, however, the witness was clearly upset at Crown precognition. Malta was like a village and so it would have been possible to find her. Had the efforts to do so come to nothing Mr Taylor would have arranged for Mr Duff to precognosce Mr Gauci again and ask him about the row. It was possible, for example, that the argument might have been about a film they had seen, in which case the defence could have made enquiries about the dates on which the film was shown. In Mr Taylor's view if Mr Gauci had been vague about the matter and was unable to remember which girlfriend it was this would have affected his credibility. If Mr Gauci had denied having a girlfriend Sergeant Busuttil could have been called to testify that Mr Gauci had said that he did have one and that he had become flustered when he was asked about this. According to Mr Taylor it would not have been necessary to refer to Mr Gauci's Crown precognition in order to bring this into the evidence. Enquiries could have been made with Sergeant Busuttil.

Consideration

The Crown's duty of disclosure in respect of precognitions

24.91 As explained in chapter 22, at the time of the applicant's trial the Crown's obligations in respect of disclosure were as set out in *McLeod v HMA* 1998 SCCR 77. There, the High Court, applying guidance given by the European Court of Human Rights in *Edwards v United Kingdom* (1992) 15 EHRR 242, held that the Crown has a duty at any time to disclose to the defence information in its possession that would

tend to exculpate the accused, or is likely to be of material assistance to the proper preparation or presentation of the accused's defence (Lord Justice General (Rodger) at p 97); and information in its possession and knowledge which is significant to any indicated line of defence, or which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt upon it (Lord Hamilton at p 100). In *Holland v HMA* 2005 SCCR 417 it was accepted by the parties that this formulation was an accurate description of the Crown's obligations under article 6(1) of the European Convention of Human Rights (Lord Rodger at paragraph 65).

24.92 In the Commission's view it is clear that in *McLeod* the court did not seek to restrict the Crown's disclosure obligations to particular classes of information. Accordingly while in terms of current practice Crown precognitions are not routinely disclosed, *McLeod* provides no basis for withholding these in circumstances where they contain information likely to be of material assistance to the defence. This was recognised in *Wotherspoon v HMA* 1998 SCCR 615, in which the court remarked that the Crown had "very properly" informed the defence at trial of what had been said by a witness at Crown precognition. More recently in *Holland* the Crown, before both the High Court and the Privy Council, conceded that it had infringed the appellant's article 6(1) Convention right by failing to disclose to the defence at trial a remark made by a complainer at Crown precognition.

24.93 Once disclosed, however, there are limitations on the extent to which Crown precognitions can be used in evidence. Under section 263(4) of the Act a witness may be examined as to whether he has on any previous occasion made a statement on a matter pertinent to the issue at trial different from the evidence given by him; and evidence may be led to prove that the witness made the different statement on the occasion specified. Although the term "statement" is not defined in section 263 it is well established that it does not extend to precognitions obtained by the Crown and defence in preparation for trial: *Al Megrahi v HMA* 2000 SCCR 1003; *Coll Petitioner* 1977 SLT 58; *Kerr v HMA* 1958 JC 14; *McNeilie v HMA* 1929 SLT 145. The effect of these decisions is that neither the Crown nor the defence can put to a witness in evidence an inconsistent account given by him at precognition (other than one given

at precognition on oath: *Coll Petitioner*). Nor can evidence be led of the contents of Crown and defence precognitions.

24.94 On the other hand there is nothing to prevent the Crown and defence from using the contents of precognitions generally as a basis for questioning witnesses (indeed, where, for any reason, police witness statements are not available they are likely to be the only such basis: see eg *Sinclair v HMA* 2005 SCCR 446). The Commission therefore does not accept Mr Beckett's comment at interview that a witness cannot be cross examined "about" the contents of a precognition.

24.95 In *Holland* the undisclosed remark made by the complainer at Crown precognition was to the effect that following her attendance at an identification parade, in which she had not identified the appellant, a police officer had told her that she "didn't do too well". In determining the significance of the Crown's failure to disclose this information at trial the Privy Council said the following:

"Similarly, it is hard to make any precise assessment of the significance of the Crown's failure to disclose the remark made to Miss Gilchrist after the identification parade. One can be sure, however, that if the defence had been aware of it [the appellant's counsel] would have deployed it in her cross examination of Miss Gilchrist. It would have been one more reason for suggesting to her – and ultimately the jury – that her dock identification of the appellant was not to be trusted. By withholding the information the Crown deprived the defence of the opportunity to advance this additional argument on the crucial issue of identification" (Lord Rodger at paragraph 83).

24.96 It is not clear from the Privy Council's judgment precisely how the information in question might have been used in cross examination but one assumes that it would have entailed counsel asking the complainer whether she recalled being spoken to by a police officer after the parade and if so what he had said to her. In terms of the authorities referred to above, however, if the complainer had denied discussing the matter with a police officer it would not have been competent for counsel to put to her directly the remark she was noted as having made at Crown precognition.

Potential significance

24.97 In the Commission's view there are two questions to consider. The first is whether the Crown was under a duty to disclose to the defence the relevant passage in Mr Gauci's Crown precognition, or at least the information contained in that passage. The second is, assuming such a duty did arise, whether the Crown's failure in this respect indicates that a miscarriage of justice may have occurred.

24.98 In respect of the first question it is important to examine closely what Mr Gauci said at Crown precognition on the subject of the date. It is clear from the passage quoted above that at no time did Mr Gauci express certainty that the purchase had taken place on 29 November 1988. Indeed that date is not consistent with Mr Gauci's recollection in the same passage that the purchase might have taken place at the "beginning of December 1988", or with an earlier passage in which he recalls the purchase as having occurred "just before Christmas." Furthermore, as 29 November 1988 fell on a Tuesday Mr Gauci's belief that the purchase might have occurred on that date runs contrary to his final position at precognition, namely that as Paul Gauci was at home that afternoon "it would have been a Wednesday." There is also perhaps some uncertainty as to whether the use of the term "that day" in the passage indicates that Mr Gauci specifically recalled having a row with his girlfriend on the date of purchase or on 29 November 1988.

24.99 In the Commission's view while such factors might affect the weight to be attached to Mr Gauci's recollections, they do not justify the Crown's decision not to disclose details of the passage to the defence. The Crown's position throughout its preparation and presentation of the case was that the items were purchased from Mr Gauci on 7 December 1988, a date on which there was evidence that the applicant was not only in Malta but staying at a hotel close to Mary's House. Indeed, had the court concluded that the purchase had taken place on some other date in November or December 1988 this would effectively have eliminated the applicant as the purchaser since, on the evidence, it was only on 7 December that he would have had the opportunity to buy the items. Viewed in that context, information from Mr Gauci not only that the purchase might have taken place on 29 November 1988 but that he had

an argument with his girlfriend that day, is of obvious significance to the defence. While Mr Gauci's final position in the precognition might cast doubt upon the reliability of that recollection, in the Commission's view this did not relieve the Crown of its duty to disclose the information contained in the passage. Similarly, the fact that the defence was aware of Mr Gauci's belief that the purchase had taken place on 29 November 1988 is relevant to determining the significance of the Crown's failure to disclose the passage, not to whether it ought to have been disclosed in the first place.

24.100 In the Commission's view the information contained in the relevant passage in Mr Gauci's Crown precognition ought to have been disclosed to the defence prior to the trial. Not only was it likely to have been of material assistance to the preparation or presentation of the applicant's defence, it also potentially undermined an important element of the Crown case.

24.101 The second question, as to whether the Crown's failure to disclose the information in question indicates that a miscarriage of justice may have occurred, must be assessed in terms of the test applied in *Holland* for determining the significance of undisclosed evidence:

"Information about the outstanding charges might therefore have played a useful part in the defence effort to undermine the credibility of the Crown's principal witness on charge (2). At least, that possibility cannot be excluded. One cannot tell, for sure, what the effect of such cross examination would have been. But applying the test suggested by Lord Justice General Clyde in Hogg v Clark... I cannot say that the fact that counsel was unable to cross examine in this way might not possibly have affected the jury's (majority) verdict on charge (2) – and hence their verdict on charge (3)" (Lord Rodger at paragraph 82).

24.102 At the very least the Crown's failure to disclose the information deprived the defence of the opportunity to carry out enquiries to establish the identity of any girlfriend Mr Gauci had in 1988 and whether she could recall an argument between them in November of that year. While the Commission's own enquiries in this area were inconclusive as a result of Mr Gauci's responses at interview, there is no telling

what he would have been able to recall had he been precognosced on the matter in 1999.

24.103 As has been said, the defence was aware of Mr Gauci's belief that the purchase had taken place on 29 November 1988. Indeed, the account given by him in his defence precognition is, if anything, more certain: "I remember it was the 29th of the month. I think it was November." The defence also put to Mr Gauci in cross examination the terms of his statement of 10 September 1990 in which he said he believed the purchase "was at the end of November." In these circumstances it might be said that the applicant was not prejudiced as a result of the Crown's failure to disclose that particular passage in Mr Gauci's precognition: *Kelly v HMA* 2006 SCCR 9.

24.104 In the Commission's view, however, Mr Gauci's apparent recollection of the purchase date in his Crown precognition cannot be separated from the basis he provides for this. Had the defence been aware that Mr Gauci had specified the same date in both precognitions this might well have altered Mr Taylor's approach as to whether Mr Gauci ought to have been cross examined about that date, even though the precognitions themselves could not have been put to him. Although the pattern of Mr Gauci's evidence on this issue suggests that he would have remained reluctant to be drawn on the date, it is again impossible to tell what he would have said had he been asked about this in the context of whether he recalled an argument with his girlfriend that day. Indeed, based upon his statement to the Commission's enquiry team his evidence might well have been that he recalled "telling them the date 29th November", that he was not sure that the purchase had taken place on that date and that he did not remember what made him think that it had.

24.105 The defence might also have sought to call Sergeant Busuttil to speak to what Mr Gauci had said during Crown precognition. Although there might have been obstacles to such a course, in the Commission's view these would not necessarily have been insurmountable (*Holland*, Lord Rodger at paragraph 82). Any evidence by Sergeant Busuttil on the matter would have been inadmissible to the extent that it sought to prove the truth of what Mr Gauci had said at precognition, but it would have been admissible for the limited purpose of demonstrating that Mr Gauci had in fact

said such things. Accordingly, based on the contents of his statement to the Commission, Sergeant Busuttil might have testified that in response to questioning regarding the date of purchase Mr Gauci had told him that he recalled having an argument with his girlfriend that day but that he didn't want to talk about it anymore. He could also have spoken to Mr Gauci telling him about his upset at the break-up of the relationship. Although at interview with the Commission Sergeant Busuttil was unclear as to whether he recalled Mr Gauci saying at precognition that the purchase had taken place on 29 November 1988, again it is impossible to say what his recollection might have been nearer the time.

24.106 In these circumstances, if Mr Gauci had been unable to recall in evidence whether he had a girlfriend at the time of the purchase this might have been contrasted with Sergeant Busuttil's recollections of what Mr Gauci had said on the matter at Crown precognition. At the very least this might have given the trial court further reason to doubt the reliability of Mr Gauci's evidence. Indeed, had the defence established that Mr Gauci had at one stage believed that the purchase had taken place on 29 November 1988 this might have cast doubt upon his other evidence that the purchase had occurred "about a fortnight before Christmas". If so then a key factor in the trial court's determination of the purchase date would have been undermined.

24.107 By its nature the above assessment is speculative. Although Mr Taylor was adamant that steps such as these would have been taken, it is impossible to say for certain what would have occurred had the information in Mr Gauci's Crown precognition been disclosed prior to the trial. Clearly there would have been obstacles to leading Sergeant Busuttil's evidence on the matter and even if these had been overcome it is impossible to know what evidence might have emerged and the view that might have been taken of it by the trial court. However, the Commission is unable to say that the defence, had it sought to take such steps, would inevitably have been unsuccessful in its efforts. Likewise the Commission is unable to say that the evidence which might have emerged would not have been helpful to the defence in undermining further the reliability of Mr Gauci's evidence as to the date. In any event, standing the approach taken by the Privy Council in *Holland* it was for the defence to decide upon the use to which the information might be put, if any, and for the court to determine its significance as appropriate (Lord Rodger at paragraph 72).

24.108 In conclusion, the passage in Mr Gauci's Crown precognition might have played a useful part in the preparation and presentation of the defence case in that it would have assisted in challenging Mr Gauci's evidence that the purchase took place about a fortnight before Christmas and in undermining the date of purchase advanced by the Crown. In the Commission's view by withholding this information the Crown deprived the defence of the opportunity to take such steps as it might have deemed necessary. Given the importance which the trial court attached to the date of purchase in drawing the inference that the applicant was the purchaser the Commission is unable to say that such measures might not have affected the verdict.

Overall conclusion

24.109 In the Commission's view the grounds addressed in this chapter, taken together or in isolation, indicate that a miscarriage of justice may have occurred. In particular, both grounds cast further doubt upon the trial court's conclusion that the purchase of the items from Mary's House took place on 7 December 1988.

24.110 In referring the case on this basis the Commission has taken into account a passage in the applicant's first supplementary defence precognition in which he said that he could travel to Malta from Tripoli in such a way as to leave no record of having done so. For the reasons given in chapter 27, however, the Commission does not consider that this information undermines the grounds set out in this chapter.

CHAPTER 25

UNDISCLOSED PROTECTIVELY MARKED DOCUMENTS

25.1 In 2006 Crown Office informed the Commission of the existence of two protectively marked documents in its possession. These documents were made available for viewing by a member of the Commission's enquiry team on 21 September 2006 at Dumfries police station on the condition that they would be treated as if they had been supplied under the minute of agreement between the Commission and D&G. Notes were permitted to be taken of the items and these notes are currently in the possession of D&G.

25.2 It was subsequently established that copies of the items, along with other documents relevant to them, were also held by D&G under the HOLMES reference D9661. These documents were examined by a member of the Commission's enquiry team whose notes are currently in the possession of D&G.

25.3 By letter dated 27 April 2007 Crown Office confirmed that neither of the protectively marked documents was disclosed to the defence. According to Crown Office's letter, "[the] documents were considered carefully by the Crown for the purposes of disclosure and the conclusion was reached that the documents did not require to be disclosed in terms of the Crown's obligations." It was also pointed out in the letter that "it has never been the Crown's position in this case that the MST-13 timers were not supplied by the Libyan intelligence services to any other party or that only the Libyan intelligence services were in possession of the timers."

25.4 Crown Office also confirmed to the Commission that neither they nor the police had carried out further enquiries or recovered any further information in connection with information contained in one of the protectively marked documents.

25.5 On 29 March 2007 the Commission sought the consent of Crown Office and D&G to disclose the documents under the minute of agreement. On 27 April 2007 the Commission was informed by Crown Office that such consent could not be given without the permission of the relevant authorities of the country from which the

documents originated. Although attempts were made on behalf of Crown Office to obtain the consent of those authorities, as at the date of issue of the Commission's statement of reasons this had not been given.

25.6 In the Commission's view the Crown's decision not to disclose one of the documents to the defence indicates that a miscarriage of justice may have occurred in applicant's case. In reaching this decision the Commission has taken into account paragraphs 49, 73 and 74 of the trial court's judgment.

25.7 In any other circumstances the Commission would have explored in detail its reasons for referring the case on this basis. However, in light of the restrictions placed upon its disclosure of the items it is unable to do so.

25.8 The Commission considered applying to the court for an order under section 194I of the Act requiring Crown Office to produce the documents. However, given the need to finalise the review, and the fact that other grounds of referral had been identified, the decision was taken not to do so. In any event, even if an order had been obtained by the Commission under section 194I of the Act, in terms of paragraph 6(5) of Schedule 9A it would have been open to Crown Office to notify the Commission that onward disclosure might be contrary to the interests of national security. In such circumstances, the Commission would have been bound to deal with the material in a manner appropriate for safeguarding the interests of national security. It is therefore unlikely that the Commission would have been any less constrained in its ability to disclose the documents had it made use of its statutory powers.

CHAPTER 26

OTHER MATTERS

Introduction

26.1 Before assessing whether it is in the interests of justice to refer the case under section 194C(b) of the Act (see chapter 27), it is appropriate first to address a number of other matters which were considered by the Commission during the course of the review. Although in the Commission's view these matters do not indicate that a miscarriage of justice may have occurred, nevertheless in some cases it considers them to be a source of concern.

The identification of the purchaser as Libyan

26.2 As explained in chapter 4 the application to the Commission seeks to cast doubt upon Mr Gauci's identification of the purchaser as a Libyan. Details of what Mr Gauci said in his statements and evidence in this connection are provided in chapter 18. Having considered these accounts, along with others given by several Maltese witnesses during the course of the review (eg George Grech and Godfrey Scicluna, see appendix of Commission interviews) the Commission decided that further enquiries were necessary in this connection. The Commission therefore instructed two psychologists in the UK, Professors Tim Valentine and Ray Bull, to undertake a research study in Malta. The aim of the study was to assess the extent to which Maltese men of similar age and occupational background to Mr Gauci were able reliably to distinguish men of Libyan nationality from those of other Arab nationalities. The research took place in July 2005 and the findings are contained in a report by Professors Valentine and Bull dated 10 November 2005, and a supplementary report by Professor Valentine dated 5 January 2006 (see appendix).

26.3 The testing involved controlled one-to-one interactions between samples of Maltese and Arab men, including Libyans. In order to simulate as closely as possible the circumstances of the transaction described by Mr Gauci, an experimental task was devised in which participants were asked to communicate as far as possible in

Maltese, English and Arabic. Maltese participants were required to be of similar age to Mr Gauci and to have day to day contact with persons foreign to Malta who spoke languages other than Maltese or English. Arab participants were also required to fulfil certain criteria.

26.4 The principal finding of the study was that Maltese men of similar age and experience to Mr Gauci are able to judge the nationality of Libyans more accurately than would be expected by chance, and more accurately than they can judge the other Arab nationalities included in the study. Indeed, almost half of the Libyan participants were correctly classified as Libyan. According to the researchers this finding provides some support for the contention that Mr Gauci was able accurately to judge the purchaser's nationality as Libyan.

26.5 However, that conclusion is subject to the following caveats:

“First, the ability of the Maltese men, although better than chance, was far from perfect. Almost one quarter of non-Libyans whom they met were incorrectly classified as Libyan. When a judgement of Libyan nationality was made, it was accurate on only 40% of occasions. These data suggest that there is a substantial possibility that [Mr Gauci] might be mistaken in his judgement.

“The second caveat is that the confidence of the Maltese men was not directly associated with their performance. Men who expressed strong confidence in their judgement that a man was Libyan, tended to be less likely to be accurate in their judgement than men who were ‘fairly confident’. There was a tendency for ‘very confident’ Libyan decisions to be over-confident. Decisions described as ‘very confident’ were more likely to incorrectly classify a non-Libyan as ‘Libyan’ than decisions made with any other level of confidence. These data suggest that the confidence that the witness expresses should not be used to infer the accuracy of his judgement.”

26.6 The second caveat is of relevance given the high level of confidence which Mr Gauci expressed in the Libyan identification when interviewed by the Commission's enquiry team (see appendix of Commission interviews). In terms of

the findings, when Maltese participants were faced with a Libyan the accuracy of “very confident” judgments was high (66%). However, the false positive rate (ie the rate by which non-Libyans were wrongly identified as Libyan) was higher for very confident judgments (42%) than for any other level of confidence expressed. The study also found that there was a “slight bias” on the part of the Maltese participants to label Arab participants as Libyan.

26.7 In assessing the significance of the findings the Commission has considered whether they are (a) capable of being regarded as credible and reliable by a reasonable court and (b) likely to have had a material bearing upon, or a material part to play in, the determination by a reasonable court of a critical issue at trial (*Al Megrahi v HMA* 2002 SCCR 509; *Cameron v HMA* 1987 SCCR 608).

26.8 In respect of the first of those tests it is important to highlight some of the difficulties which occurred during the recruitment of Maltese and Arab participants for the study. Although the selection criteria for participants were for the most part satisfied, in some cases they were not. For example, one of the requirements was that Arab participants should not have spent any considerable period outside their countries of origin such as might distort any characteristics which could assist in the correct identification of their nationality. However, as the recruitment of all participants took place in Malta it was inevitable that those in the Arab sample would have spent some time in that country. Although the majority of the Libyan participants had spent only limited periods abroad, two of them had lived extensively in Malta. Furthermore, while Arab participants were required to prove their nationality by means of a passport, identity card or driving licence, one of them was unable to do so. Although it is not mentioned in the report, the participant in question formed part of the Libyan sample. In the Commission’s view both of these factors might be viewed as undermining the reliability of the findings.

26.9 In any event, although the precise basis for Mr Gauci’s identification of the purchaser as Libyan remains unclear (see his statement to the Commission; also chapter 21) it cannot be said that he is unique among Maltese men of similar age and experience in being able accurately to do so. In that sense, the findings are distinguishable from those produced by the research described by the court in

Campbell v HMA 2004 SCCR 220, where none of the participants was able to recall, verbatim, comments attributed by police officers to two of the appellants. Accordingly, while the results of the present study do not inspire confidence in the trial court's conclusion that this aspect of Mr Gauci's evidence was "entirely reliable", in the Commission's view they are not capable of demonstrating that his evidence was unreliable.

26.10 For these reasons, the Commission has reached the view that the findings are not sufficiently material to satisfy the second arm of the test described above.

26.11 The Commission has also considered under this heading a police statement given by a witness, David Wright, on 15 December 1989 (HOLMES reference S5114). A copy of the statement is contained in the appendix along with relevant correspondence from Crown Office and D&G. As the existence of this statement only became known to the Commission at a late stage of the review it was not possible to put its contents to Mr Gauci at interview or to make further enquiries with Mr Wright himself. In these circumstances, although the statement may be relevant to the Libyan identification, the Commission has not been able to reach a view as to its potential significance.

Anthony Gauci's other sightings of the purchaser

26.12 In chapter 18 the Commission addressed an allegation concerning the decision by the applicant's trial representatives not to cross examine Mr Gauci about other possible sightings he had made of the purchaser. One of those sightings is detailed in Mr Gauci's statement of 26 September 1989 (CP 459) in which he described a man as having entered his shop on Monday 25 September 1989. According to the statement Mr Gauci was immediately startled as he believed that this man was the "same man" as he had described in his previous statements (ie the purchaser). At the foot of the HOLMES version of this statement (see appendix to chapter 18) there is a note by the police to the effect that when initially seen Mr Gauci said that the man described in the statement had visited his shop on 21 or 22 September 1989. However, when the statement was noted he said that the visit had

taken place on 25 September and was not questioned about the date change. The note also refers to evidence that the applicant was in Malta on 21-24 September 1989.

26.13 In his statement of 4 October 1989 (CP 462) Mr Gauci described the man who bought the dresses as being only “similar” to the purchaser and as having come to his shop “last Monday” ie 25 September 1989. In his statement of 10 September 1990 (CP 469) he repeated that the man who bought the dresses was only “similar” to the purchaser and he could not say for definite that it was the same person. However, when questioned by the police again on 4 November 1991 (CP 471) he suggested that the man he saw in September 1989 was the “twin” of the purchaser. When asked at that stage to explain why on the morning of 26 September 1989 he had told the police that the man who purchased the dresses had come to his shop on 21 or 22 September, but when seen on the evening of 26 September had said that the incident had taken place the previous day, Mr Gauci was unable to do so. He could only say that he had problems at the time with his father and brother who did not want him to speak to the police anymore, and that he might have got things mixed up.

26.14 Further reference to this incident is contained in a report apparently compiled by Henry Bell. The report was attached to a Joint Intelligence Group (“JIG”) fax numbered 1438 (see appendix of protectively marked materials) and describes a meeting with Mr Gauci on 2 October 1989. It contains the following passage:

“Tony then left to speak with FBI Hosinski in presence of BKA Frank Leidig, to allow them to assess him and his credibility. He (Tony) now states that he can only be 50% sure that it was the same ‘Man’ in the shop on Monday 25 September 89. The question now is with an apparent ability to recall in detail events of November and possibly December 1988 coupled with his recollection of the ‘Shooting trip’ several years ago Tony can only be 50% sure of a week old sighting. DCI Bell pointed out that Tony was still under pressure from his father and brother Paul not to give information. ”

26.15 By letter dated 8 March 2007 Crown Office confirmed that it has no record of this report within its files and that it was not disclosed to the defence. On 18 December 2006 a member of the Commission’s enquiry team examined a number of

protectively marked Security Service documents held at Thames House including a file containing JIG Fax 804. JIG Fax 804 contains the complete version of the report detailed in JIG Fax 1438. The notes taken in this connection are currently in the possession of the Security Service. It was apparent from a note within the relevant file that its contents had been examined by the Crown on 21 March 2000.

26.16 At interview with the Commission's enquiry team Mr Bell stated that there was no sinister reason why the incident described in the report was not recorded in a statement. He suggested that Mr Gauci would have been under great pressure at that time and that this might explain his change in position regarding the sighting.

26.17 In chapter 18 the Commission concluded that the risks associated with cross examining Mr Gauci on his other possible sightings of the purchaser justified the decision by the defence not to do so. In terms of the accounts given by Mr Beckett and Mr Duff at interview, it seems highly unlikely that the disclosure of Mr Bell's report would have resulted in the defence adopting a different approach to this issue.

26.18 Nevertheless the fact remains that within a week of identifying the man who bought the dresses as the "same man" as the purchaser, Mr Gauci could only be "50% sure" of this. As Mr Bell seems to suggest in his report, Mr Gauci's ability to recall with only fifty per cent certainty a positive sighting made by him seven days previously might call into question his ability to recall the man who purchased the items from his shop ten months previously (not to mention his ability to do so more than a decade later at the identification parade and in court). Furthermore, as highlighted in chapter 18, over the course of 26 September 1989 Mr Gauci also altered his position from one in which the man who bought the dresses had come to his shop the previous week, to one in which he had come the previous day.

26.19 In the Commission's view it is a matter of concern that none of this evidence was before the trial court, which proceeded on the basis that Mr Gauci had seen the purchaser on only one occasion. As indicated the Commission considers there to be sound reasons as to why the defence did not seek to cross examine Mr Gauci on the other possible sightings. However, the same might not apply to the Crown whose approach to such evidence should perhaps have been dictated by more than simply

tactical considerations, even if the evidence about the other sightings did not amount to a “plain contradiction” of Mr Gauci’s testimony (cf *Kelly v HMA* 2006 SCCR 9, at para 22).

Other photographs viewed by Anthony Gauci

26.20 The final matter to be addressed in this chapter arises from another JIG document, known as fax 731. The document is dated 8 September 1989, a week after the police first spoke to Mr Gauci. It states:

“Following the description given by Anthony Gauci, Inspector Anthony [sic] Scicluna of the Maltese Police Security Branch thought that he recognised the description of the suspect as being that of No 1 on the accompanying sheets.

Bell (for evidential reasons) did not wish at this stage to have the witness shown photographs but Scicluna did so on his own. The witness did not i/d No 1 but he said that the suspect had a hairstyle identical to No 2 (afro-style) and the facial features of No 20.”

26.21 A redacted version of this document is contained in the appendix, in which the names and other details of the individuals whose photographs were shown to Mr Gauci have been removed. The Commission has seen the document in unredacted form. The Commission is not aware of any police statements or other records which record that Mr Gauci was shown these photographs.

26.22 By letter dated 8 March 2007 Crown Office confirmed that it has no record of fax 731 within its files and that it was not disclosed to the defence. On 18 December 2006 a member of the Commission’s enquiry team examined a number of protectively marked Security Service documents held at Thames House including a file containing JIG Fax 731. The notes taken in this connection are currently in the possession of the Security Service. It was apparent from a note within the relevant file that its contents had been examined by the Crown on 21 March 2000.

26.23 At interview with the Commission's enquiry team, Mr Bell stated that he would have been present when Mr Gauci was shown the photographs and that Mr Scicluna would not have done so by himself. Mr Bell said he was clear in his mind that Mr Gauci had not identified the purchaser on this occasion. He was asked whether he considered Mr Gauci's description of photograph number 20 to be in any way similar to the terms of Mr Gauci's identification of the applicant by photograph on 15 February 1991 (when he said that the applicant had the same eyebrows, chin and shape of face as the purchaser). Mr Bell replied that it would be a "quantum leap" to compare the two incidents in this way and pointed out that Mr Gauci had described a number of other individuals as having similar features to those of the purchaser. He explained that on the occasion in question Mr Gauci's initial position would have been that he could not see the purchaser in the photo-spread. Mr Gauci's comments regarding photograph number 20 would, Mr Bell said, have been made as a result of being asked whether he saw anyone similar to the purchaser in the photo-spread.

26.24 The Commission also raised this matter with Mr Gauci whose account provides support for Mr Bell's position. So far as Mr Gauci could recall he had never been shown photographs without a Scottish police officer being present. He was shown the photographs attached to fax 731, in response to which he said that the purchaser's hair was like the hairstyles of the men shown in photographs number 2 and 23. He said of photograph number 20 that the purchaser's face was not dark like the man pictured in that photograph and that the purchaser did not have a moustache. He confirmed that the man in photograph 20 was not the purchaser.

26.25 It is a matter of concern to the Commission that this incident was never recorded in a police statement. However, in light of its enquiries the Commission does not consider that the non-disclosure of fax 731 breached the applicant's right to a fair trial. It appears that on the occasion in question Mr Gauci simply highlighted the features of the men in the photographs which he recalled as similar to those of the purchaser. Although he believed the man in photograph number 20 had the facial features of the purchaser, in terms of the accounts given by Mr Bell and Mr Gauci, it is clear that this did not amount to an identification.

26.26 It is worth noting in this connection that the Commission knows of no other instances in which the showing of photographs to Mr Gauci by the police was not recorded in his statements. In particular the Commission has found no evidence to suggest that the police showed Mr Gauci a photograph of the applicant on any occasion other than 15 February 1991 (see chapter 5).

CHAPTER 27

INTERESTS OF JUSTICE

Introduction

27.1 In terms of section 194C of the Act, where the Commission believes that a miscarriage of justice may have occurred, it may refer the case to the High Court only where it also believes that it is in the interests of justice that a reference should be made.

27.2 There is little in the way of guidance, either statutory or judicial, as to the correct interpretation of the interests of justice test. The circumstances in which the Commission might contemplate refusing to refer a case on this basis would have to be somewhat special. For example, notwithstanding its conclusion that a miscarriage of justice may have occurred in a particular case as a result of, say, a misdirection by the trial judge, the Commission might decide not to refer where the applicant's guilt is nevertheless beyond doubt, such as where the applicant has made a full confession to the Commission, or where the evidence against him was so overwhelming that the only logical conclusion is his guilt. The Commission recognises, however, that faced with a similar situation at appeal the High Court might consider that the overall circumstances did not warrant the finding that there had been a miscarriage of justice in the first place. Thus it is arguable that such matters should be considered by the Commission under the first branch of the test in section 194C.

27.3 In any event, in considering whether or not it is in the interests of justice to refer the applicant's case to the High Court, the Commission is of the view that the accounts given by the applicant and the co-accused at precognition and at interview with the Commission must be considered. Notwithstanding its conclusions in chapters 21 to 25 above, if the entirety of the evidence in the case, including their accounts and the other information which has been uncovered during the review, were such as to leave the Commission in no doubt about the guilt of the applicant the Commission might be led to conclude that it is not in the interests of justice to make a reference.

27.4 The positions of the applicant and the co-accused (referred to in this chapter as “Mr Fhimah”) in respect of a number of important aspects of the Crown’s case are set out below. Thereafter the Commission sets out its conclusions as to whether it is in the interests of justice to refer the applicant’s case.

(i) The applicant

General

27.5 The areas covered in this section include the applicant’s connections to the JSO; his association with MEBO; his movements in December 1988 and his use of a coded passport. Other matters of interest to the Commission, but which did not feature at trial, such as the applicant’s Swiss bank account and his ability to travel without leaving a record, are also addressed. In order to provide some context for these issues, a brief biography of the applicant is included.

27.6 There are three main sources for the accounts given by the applicant. First, the applicant was interviewed in Libya by the US journalist, Pierre Salinger, in November 1991 (“the Salinger interview”), a transcript of which formed Crown production number 1728. Secondly, the applicant’s trial representatives obtained a total of thirty-seven precognitions from him between 1 June 1999 and 13 September 2000 (although the last account is undated). The Commission obtained copies of these precognitions from MacKechnie and Associates, although one (the 25th supplementary precognition) was missing. Copies are contained in the appendix. Lastly, two members of the Commission’s enquiry team interviewed the applicant at HM Prison Barlinnie on a number of dates between 24 August and 9 September 2004 (“the Commission interview”). The interview was tape-recorded and a transcript is contained in the appendix of Commission interviews. A supplementary statement obtained from the applicant in relation to his Swiss bank account is also included in that appendix. Reference is made throughout this section to each of these sources.

Biography

27.7 The following details of the applicant's background are taken primarily from the account he gave in his initial precognition.

27.8 The applicant was born on 1 April 1952 in Tripoli. After studying English and maritime law for a year in Cardiff in 1970-1971, he joined LAA in 1972. He trained in the US in 1973 and was in the first group of LAA employees to receive the Federal Aviation Administration qualification as a flight dispatcher. He thereafter worked at Tripoli airport and by 1979 was Chief of Flight Dispatchers. Between 1979 and 1980 he worked at the University of Benghazi, before returning to his post at LAA. There he became Chief of the Operations Department and was responsible for organising the training of pilots. He later became a member of the committee which had responsibility for running Tripoli airport, and was also station manager there for a period. In 1984, he attended an airline safety training course in Stockholm. When the Tripoli airport committee was disbanded in 1985 the applicant was left without a role in LAA, although he continued to receive his salary. At that time, the JSO was responsible for security on LAA aircraft, and a decision was taken that LAA should assume responsibility for this. The applicant was therefore appointed as head of airline security, a post which he held for one year, until December 1986. The post involved him being seconded to the JSO for that period, in order to oversee the transition in responsibility from the JSO to LAA. Thereafter he became the co-ordinator of the Centre for Strategic Studies ("CSS"), a post which he held until 1991. Further details about the applicant's secondment to the JSO, and his employment at the CSS, are given below.

27.9 The applicant was also involved in a number of business ventures. In 1986 he joined El Badri Ben Hassan ("Badri Hassan") and others in a company Badri Hassan had established in Zurich called ABH. The company was engaged in arranging aviation deals to circumvent the US sanctions in place against Libya at that time, and the applicant's role involved him travelling frequently to Zurich. ABH dealt with a number of companies, including MEBO (of which there are further details below). The company ceased to exist in December 1988 following allegations that Badri Hassan had embezzled money from it.

27.10 The applicant was also involved with a number of other persons in organising the Libyan leg of the Paris to Dakar rally in 1988, and again in 1989 when Mr Fhimah was also involved. In 1991 he and a number of those who had organised the rallies, including Mr Fhimah, established a factory which manufactured plastic pipes.

27.11 After the indictments were issued in November 1991, the applicant was under a form of house arrest in Tripoli until 1999, when he travelled to the Netherlands for trial.

The applicant's accounts

Connections to the JSO

27.12 The trial court accepted that the applicant was a member of the JSO and that he had an association with the members of that organisation who purchased MST-13 timers from MEBO. The court considered that such “background circumstances” fitted together with other evidence in the case to form a real and convincing pattern proving the applicant’s guilt (see paragraph 89 of the judgment).

27.13 In the Salinger interview the applicant denied having worked for Libyan intelligence. He stated that in his family and even in his society “you have to feel afraid to work with the Intelligence here”, and that it was “not acceptable” to work in that field. He reiterated that he had never worked for Libyan intelligence in any way. He confirmed that he worked at the CSS but explained that he did this on a part time basis in the evening and that he was not a director there, as was alleged in the indictment.

27.14 In his defence precognitions and at interview with the Commission the applicant provided a substantial amount of information regarding his connections to the JSO and to certain members of that organisation. In both cases his position was that he was linked by “tribe” or direct family relationship to a number of individuals who held positions in the JSO. For example, in his initial precognition the applicant

confirmed that he was related by marriage to Ezzadin Hinshiri (“Hinshiri”), whom he considered a friend. Hinshiri, he confirmed, had held governmental positions in Libya such as Minister of Transport and Minister of Justice, and was at one period, which included the time of the US bombing of Tripoli in 1986, a director or manager in the JSO. At interview with the Commission, the applicant stated that Hinshiri left the JSO in 1987 and became Minister of Justice for Tripoli, at which time the applicant imported Audi motor cars for him through ABH. In terms of the evidence of the MEBO witnesses, and the defence precognition of Hinshiri himself, Hinshiri was also involved in the acquisition of MST-13 timers. According to the applicant Hinshiri was also involved in arranging the coded passport which the applicant used in connection with his visit to Malta on 20 and 21 December 1988 (as discussed below).

27.15 The applicant confirmed at interview with the Commission that another individual, Said Rashid (“Rashid”), was a member of his tribe, was related to him and was a personal friend. According to the applicant Rashid was seconded to the JSO in 1986 and was chief of the operations department there. He was therefore the applicant’s superior while the applicant was seconded to the JSO as head of airline security. The evidence of the MEBO witnesses indicated that Rashid was also involved in purchasing MST-13 timers. The applicant was asked at his Commission interview if he was aware of Rashid’s involvement in any illegal activities. The applicant said in response that while Rashid had never told him about his activities, he was aware through his contacts at Tripoli airport that Rashid had been wanted for trial in Italy. When it was suggested to him at interview that Rashid had been convicted *in absentia* by an Italian court of the assassination of a Libyan exile, the applicant said he had never heard that Rashid had been in Italy, and that he might have been convicted of “giving orders”.

27.16 Another member of the JSO with whom the applicant had a close relationship was Abdullah Senoussi (“Senoussi”). Senoussi was said to be Colonel Gadaffi’s brother-in-law and at one time occupied senior positions in the JSO. The applicant confirmed at interview that he had known Senoussi since about 1966, and was aware of the latter’s conviction *in absentia* in France for the bombing of UTA flight 772 over Niger in 1989. According to the applicant another man convicted of

that crime, Abdessallam Hammouda, occupied a position in the JSO and was a member of his tribe.

27.17 The applicant also confirmed that he knew Mohamed Nayil (“Nayil”, aka Marzouk and Wershafani), who was also a member of his tribe. He was aware that Nayil had been accused of a plot to assassinate the Prime Minister of Tunisia in the 1970s, and that he was arrested in Senegal in February 1988 whilst allegedly carrying a gun, explosives and a timer. The applicant also knew of Mansour Omran Ammar Saber, the individual arrested with Nayil in Senegal, whom the applicant was aware had worked at Tripoli airport in charge of security and intelligence.

27.18 The applicant also informed members of the enquiry team that through his work at LAA, he was familiar with Ibrahim Bishari (“Bishari”), one-time head of the JSO, and with Nassr Ashur (“Ashur”), a colonel in that organisation, although he did not know them personally. According to the applicant he had travelled with Ashur on one occasion in 1987 when both used coded passports (further details of this are given in the section on coded passports, below). The applicant added that the prevailing view of Libyans was that Ashur had connections with the IRA, although he had no personal knowledge of that.

27.19 Another individual mentioned in the indictment is Mohammed Abouagela Masud (“Masud”), with whom the applicant is alleged to have travelled on a coded passport from Malta to Tripoli on 21 December 1988. It was also alleged that he flew to Malta with Masud in October 1988 in an aborted attempt to travel to Chad. In a number of defence precognitions, and at interview with the Commission, the applicant consistently denied any knowledge of Masud. Two of the applicant’s trial representatives, John Beckett QC and Alistair Duff, indicated during their interviews with the Commission that although the defence were able to precognosce a number of members of the JSO, including Hinshiri, Rashid, Senoussi and Ashur, they were advised by the defence lawyers in Libya that Masud could not be identified. At precognition and also during the Commission interview the applicant was shown a photograph allegedly of Masud (CP 313, photo 23) but maintained that he did not recognise this individual.

27.20 It is therefore clear that the applicant had personal relationships with various members of the JSO and that he knew others through his work at LAA. Moreover, as explained, the applicant was seconded to the JSO for around a year in 1986, as head of airline security. In terms of his precognitions and Commission interview the JSO had been responsible for security on LAA's aircraft but, as they were the cause of the majority of delays in LAA flights, a decision was made to transfer control of airline security to LAA. According to the applicant he was appointed to oversee this transition. The idea for his appointment was that of Senoussi, who at that time was second in command of the JSO, although the actual appointment was made by the Minister of Transport. The role involved the applicant in training JSO officers on LAA flights by, for example, replacing the use of guns with CS gas, for safety reasons. According to the applicant, while he was in this post he also received reports from JSO officers who were positioned as assistant station managers in foreign airports. One of the station managers from whom the applicant would receive reports was Abdul Majid Giaka ("Majid") who at the time was based at Luqa airport.

27.21 However, despite the fact that Senoussi, a senior JSO figure, was involved in appointing him to the post, and that Rashid was his superior while he was in the post, and despite the fact that he was responsible for junior JSO officers, the applicant maintained at interview that he was not employed by the JSO but was only seconded there. According to the applicant, not only did he continue to be paid by LAA, he also worked from an LAA office and was a civilian. His role involved airline security, not airport security. In particular, he had no knowledge of security at Luqa airport, either as a result of his role as head of airline security at LAA or from being a member of the committee at Tripoli airport. According to the applicant his positions did not permit him access to secure areas of airports from which LAA operated.

27.22 The accounts given by the applicant in his defence precognitions and at interview are inconsistent with the position he adopted in the Salinger interview. This is true of a number of the statements he made to Salinger, and there is a detailed examination of what he said at that interview later in this section. As regards his links to the JSO, the applicant explained at interview with the Commission that the advice he was given by his Libyan lawyer was to avoid discussing with Salinger his travel movements and his job. This advice, he said, was given in advance of the interview,

and the lawyer in question was not present during the interview itself. He was ashamed to have lied about this at the Salinger interview but claimed not to have known how to avoid answering the question. He had been told that the interview would be about his family.

27.23 However, later in the Commission interview, the applicant's position on this matter seemed to change. In particular, he maintained initially that he had told the truth when he informed Salinger that he was not connected to the JSO, and claimed that he was neither "an intelligence man" nor a member of the JSO. Thereafter, however, when the fact of his secondment was put to him, the applicant accepted that he had lied when he told Salinger he was not connected to the intelligence services "in any way". He went on to say that he had told Salinger the truth when he said it was shameful to one's family to be involved in intelligence. When asked what his family's attitude was to his secondment to the JSO, he explained that his family knew he was not employed by the JSO. He maintained that his own view of the JSO was that they were generally bad people who lacked morals and who would report on their own family members. However, when asked how this reflected on those in the JSO with whom he had close relationships (Hinshiri, Rashid and Senoussi), he explained that this did not apply to every individual in the JSO, and that it was simply a general attitude towards the JSO. He did not feel ashamed to have been seconded to the JSO as he considered himself still to be an LAA employee.

27.24 As regards the applicant's subsequent appointment as co-ordinator of the CSS, a position he held from 1987 to 1991, the applicant stated at interview with the Commission that this too was Senoussi's idea. His position with the CSS was one of "co-optee", in that he continued to be paid by LAA. He also explained that, because of Senoussi's influence, the CSS was partly funded by the JSO. He maintained, however, that it was not a JSO organisation, describing it at interview as like a charity, independent of any government department. He said it was established by academics assisted by Senoussi (although in a defence precognition the applicant indicated that the centre was originally the idea of Bishari, one time head of the JSO), and had various departments including geography, history, media monitoring, political analysis and translation. It was, he said, modest in its scope, its annual funding being around £30,000. Although most of this money came from the JSO, this

was because of Senoussi's involvement in that organisation. According to the applicant, if Senoussi had belonged to another department he would have arranged for that department to provide the funding.

27.25 At interview with the Commission, the applicant explained that in his role as co-ordinator he facilitated the work of the academics, and arranged matters such as travel and expenses for them. According to the applicant the studies conducted by the CSS were not intelligence-orientated, although on occasion the JSO requested information from them. In a defence precognition the applicant suggested that the only intelligence-related study conducted by the CSS concerned fundamentalism in Libya. He also explained that while the CSS employed three JSO members, these were just a driver, a typist and an administrative assistant, all of whom continued to be paid by the JSO as the CSS did not have the funding to pay salaries to them. The CSS building, he said, was not heavily guarded and various people had access to it, including, for example, the applicant's business associates in the Paris-Dakar rally, who used the facilities there to organise the rally.

27.26 Although the applicant was at pains to emphasise in his Commission interview that the CSS was not an intelligence organisation, it undoubtedly had close connections to the JSO, given that a senior JSO figure was involved in its establishment and funding, and in the appointment of personnel. Indeed, in his fifth supplementary defence precognition, the applicant is noted as saying that because the CSS's funding came from the JSO, "the Centre therefore became part of the Security or Intelligence Service. I therefore accept that I was effectively working in an office which was part of security or intelligence and I was the co-ordinator."

27.27 One aspect of the applicant's involvement with the CSS which, according to Mr Beckett, caused some concern to the defence, is referred to in the applicant's first defence precognition. There the applicant described the CSS and its role in monitoring the worldwide media, and how people around the world collected articles from newspapers and magazines and sent them back there. The precognition goes on: "I remember that there was a man in Spain who used to send back articles from the Spanish media. Sometime during the 1990s it turned out that he was an American spy

and he was assassinated.” Mr Beckett considered such information potentially damaging to the applicant’s defence.

27.28 The applicant’s accounts to the Commission and to his legal advisers of his involvement with the CSS again contrast with the position he adopted at the Salinger interview. There he accepted that he worked at the CSS but said that this was on a part time basis in the evening, and that he was not a director, as was alleged in the indictment. This is to some extent consistent with the terms of his thirty-fifth supplementary precognition, in which the applicant describes his position in the CSS as co-ordinator rather than director. In that precognition he said that he explained to Salinger that he was connected to the work of the CSS but that, as he had some difficulty expressing himself in English, he spoke Arabic and one of Salinger’s companions translated. In the final, undated precognition, the applicant again referred to his role at the CSS as being different from that of a “manager”, as Salinger had suggested.

27.29 At interview with the Commission the applicant accepted that that he had lied to Salinger about this issue. He repeated that the reason he lied was that he had been told by his lawyer to avoid talking about his job. Following further questioning by members of the enquiry team he suggested that the advice he was given related only to those aspects of his employment, such as his involvement in the CSS, which were mentioned in the indictment, rather than his general employment history (which he had in fact described to Salinger). When pressed, however, he also accepted that it might simply have been his own decision not to tell the truth about his involvement with the CSS. He was asked whether the reason he had lied about this was because he feared that the links between the JSO and the CSS would be established. The applicant confirmed that this might have been one of his reasons for lying, and said that it would have taken time to explain the connections with the JSO, and that the CSS was not a JSO organisation.

Connections to MEBO and MST-13 timers

27.30 In addition to the various accounts referred to in this section, the applicant's connections to MEBO were, of course, spoken to in evidence by the MEBO witnesses.

27.31 In the Salinger interview the applicant stated that he would not recognise a timer unless he was told in advance what it was, and that he had never worked in that business. He claimed not to have any link with MEBO, although at another point in the interview he said he might have spoken to someone from MEBO at the airport (presumably Zurich airport). He had met several people there and he could not remember whether one of them was from MEBO. The applicant mentioned attempts to establish a business in Zurich with a former chairman of LAA (which was clearly a reference to ABH set up by Badri Hassan) but explained that no business was completed.

27.32 In his defence precognitions, and in his Commission interview, the applicant frankly accepted that he had dealings with MEBO through ABH. In his first defence precognition, he referred to ABH having purchased from MEBO a large satellite dish on behalf of the JSO which was used to monitor messages. However, in a subsequent precognition he said that the satellite dish was for Bishari, in order that he could watch television news programmes. At his Commission interview the applicant maintained that the satellite dish was obtained by Bishari in his personal capacity rather than in his capacity as head of the JSO. The applicant acted as an intermediary in this transaction.

27.33 In his initial precognition, his eighteenth supplementary precognition, and his Commission interview, the applicant also referred to ABH purchasing walkie-talkies from MEBO for use by the Libyan military in connection with the war against Chad. According to the applicant, there was also a proposed agreement between ABH and MEBO, whereby ABH would lend \$500,000 to MEBO in exchange for a share in MEBO, and ABH would earn commission by assisting MEBO to conclude deals in Libya. ABH could not come up with the money, however, so the proposal was never carried through. The applicant stated that the only other dealings he had with MEBO

concerned his attempts to assist them in recovering money owed to them by various Libyan departments, including the JSO. At his Commission interview the applicant explained that it was his good connections with the JSO which allowed him to mediate in such payments. ABH, he said, had also rented an office from MEBO but he only visited that office once, very briefly, and MEBO had paid the rent for a number of months in exchange for the assistance in resolving debts. He had met Mr Bollier only on a few occasions, mainly in Switzerland but once in Tripoli.

27.34 The applicant's position on this matter at the Salinger interview is again in stark contrast to the accounts he gave at precognition and to the Commission. In his thirty-fifth supplementary precognition the applicant stated that when Salinger had asked him about MEBO he was "confused" and did not appreciate at that time that he had in fact been to MEBO's offices, as the offices he had visited had seemed like domestic premises (a fact to which he had referred in previous precognitions). He stated that it was only much later, after the Salinger interview, that Badri Hassan told him that those premises had in fact been MEBO's offices. In the same precognition he said that he had not appreciated that "MEBO" stood for the names Meister and Bollier. In his final, undated precognition the applicant is noted as saying that when he told Salinger that he did not know anything about MEBO what he meant was that the person who knew the company and the people in charge there was Badri Hassan.

27.35 At interview with the Commission the applicant at first suggested that his account to Salinger was "partly true" because it was Badri Hassan who "knew" MEBO rather than he himself, and that he had no knowledge of the timers to which Salinger had referred. However, when it was put to him that he denied to Salinger having any knowledge of MEBO, he accepted that he had lied and referred once again to the advice that his lawyer had given, namely that he should not talk about his movements or his job. He explained that his knowledge of MEBO was related to his travel movements, as he only knew about that company from his trips to Zurich. He had therefore lied about MEBO to avoid questions about his movements.

27.36 The applicant has, however, been consistent in his denial of any connection with the MST-13 timers. He maintained throughout his defence precognitions and his interview with the Commission that he had nothing to do with any transaction with

MEBO whereby timers were supplied to Libya, and that he had no knowledge of such timers until after the indictment had been issued. At interview he said that he did not enquire with Hinshiri or Rashid about the purchase of the timers, even after the issue of the indictments, nor did he ask Badri Hassan about the alleged order for forty timers in December 1988. He did not deny, of course, that he had a close association with all three men. Likewise, he said that he did not discuss with any of his friends or relatives in the JSO, including Senoussi, whether there was any truth in the allegations of Libya's involvement in the bombing or in any other terrorist activities. The only matter he said had been discussed with Senoussi concerned the testing of the MST-13 timers alleged to have taken place at Sabha, which Senoussi informed him were military tests.

Movements on 7 December 1988 and following dates

27.37 A crucial aspect of the applicant's conviction was the court's finding that on 7 December 1988 he purchased various items from Mary's House, many of which were established to have been within the primary suitcase. In the Salinger interview the applicant accepted that he was present in Sliema on 7 December, but denied that he had visited Mary's House, or that he bought clothing and an umbrella.

27.38 In his defence precognitions and at interview the applicant significantly expanded on the circumstances of his visit to Malta on 7 December. Broadly, he confirmed that he had flown to Malta from Tripoli on 7 December, and that on the following day he boarded a flight to Zurich from where he intended to travel to Prague. As a result of bad weather, however, the flight from Malta to Zurich was cancelled until the following morning. He stayed at the Holiday Inn in Sliema on both 7 and 8 December, although the second night was arranged by Swissair following the cancellation of his flight. Upon his eventual arrival in Prague on 9 December, he stayed at the Intercontinental Hotel where he remained until 16 December. On that date he flew back to Zurich, staying at the Zurich Hotel, before travelling on to Malta and then Tripoli the following day.

27.39 In his defence precognitions the applicant explained that his purpose in travelling to Prague was in order to purchase items for the house he was having built.

In his first defence precognition he stated that items were sold very cheaply in Prague, and that he bought crystal chandeliers and two carpets which he arranged to have sent back to Tripoli on a charter flight for Libyan military personnel and their families. He suggested that it was Abdulmajid Arebi Alesh (one of the individuals involved in ABH and with whom the applicant organised the Paris-Dakar rally and who was based in Prague at the time) who arranged for the transportation of the items. He claimed that, at the time of precognition, he still had these items in his house. In his twenty-first supplementary precognition he stated that he also purchased items for Christmas, along with a suit and one or two cheap bags in which to bring the items back with him. The applicant's account at his Commission interview was broadly similar, although he indicated that the charter flight from Prague to Tripoli was a cargo flight for check-in staff.

27.40 As regards his reasons for flying to Prague via Malta the applicant stated in his first precognition that this was the easiest way to travel, that other airlines were fully booked, and that by doing so he would be able to visit Mustapha Shebani ("Shebani"), then LAA station manager in Malta. It is also noted in that precognition that he booked the onward journey to Prague once he was in Malta, on 8 December. However, although the applicant confirmed in his Commission interview that he often travelled via Malta on the basis that it gave him an opportunity to meet Shebani, he did not recall that he had purchased his onward ticket to Prague only once he arrived in Malta. Indeed, he suggested that it would have been much cheaper for him to have bought tickets for the whole journey in Tripoli.

27.41 During the course of the Commission interview the applicant was questioned in some detail about his presence in Malta on 7 and 8 December. His position remained that he had stopped over in Malta to see Shebani, but he added that it would not have been possible to travel more quickly to Prague by any other route. This was because, although he could have flown direct from Tripoli to Zurich, he would still have required to stay overnight in Zurich before meeting his connecting flight to Prague. He claimed to be unable to remember anything about the night of 7 December. He considered it possible that he met with Shebani, as he recalled that Shebani had taken him to the airport the next day, and that they were together while he was at the airport.

27.42 The applicant's inability to remember the events of 7 December contrasts, to some extent, with the contents of his precognitions, in which he is noted as recalling various events of that day. In his first precognition, for example, the applicant describes meeting Shebani in Malta on 7 December and being told by him about Mr Fhimah having taken a year's leave to start a tourist agency (i.e. Medtours). According to the precognition, Shebani asked the applicant to help Mr Fhimah, and they then met Mr Fhimah, at which stage the applicant agreed to speak to his brother-in-law who worked at the Libyan oil company, ADWOC (referred to as "Adwick" in the precognition), and recommend Medtours to ADWOC.

27.43 On the other hand, in his nineteenth supplementary precognition the applicant recalled arriving in Malta at around noon on 7 December and being asked by Shebani to wait while he (Shebani) arranged for someone to take him to the hotel. According to the precognition Majid then offered to drive him. The applicant recalled that Majid had a small black Fiat hatchback which was parked right outside the departure area, and that he had to wait while Majid picked up an Air Malta employee, who later became Majid's wife. Majid dropped her off at her house on the way to the applicant's hotel.

27.44 As regards the crucial allegation that he bought the clothing found within the primary suitcase, in his twenty-eighth supplementary precognition the applicant denied visiting Mary's House on 7 December or at any other time. His initial position at interview with the Commission was similar, in that he said he had never seen Mr Gauci or Mary's House in his life. After further questioning, however, he said that he could not remember ever having shopped in Mr Gauci's shop, or in the Sliema area of Malta, and that he always shopped in Valletta. He remained steadfast that he did not purchase the items that were recovered at the crash site. While he did not rule out the possibility that when he was staying at the Holiday Inn he might have gone for a walk and passed Mr Gauci's shop, he maintained that he could not recall doing so and could not recall buying anything from that area. According to the applicant he stayed

at the Holiday Inn out of choice because of its good facilities but, in his view, Sliema had a bad reputation and because of this he did not frequent the area.

27.45 Later in the interview it was put to the applicant that as his position was simply that he could not remember whether he had shopped in Sliema, it was difficult to understand how he could say with certainty (as he had done at precognition and, initially, at interview) that he had never visited Mary's House. The applicant reiterated that he could not remember ever having shopped in Sliema or in Mary's House. He insisted he was not the man who bought the clothing, referring to the discrepancies in height, age and skin colour between him and the purchaser as described by Mr Gauci, and to other evidence which he suggested pointed away from 7 December as the date of purchase. The applicant also claimed never to have been to the Libyan People's Bureau in Malta, which was situated very close to Mary's House.

27.46 One other matter concerning the applicant's movements on 7 December relates to the passage in his first precognition in which he claims to have changed \$200 to cover his accommodation and expenses, a transaction for which he claimed still to have the bank receipt. At interview Mr Beckett suggested that, had this been brought out in evidence, it might have been possible to infer that the applicant's purpose in changing this sum was to purchase the clothing.

27.47 Whether or not such an inference can legitimately be drawn would very much depend upon the exchange rates prevalent at that time. Based on certain CIA cables relating to Majid, the exchange rate in early 1989 was approximately LM1 to \$3 (see eg the less redacted version of Crown production 819, a CIA cable dated 19 January 1989, which equates LM500 with approximately \$1500). This accords with present rates, and would suggest that \$200 would not in fact have been sufficient to cover the cost of the clothing and the applicant's hotel bill for 7 December. Crown production 757 indicates that on 8 December the applicant paid his hotel bill of LM43.50 (approximately \$130) in cash. In terms of Anthony Gauci's first police statement the purchaser spent LM76.50 (approximately \$230), although in subsequent statements Mr Gauci added to the list of items he sold, so the figure may in fact have been higher than this. Accordingly, in the absence of evidence that the applicant had a further sum of Maltese currency in his possession on 7 December, it would appear

that he would have required to change significantly more than \$200 in order to purchase the clothing and meet his hotel bill.

27.48 As to the events of 8 December, the applicant recalled at his Commission interview that Shebani picked him up from the hotel and took him to the airport for around 11.30am or 12pm. However, there was thunder and lightning and the flight to Zurich, which was due to depart around 2pm, was delayed until after dark, around 7 or 8pm. The applicant boarded the flight at that time but it was then cancelled and he, along with the other passengers, was taken back to the Holiday Inn by Swissair. He did not think that he saw Shebani again that night. He flew out the next morning and arrived in Prague that day.

27.49 The applicant was asked in his defence precognitions about the fact that his hotel room in Prague was paid for by the Libyan Embassy. He explained in his first precognition that it was much cheaper to have the Embassy book a hotel room on his behalf, rather than for him to book it as an individual. According to the applicant this was not abnormal and many Libyans could make such arrangements, depending on whom they knew. He repeated this explanation at his Commission interview.

27.50 According to his twelfth supplementary defence precognition the applicant's solicitor showed him certain documents which the defence had apparently obtained in Tripoli, and which indicated that he was sent to Switzerland and Prague in December 1988 on business, rather than for personal shopping, as he claimed. The applicant replied that although he could not remember this particularly, it was possible, and that if there was any question of suspicion over the documents they should not be used (ie they should not be lodged as defence productions). At his Commission interview the contents of this precognition were put to the applicant. He denied that he had any business interests in Prague in 1988. He seemed to think that the precognition might relate to the fact that the Libyan Embassy booked his hotel in Prague, and that he had been concerned when giving the precognition that, although innocent, this might be misinterpreted as suspicious.

27.51 As to his return from Prague, the applicant explained in his second supplementary precognition that his original intention had been to fly to Malta on 15

December, but that there were often delays at that time of year owing to bad weather. He confirmed that his intention to be in Malta on 15 December tied in with the entry in Mr Fhimah's diary, which recorded that the applicant was coming to Malta from Zurich on that date. A similar account was given at interview with the Commission.

27.52 In his first precognition the applicant explained that on his way back to Tripoli on 17 December he met Shebani at Luqa airport, and that Shebani repeated that he hoped the applicant would assist Mr Fhimah's new business venture. According to the precognition Shebani also introduced him to Vincent Vassallo on this occasion. However, in later precognitions the applicant indicates that he first met Mr Vassallo on 20 December (as described below). At his Commission interview the applicant could not recall if he met Shebani or Mr Fhimah on 17 December, although he thought it more likely that he met Shebani. He also could not recall if he met Mr Vassallo that day or if the first meeting between them was on 20 December.

Movements on 20 and 21 December 1988

27.53 Evidence of the applicant's movements on 20 and 21 December 1988 was crucial to his conviction. The trial court relied on (1) the applicant's presence in Malta on those dates; (2) his use of a coded passport; and (3) his presence at Luqa airport at around the time the bomb would require to have been ingested on flight KM180, to draw the inference that the visit was in connection with the planting of the device.

27.54 On a number of occasions during the Salinger interview the applicant denied that he had travelled to Malta on 20 and 21 December 1988, and claimed that he was in Tripoli with his family. He also denied having stayed at the Holiday Inn on the night of 20 December and asserted that there would be no record at Tripoli airport of his travelling on that date. Understandably, given the weight of evidence to the contrary, the trial court did not accept these denials.

27.55 Whereas the applicant confirmed both at precognition and at interview with the Commission that he had in fact been in Malta on those dates, he maintained that he had nothing to do with introducing an unaccompanied bag on to KM180. He also

denied ever having been involved in discussions about destroying aircraft or having seen explosives. Given the importance of this aspect of the Crown case, it is necessary to examine the applicant's accounts in some detail.

27.56 According to the applicant's first defence precognition Mr Fhimah visited him at his office in Tripoli on 18 December to discuss Mr Fhimah's travel agency, Medtours, and the applicant's contact in ADWOC. At that stage, Mr Fhimah told the applicant that he was going back to Malta on 20 December and the applicant said that he would join him for one or two nights. They met again on 19 December, after Mr Fhimah had had a meeting at ADWOC, and the applicant repeated that he might go to Malta with Mr Fhimah the next day for a night or two. According to this first precognition the applicant thought it would be an opportunity to meet Mr Vassallo again and get a better idea of Mr Fhimah's new business. As explained, however, while in his first precognition the applicant suggested that Shebani had introduced him to Mr Vassallo on 17 December, in later precognitions he claimed never to have met Mr Vassallo until 20 December.

27.57 The applicant also explained in his first precognition that his purpose in travelling to Malta on 20 December was to purchase a banister he needed for the house he was having built. In his twenty-eighth supplementary precognition, however, he stated that on 19 December he had a conversation with Mr Fhimah about carpets he needed for his house. He had hoped that Mr Fhimah would buy these for him in Malta, but Mr Fhimah suggested it was better for the applicant to go to Malta and pick them himself. According to the precognition Mr Fhimah told him at that stage that he was going to Malta on 20 December and suggested the applicant come with him.

27.58 Thus, a number of different explanations were given by the applicant in his precognitions as to the purpose of his visit to Malta on 20 December. At interview with the Commission the applicant was asked about his meeting with Mr Fhimah on 18 December, but he was unable to remember details of the events that day. He explained that his memories at precognition had been assisted by discussions with Mr Fhimah. Accordingly, other than referring generally to the need to buy items for his

house and, in particular, his need for a banister, the applicant claimed to be unable to recall the purpose of his trip to Malta on 20 December.

27.60 The second additional explanation concerned the applicant's use of his coded passport in the name of Abdusamad ("the Abdusamad passport"). In particular, the applicant referred to the fact that on the Abdusamad passport (the use of which is discussed in more detail below) there was a stamp dated 22 June 1988 which, according to the applicant, entitled him to an allowance of \$1000 in hard currency. This allowance had to be obtained by the end of the calendar year and was only valid once the passport had been stamped to show the applicant had travelled abroad. The applicant suggested that, as the year end was approaching, this might have been a factor in his travelling to Malta on 20 December, and that it was also a possible reason for his use of the Abdusamad passport on that occasion. According to the applicant, Libyans often travelled to places like Tunisia for a very short period in order to take advantage of the allowance.

27.61 The applicant repeated on a number of occasions at interview that he could not be certain of the precise purposes of his visit to Malta on 20 December. As the applicant had shown no uncertainty at interview as to the purpose of other trips he had made throughout the course of 1988, he was questioned as to why he should be so uncertain as to the reasons for this particular visit. In response the applicant explained that he was not in fact certain of the purpose of any of these other trips, and that he might be wrong about what he said had taken place on those occasions.

27.62 Given the importance of events on 20 and 21 December 1988, it is worth exploring the applicant's accounts in further detail. As regards 20 December, in his first and twenty-eighth supplementary precognitions the applicant indicated that he did not finally decide to travel to Malta until that day. According to these accounts he spoke to Mr Fhimah over the telephone and arranged to meet him at the airport, from where they caught the Air Malta flight. Although generally in his precognitions he claims to have purchased his ticket from an LAA ticket office in Tripoli, in his twenty-eighth supplementary precognition (and at interview with the Commission) he suggests that he sent a member of staff to buy the ticket on his behalf. The applicant is noted in the same precognition as saying that he and Mr Fhimah carried only hand luggage on the flight.

27.63 At interview with the Commission the applicant confirmed that he understood from documents he had seen that he only purchased the ticket for Malta on that day. His position, in that sense, was that the trip was not pre-planned. He could not remember himself or Mr Fhimah checking in any luggage, but explained that normally for a short trip he would only carry one item of hand luggage.

27.64 The applicant is also noted in his twenty-eighth supplementary precognition as recalling an incident on the flight to Malta, which was the first time he had travelled with Mr Fhimah. According to the precognition an individual sitting next to him, who was possibly Russian, had a bandaged hand and could not fill out his embarkation card. In the event, Mr Fhimah completed this for him. The individual in question was staying at a hotel in Malta which the applicant and Mr Fhimah knew to

be a very cheap, down-market hotel. The applicant repeated this account of events at his Commission interview.

27.65 As to the circumstances of his arrival at Luqa airport, at interview the applicant could not remember himself or Mr Fhimah taking anything off the luggage carousel. Likewise, he could not recall seeing Majid or Mr Vassallo at the airport. As to Majid's account that he had seen the applicant with Masud at the airport, the applicant again denied knowing Masud or having been in his company on 20 December. The photograph purportedly of Masud (CP 313; photograph 23) was again shown to the applicant but he maintained that he could not recall ever meeting with or speaking to such a man.

27.66 At trial the Crown submitted that Mr Fhimah's position as former LAA station manager at Luqa airport meant he might have received special treatment on arrival there. However, according to the applicant's eighth supplementary precognition everybody knew that Mr Fhimah was no longer station manager at Luqa, and therefore he would not have received any special privileges. On the other hand, at his Commission interview the applicant said that, as Mr Fhimah was well known at the airport, and was trusted and well-liked there, it was possible that staff would be reticent about checking his luggage at customs. However, the applicant suggested that this was more a question for Mr Fhimah. He denied that he or Mr Fhimah had carried a bag containing the bomb on the flight from Tripoli, and said that it would have been "crazy" to travel on the same aircraft as a bomb.

27.67 The applicant's account at precognition was that upon leaving Luqa airport on the evening of 20 December Mr Fhimah drove him to Mr Vassallo's home. As mentioned above, the applicant is inconsistent in his precognitions as to whether this was the first occasion on which he met Mr Vassallo: in his initial precognition, the applicant said that he was introduced to Mr Vassallo by Shebani on 17 December 1988, but in subsequent precognitions his position was that he first met Mr Vassallo on 20 December. Indeed, in the twenty-eighth supplementary precognition, the applicant suggested that Mr Fhimah first mentioned Mr Vassallo, and the fact that he would be a partner in Mr Fhimah's business, on 20 December while en route to Mr Vassallo's house.

27.68 According to the applicant's initial precognition he and Mr Fhimah stayed at Mr Vassallo's house for over an hour, discussing the travel agency business. In his twenty-eighth supplementary precognition, the applicant suggests that during the meeting he specifically discussed his connection at ADWOC, and also mentioned the possibility that Medtours could be involved in organising the following year's Paris-Dakar rally. He also refuted the suggestion by Mr Vassallo that in fact they had not discussed any business. The applicant consistently refers throughout his precognitions to admiring the banister on Mr Vassallo's staircase and to Mr Fhimah and Mr Vassallo telling him that they knew the carpenter.

27.69 The applicant's account of the visit to Mr Vassallo's home which he gave at his Commission interview was broadly consistent with those recorded in his precognitions. He recalled that Mr Fhimah drove him there in the Volvo car belonging to LAA. Although Shebani would likely have been at the airport to give them the use of this car, he could not recall having met him. The applicant suggested that the visit to Mr Vassallo and his family demonstrated that he was not trying to hide anything during the trip, and that he was not engaged in criminal activity. He gave a detailed description of events in the house. In particular, he referred to a conversation about Mr Vassallo's hunting rifle and his dog (matters which the applicant also mentions in his precognitions). Although he had been reluctant to discuss Mr Fhimah's proposed business with Mr Vassallo, since this was his first visit to the latter's house, the matter was briefly discussed. The applicant also referred to Mr Vassallo's staircase, and to the fact that Mr Fhimah arranged for carpenters to visit his house at the end of December 1988 to provide a quote for a banister. He stated that, at the time of trial, he still had the sample of material which the carpenters had left.

27.70 Whereas the applicant's accounts at precognition and at interview are relatively consistent as regards the visit to Mr Vassallo's house, his accounts as to what occurred thereafter contain a number of contradictions.

27.71 In his first precognition, the applicant said that, as Mr Fhimah was staying at a less desirable hotel (the Central Hotel), he himself chose to stay at the Holiday Inn,

at which they arrived at about 7 or 8pm on 20 December. He asked Mr Fhimah to come and meet him the next day to go and look at carpets and other items for his house, as Mr Fhimah knew where the carpet seller was – he was an individual who sold carpets from his garage. The receptionist who checked him in at the Holiday Inn was an ex-LAA employee, and Mr Fhimah asked that the applicant receive an airline discount, although the applicant did not think in the end that he received this. Mr Fhimah gave him the telephone number for Mr Fhimah's apartment and said that he could be contacted there. The next morning the applicant telephoned the number but it was not Mr Fhimah who answered, but a man who sounded drunk. The applicant was angry and hung up. He checked out of the hotel and got a taxi to the airport. He asked the taxi driver, whom he recalled was bald, whether he knew where to find the carpet seller who sold items from his garage, but the taxi driver just laughed. He went to the airport as he just wanted to go home. There, he met Shebani, who received a telephone call from Mr Fhimah apologising, and stating that he had gone to the Holiday Inn to find that the applicant had checked out. He explained that he had fallen asleep at his hotel, and had not got back to his apartment.

27.72 It is apparent from the preceding paragraph that the account given by the applicant in the first precognition contains a number of very precise details. However, in subsequent precognitions, the applicant's description of events after the visit to Mr Vassallo's house changes. In his sixth supplementary precognition, the applicant is noted as saying that he had already been over his account of 20 December 1988 a number of times (although the only previous account recorded in the precognitions is in the first precognition, as described above). He suggests that Mr Fhimah would be able to identify the carpet shop that they went to on 20 December, which was like a garage. The proprietor, he said, had a lower lip larger than his top lip, and did not speak clearly. The applicant is thereafter noted as saying: "I purchased carpets and [Mr Fhimah] arranged for them to be sent to Tripoli for me". Clearly, then, this account of events differs from the contents of his initial precognition.

27.73 According to the applicant's twelfth supplementary precognition, on leaving Mr Vassallo's house, Mr Fhimah suggested they go to the carpet seller. When the applicant suggested that it might be closed, Mr Fhimah told him that the man sold the carpets from his garage so they could just visit the man's house and he would open

the garage. Mr Fhimah thereafter drove the applicant to the carpet seller. En route, Mr Fhimah pointed out the office of Medtours, and they stopped at the Central Hotel in order for Mr Fhimah to collect keys for the hotel. On arrival at the carpet seller's house, the applicant stayed in the car while Mr Fhimah spoke to the man. They then drove a short distance to the man's garage where the man joined them. The man showed the applicant some carpets in the garage, and told him that, as he would be obtaining more stock at the end of the year, the applicant would see more if he came back in two months time. According to the precognition, the applicant selected two carpets which the man rolled up and put in Mr Fhimah's car. As the applicant did not have sufficient Maltese currency to pay for them, the man accepted 100 US dollars for each carpet.

27.74 The applicant goes on to say in the precognition that when he and Mr Fhimah went back to the Holiday Inn he thought of leaving the carpets in Mr Fhimah's car, but was worried that they might be stolen. He therefore took them to his hotel room. As he could not get hold of Mr Fhimah the next morning, he got a taxi to the airport and left the carpets at the check-in area while he went to Shebani's office. Although he could not recall the precise details of what took place at the airport, he told Shebani about the carpets, who said that he would organise for them to be put in the aircraft's hold. According to the precognition, Shebani must have done so as on his arrival at Tripoli the applicant collected the carpets.

27.75 Clearly, then, across three different precognitions there are three different accounts of events on 20 and 21 December: one in which the applicant did not visit a carpet seller or buy carpets; a second in which he bought carpets which Mr Fhimah arranged to be transported to Tripoli; and a third in which the applicant gives a detailed account of having purchased the carpets and of Shebani arranging for these to be transported to Tripoli. The applicant maintained this latter account in his twenty-eighth supplementary precognition.

27.76 At his Commission interview the applicant recalled that he bought carpets in Malta with Mr Fhimah on one occasion, that they cost \$200, and that the carpet seller was small and had a speech impediment. However, he could not be certain if this took place on 20 December 1988 or on one of his other trips to Malta. Later in the

interview, he said that after visiting Mr Vassallo Mr Fhimah drove him past the Medtours office and pointed it out. They also drove past the workshop of the carpenter who made Mr Vassallo's banister, which was close to Mr Vassallo's house, but which was closed. Thereafter they went to the Holiday Inn.

27.77 Insofar as he mentions being driven to the carpenter's workshop, the applicant's Commission interview is effectively a further account of his movements on the evening of 20 December. Asked whether he had bought carpets that day, the applicant replied that it was possible but that he was not certain. When it was pointed out to him that in his previous accounts he had seemed sure that he had done so, the applicant repeated that he could not be 100% certain of this, and thought it was perhaps 70% possible that he had purchased the carpets on 20 December. The carpet seller, he said, was situated close to Mr Vassallo's house as well.

27.78 When asked at interview what happened to the carpets thereafter, the applicant was uncertain at first, explaining that he might have taken them to the hotel with him or Mr Fhimah might have held onto them. He then said, however, that he thought he could remember taking them to the hotel room with him, but then repeated that he could not recall what he did on the night of 20 December. He recalled that when he arrived at the Holiday Inn, Mr Fhimah was still with him and the receptionist, a former LAA employee, agreed to give the applicant an airline discount. Thereafter, however, he could not distinguish between what took place on that occasion from what took place on any of the other occasions when he visited Malta.

27.79 The applicant was reminded that he had provided detailed accounts of his movements on 20 December 1988 to his trial representatives. While he did not dispute giving the account described in his twelfth precognition, he explained that this was only what he thought had happened and that he had told his representatives that he could not be 100% sure that these events occurred on 20 December as opposed to some other date. It was pointed out to the applicant that he had not been noted as expressing any uncertainty about his accounts in any of his precognitions. The applicant replied that he had told Mr Duff what he thought he remembered, but that at a subsequent meeting he told him that he could not remember if that was exactly what happened and whether it happened on that day or some time before or after. A

passage from his twenty-eighth supplementary precognition which reflected the terms of the twelfth precognition was read to the applicant at interview, and it was suggested again that there was no indication of any difficulties on his part in recalling events. The applicant replied that while the account reflected his thinking at the time, he could not be certain that the events took place on 20 December.

27.80 When this matter was returned to later in the interview the applicant reiterated that he could not remember on exactly which occasion in Malta he had bought the carpets with Mr Fhimah. Although it had to be before November 1989, when he moved into the house he had built, he could not say for certain that it was the same day on which he had first visited Mr Vassallo's house. Likewise, he could not recall if he left the carpets with Mr Fhimah to arrange their return to Tripoli, or if he took them with him and arranged their return with Shebani at the airport. As to whether he recalled asking a taxi driver about the carpet seller (which he had referred to in his first precognition, when he had suggested he did not buy carpets on 20 December), the applicant said he might have done so, and that he had a memory of asking a taxi driver who laughed at his request. He could not remember where this took place, but he had only ever used a taxi in Malta on perhaps two occasions. One such occasion was when he took a taxi to the airport on 21 December, the other was when he was transported to the Holiday Inn on 8 December courtesy of Swissair. Asked whether the taxi ride on 21 December could have been the occasion when he asked the driver about the carpet shop, the applicant replied that it might have been.

27.81 As regards the telephone call to Mr Fhimah's apartment on the morning of 21 December, although the applicant accepted at interview that the call had been made, he could not recall why he had made it. Initially, he said that he could not recall if he spoke to Mr Fhimah or to anyone else. However, he then went on to say that he recalled telephoning the number but that as the person who answered was drunk, and was not Mr Fhimah, he had hung up. He also recalled Mr Fhimah telling him that he would be staying at his (Mr Fhimah's) apartment that night. The applicant was asked if he had ever enquired with Mr Fhimah as to who had answered the telephone, to which he replied that he had not done so on the basis that he respected Mr Fhimah's privacy. He had then taken a taxi from the hotel to the airport. Asked if he specifically recalled taking a taxi on this occasion (which, based on previous

responses at interview, it seemed he did), he could not say for certain and appeared to be basing his account on an assumption that he must have taken a taxi.

27.82 Later in the interview the applicant said that, although he recalled telephoning Mr Fhimah's flat on an occasion when a man answered who seemed to him to be drunk, he could not say for certain that this occurred on 21 December 1988. As to why he had called Mr Fhimah on 21 December, the applicant explained that this might have been to ask for a lift to the airport, or to remind Mr Fhimah about the banister. The applicant's attention was drawn to previous accounts in the twelfth and twenty-eighth supplementary precognitions in which he had said that on 20 December Mr Fhimah picked up keys for his room at the Central Hotel before driving the applicant to the Holiday Inn. In particular, it was put to him that this suggested Mr Fhimah had intended to stay at the Central Hotel that night.

27.83 The applicant was also unable to recall at interview the events at Luqa airport on 21 December. In particular, he could not remember whether he met Shebani there, although he explained that normally whenever he flew with LAA he would receive assistance at the local LAA station manager's office. Shebani could arrange it so that the applicant did not have to check-in formally at the desk in Malta. Shebani would take the applicant's ticket and obtain a boarding pass for him from the check-in staff, while the applicant waited in Shebani's office. This was a privilege he received as an employee of LAA. In addition, because of his seniority, he would never stand in a queue for check-in and would always be assisted by the local LAA staff. The applicant said that the check-in could be done on his behalf only if he had no luggage to check-in and there was no need for items to be weighed and tags attached. Later in the interview, however, he said that even if he had luggage the LAA staff would arrange for it to be weighed and tagged on his behalf.

27.84 The applicant was asked at interview about the carpets he had bought and how they had been transported to Libya (whether on 21 December or on some other occasion). He explained that as he was an LAA employee, such items could normally be sent on the aircraft as company cargo, or else under the name of a member of the

crew on the flight. Carpets, he said, would be treated as cargo rather than as normal hold luggage, and for normal passengers a cargo manifest would have to be completed. Depending on the capacity of the aircraft, there might not be room for all the cargo and luggage, and so items might be sent on a separate flight. He could not, however, remember anything specific about 21 December. When referred to the evidence of Anna Attard, who was recorded as having dealt with the applicant's check in on that day, he reiterated that he might not have been present with her when she checked him in. He accepted that, based on the records, he did not check in any luggage.

27.85 According to Mr Beckett and Mr Duff the applicant's account that on 21 December Shebani had arranged on his behalf for carpets to be placed on flight LN147 to Tripoli was a concern to the defence. This was because documentary evidence relating to that flight indicated that the applicant had not checked in any baggage. According to Mr Beckett, one of the difficulties in the Crown's case was the absence of any record of an unaccompanied bag on flight KM180. However, the applicant's account demonstrated that items could in fact be placed on to a flight without any record. More generally, Mr Beckett considered that the applicant's accounts of the assistance he received from Shebani would have been detrimental to his defence as it would have bolstered the Crown submission that the applicant received special assistance at Luqa.

27.86 The applicant was also asked at interview why it was that he had stayed in Malta for such a short time on this occasion, having arrived in the evening of one day and left on the morning of the next. He suggested that this was not exceptional, and that he had stayed in Malta for short periods on other occasions. In his thirty-third supplementary precognition, the applicant had indicated that there were two "good reasons" for wishing to return to Tripoli quickly after completing his business in Malta. First, he was in the middle of organising the Paris-Dakar rally, and the cars were due to arrive in Libya in the New Year. Secondly, his sister had given birth to a baby girl the week before, and there was a celebratory party taking place on the evening of 21 December which he wanted to attend. At interview he repeated these as possible reasons for his return, and also suggested that he might have wanted to return quickly to avoid his wife being suspicious about the length of time he was away.

27.87 As well as being mutually inconsistent, the applicant's various accounts of his movements on 20 and 21 December are in stark contrast to his position at the Salinger interview, in which he denied being in Malta at all on those dates. The applicant's explanation as to why he adopted that position with Salinger is linked to his explanation for denying that he had a coded passport, an issue dealt with in the following section.

Use of coded passport

27.88 Crucial to the trial court's basis for drawing an adverse inference about the applicant's visit to Malta on 20 and 21 December was his use of the Abdusamad passport. At the Salinger interview the applicant claimed not to know that name and said that it might be another person. Later in the interview he claimed to have only one passport. Again, the trial court rejected these denials.

27.89 In his precognitions and at interview with the Commission the applicant accepted that the Abdusamad passport belonged to him. In his eighteenth supplementary precognition the applicant explained that he had asked Hinshiri to obtain the passport in connection with his involvement in deals for aircraft spare parts, as he wanted to avoid being caught breaching the US sanctions in place against Libya. Hinshiri was the Minister of Justice for Tripoli at the time. In the same precognition and in his twenty-first supplementary precognition the applicant stated that the passport was obtained specifically for a trip he undertook to Nigeria in 1987 when he was part of a larger delegation which included Nassr Ashur. He confirmed that they returned from Nigeria to Tripoli via Zurich and Malta. His account bears out the part of the indictment which alleged that the applicant travelled from Zurich to Malta with Ashur and stayed with him in the Holiday Inn in Malta on 22 August 1987 before travelling to Tripoli the following day. However, in his sixth and eighth supplementary precognitions, when the applicant addressed the suggestion that he had stayed in Malta with Ashur, he failed to provide any of the details he mentioned in the subsequent precognitions, stating only that he recalled meeting Ashur in Malta on one occasion and that he recalled Ashur being on the same flight as him from Zurich to Malta on one occasion. Moreover, it is apparent that in August 1987 Ashur also

travelled under a coded passport, in the name of Nassr Salem, and that he booked into the hotel in Malta using that name when in the company of the applicant. However, in the sixth and eighth supplementary precognitions the applicant denied knowing that Ashur used that name.

27.90 In his precognitions the applicant insisted that he did nothing unusual or wrong on any of his trips abroad, including those which he made using a coded passport. Although the Abdusamad passport was issued in relation to obtaining spare parts for LAA, the applicant said he also used it for other purposes if it was the first one that came to hand. For example, he had used it on a pilgrimage to Mecca. In addition, when the passport in his own name was not in his possession, such as when it was at various embassies having visas applied, he would use the coded passport.

27.91 The applicant's account to the Commission broadly reflects the contents of his precognitions, although he could not recall whether he had requested Hinshiri to arrange for the Abdusamad passport to be issued to him. His initial position at interview was that the passport was issued at the request of the Minister of Transport and that approval was granted by the JSO (as it had to be for all coded passports), although he accepted that it was possible that he had asked Hinshiri to arrange for the passport to be issued. He explained that the form submitted by the JSO for the issuing of the coded passport (CP 1776, spoken to in evidence by Moloud Gharour 59/7783 et seq) was not a request that he be given such a passport, but rather was a pro forma which confirmed the JSO's permission for him to be given one. The applicant was also insistent that the issuing of the coded passport was not sinister. He pointed out that if he had been sent by Libya to plant a bomb on an aeroplane a new coded passport could have been issued to him within an hour, and that there were other ways in which he could have travelled to Malta without leaving any record (as described below). He confirmed that the Abdusamad passport was issued simply because he was dealing with people in Nigeria regarding aircraft parts, and he was concerned that Nigeria was a corrupt country with links to the West and he wanted to protect himself. According to the applicant the trip to Nigeria was the first occasion in which he was involved in "sanctions busting".

27.92 The coded passport issue is a further example of the applicant's accounts diverging between what he originally said at the Salinger interview and what he told his legal representatives and latterly the Commission. At his Commission interview he explained that he had lied about the passport at the Salinger interview in order to avoid being asked further questions about it. He had been shocked when he was asked such questions as he was told the interview was to be about his family, not the matters in the indictment. Asked if he had considered stopping the interview, he said that he was concerned that this would have been viewed as him escaping from answering the questions, and that it would be a problem "because I never did an interview."

27.93 As to his reasons for using the Abdusamad passport on 20 and 21 December 1988, the first recorded account given by the applicant is contained in his first supplementary precognition. There he said that he did not use the Abdusamad passport for any clandestine reason and that one possibility was that it was simply the first passport that came to hand. Another possibility, he said, was that he did not have his normal passport available. As it was almost the end of the year, it was possible that he had lodged his normal passport with the bank to obtain his allocation of US dollars before the year end, when he would lose his entitlement to that year's allocation. In his nineteenth supplementary precognition he simply could not recall why he had used that particular passport, but his guess was that he probably did not tell his wife that he was going to Malta and by using the coded passport his wife would see that his normal passport was still in the house. In his twenty-eighth supplementary precognition he stated that he definitely did not tell his wife that he was going to Malta as he had only just returned from Czechoslovakia and did not want to upset her by letting her think that he was going away overnight to a place where Libyans went in order to drink and womanise. He repeated that, as his own passport was almost certainly in his house, if he had taken it his wife would have known he was travelling abroad. He therefore used the coded passport which he brought from his office.

27.94 The applicant offered two explanations to the Commission for using the coded passport. The first was that he had to travel with this passport in order to take advantage of the allocation of US dollars to which the stamp in the coded passport

entitled him (as described above). Although this is not an explanation found in any of his precognitions, the applicant maintained that he had raised it with his representatives. It differs from the account given in the early precognitions, in which his reason for using the coded passport was because the passport in his own name was lodged at the bank. The second possible explanation was that he wanted to conceal his travels from his wife. His position was that, having just returned from Czechoslovakia, his wife would have been suspicious of him travelling abroad again so soon. According to the applicant, he would have lied to her about where he was going, and would likely have told her that he was going to a friend's wedding in Libya.

27.95 The applicant also stated at interview that he was issued with further coded passports, in the names Ali Mohammed Salah in 1989 ("the Salah passport") and Abdelbaset Zorgani in 1990 ("the Zorgani passport"). The reason that he was issued with the Salah passport was that his wife discovered the Abdusamad passport by chance in his jacket pocket and was upset about it, following which he made a promise to her that he would not use it again. As to the Zorgani passport, he obtained this in 1990 in connection with a trip to Brazil. His wife was abroad and had locked his normal passport in a safe in his house. He had therefore persuaded the head of the passport authority, who was a friend and neighbour of his, to issue him with a coded passport for the Brazil trip.

After the indictment was issued against him he was prevented from travelling abroad by the Libyan authorities, and his children were issued with coded passports in false names to allow them to travel abroad safely. He also knew people in LAA and in oil companies who had coded passports to protect them when they tried to arrange spare parts, in breach of the US sanctions.

27.96 The issue of these further coded passports is of relevance to the Crown's submissions that following its use on 20 and 21 December 1988 the Abdusamad passport was never used again, and that despite a period of frequent travel up to that point, as evidenced by the stamps in his standard passport, it appeared that the applicant did not travel abroad again until May 1989. At precognition the applicant

sought to explain the lack of travel during that period by the facts that ABH had been wound up and that there was no longer any need to travel to Zurich. He also said that at the beginning of 1989 he was working on the Paris-Dakar rally, that Ramadan was early in 1989 and that he had other business interests in Libya, all of which meant that there was no need to travel from Libya.

27.97 However, at interview with the Commission the applicant explained that he had in fact travelled between the start of 1989 and May of that year and had used the Salah passport to do so. In particular, he travelled to Saudi Arabia towards the end of Ramadan in April of that year. As to why the Abdusamad passport was not used again after 21 December 1988, the applicant explained that his wife discovered it in his jacket and became upset, as a result of which he promised not to use it again. According to the applicant his wife even crossed out pages of the passport so that he could not use it again. He therefore returned it to the immigration authorities.

27.98 As indicated, the applicant's acceptance that he used the Abdusamad passport to travel to Malta on 20 December 1988 is in complete contrast to his denial of this at the Salinger interview. According to his thirty-fifth defence precognition the applicant stated that he realised that although some of the list of allegations that his lawyers had told him had been made, such as the trip to Malta on the coded passport, were true, others were false. He said that he felt at the Salinger interview, that he should deny even the true allegations because if he admitted these then people would be inclined to believe the truth of other allegations that were false, and he would be reported as admitting some of the charges. The applicant had been concerned when Salinger asked about his visit to Malta on 20 and 21 December, as his lawyer had told him not to discuss this and, had he been present, his lawyer would have told Salinger not to ask about it. In these circumstances, the applicant felt he should deny it, just as he had the other allegations.

27.99 In addition, the applicant is noted as saying that his wife, who was pregnant at the time, was present during the interview and did not know about the existence of the coded passport or the trip to Malta on 20 December. Because of this he could not answer these questions. It is worth noting that this latter explanation contrasts with the position adopted by the applicant at interview with the Commission, as stated

above, which was that his wife knew about the coded passport during the early part of 1989 when, following a row between them, he had promised not to use it again.

Ability to travel to Malta without leaving a record

27.100 In his precognitions and at interview the applicant said that his use of a coded passport on 20 and 21 December 1988 did not justify a suspicious inference being drawn against him. For example, he referred to matters such as his visit to Mr Vassallo and the fact that he stayed at a hotel on 20 December as being inconsistent with any suggestion that he was attempting to conceal his presence in Malta.

27.101 According to the applicant's precognitions if he had wanted to conceal his presence in Malta he could have travelled there without leaving any record rather than use a coded passport which could be traced back to him. In particular, he referred to an arrangement in place between Libya and Malta whereby Libyans could use an identification card to enter Malta, rather than a passport. Indeed, according to the applicant, he could travel to Malta without even using an identity card. In his first supplementary precognition he stated:

"... as a Libyan Arab Airlines employee and as someone well known, both at Tripoli airport and at the airport in Malta I could get away with not using a passport or an identification card at all, but simply by wearing my Libyan Arab Airlines uniform. This may sound ridiculous but it is true. If I wanted to do something clandestine in such a way that there would be absolutely no record at all of me going from Tripoli to Malta and back again, I could do it."

27.102 He repeated this claim in his nineteenth supplementary precognition, in which he explained that, if he wanted to travel secretly, he could do so in his uniform or use an immigration pass which did not even have a photograph on it.

27.103 At interview with the Commission the applicant confirmed that in his capacity as a flight dispatcher he had an LAA uniform. This allowed him to travel with LAA crew and enter through arrival gates designated for crew without having to show a passport or complete immigration procedures and without the need for an

entry visa. According to the applicant, this was part of an international aviation agreement. However, when travelling by this means, a “general declaration”, a document listing the aircraft and its crew, including the flight dispatcher’s name, required to be provided to the destination airport upon arrival there. In that sense, there would still be a record of his entry into a country, although the applicant’s understanding was that these records were only required to be held for six months and could then be destroyed. In addition, the name recorded on the declaration did not have to be a full name and could just be, for example, “Mohammed”.

27.104 While at interview the applicant could not recall having worn his uniform to travel in this way in December 1988, he explained that he had travelled in this manner on many occasions. This included occasions when he travelled with a charter or VIP flight, or if he was doing a “route check”, which he had to complete periodically to maintain his flight dispatcher’s licence. He still had to carry some identification, either his passport or a flight dispatcher’s identification booklet or an LAA identification card, which he could use to show that he was a member of the LAA crew.

27.105 The applicant’s account at interview is consistent with the terms of his second supplementary precognition, in which he said that he often travelled with aircraft when he was doing route checks. He also mentioned in the same precognition travelling as a flight dispatcher to Senegal for the visit of a high level delegation. On the other hand, in his eighth supplementary precognition the applicant claimed never to have travelled with crew as a flight dispatcher. He then suggested, however, that the only occasion he had done so was when he flew with a delegation to Senegal.

27.106 As regards the identification card which allowed Libyans to travel to Malta without a passport, the applicant claimed at interview that he never possessed such a card. He understood that when they were used to travel to Malta the cards themselves were not stamped to record entry or exit, but that embarkation cards still required to be completed. According to the applicant this contrasted with the position when one flew as crew, when there was no requirement to complete embarkation cards.

27.107 Although the applicant considered that these alternative methods of entering Malta demonstrated that his use of the coded passport was not sinister, his former representatives informed the Commission that they believed such information was potentially detrimental to his defence. In particular, Mr Beckett expressed concern that if this evidence had been brought out at trial, it had the potential to remove the need for the Crown to prove that 7 December 1988 was the date on which the clothing was purchased from Gauci's shop.

27.108 In the Commission's view while such evidence might ultimately have proved unhelpful to the defence it also begs the question as to why the applicant would not have chosen to travel to Malta by this means on the crucial dates in December 1988, assuming these visits were connected to the bombing. In other words, if the applicant did indeed purchase the clothing on 7 December 1988 it is difficult to understand why he travelled to Malta using a passport in his own name when there was an alternative means available to him which would have minimised the possibility of his movements being discovered. Similarly, while the applicant's use of a coded passport on 20-21 December 1988 went some way to obscuring his presence in Malta during that visit, it still required him to complete embarkation cards, something which he could have avoided had he travelled in uniform.

Mr Fhimah's diary entries

27.109 The trial court's approach to this issue was that, having acquitted Mr Fhimah, the entries in his diary were inadmissible as evidence against the applicant. It is nevertheless worth noting the applicant's position in respect of these.

27.110 As explained, the applicant confirmed in his precognitions and at interview that he intended to travel through Malta on 15 December 1988 en route from Prague, and that the entry in Mr Fhimah's diary for that date, "Abdelbaset coming from Zurich", related to this.

27.111 As regards the other entries of interest in Mr Fhimah's diary ie, the entry "Take taggs from Air Malta OK" on the page for 15 December 1988, and "take tags from the airport (Abdulbaset/Abdussalam)" in the notes towards the end of the diary,

there is very little comment about this by the applicant in his defence precognitions. In the Salinger interview, when it was put to him that he or Mr Fhimah had unlawfully obtained Air Malta luggage tags at Luqa airport, the applicant replied that it would not be easy simply to obtain such tags, and that he was surprised by this allegation.

27.112 At interview with the Commission the applicant's position was that questions regarding the diary entries were for Mr Fhimah to answer. Asked if the entry in the diary "take tags from the airport (Abdulbaset/Abdussalam)" related to him, he claimed that he did not know and that Mr Fhimah would have to be asked. He added, however, that there was an Abdelbaset who worked at the "lost and found" department at Tripoli airport, and that a number of people named Abdelbaset and Abdussalam worked for LAA. He claimed to know nothing about the diary entries. Tags for various airlines, including Air Malta, were, he said, available at Tripoli airport, and were stored in a stationery cupboard in the lost and found department. According to the applicant certain witnesses on Mr Fhimah's list could speak to this. As LAA were the handling agents for a number of airlines at Tripoli airport, there would be no difficulty in obtaining tags for other airlines there. He said that various members of the lost and found department and check-in counter staff at Tripoli airport had access to the tags. It was suggested to the applicant that the evidence at trial indicated that baggage tags were stored securely at Luqa airport, but the applicant said that he was not familiar with the procedures there.

27.113 When referred to his comments at the Salinger interview on the subject, the applicant reiterated that it would not be easy for him to obtain tags from Luqa airport (which was what Mr Salinger had asked him about) but that it would be easy for him to obtain Air Malta tags from Tripoli airport.

27.114 The issue of the diary entries is revisited in the Commission's assessment of Mr Fhimah's accounts below.

Applicant's Swiss bank account

27.115 The various advantages and disadvantages of the applicant giving evidence are set out in a discussion paper dated 16 November 2000 prepared by the applicant's

trial representatives (see appendix to chapter 18). Among the factors listed is a comment that the applicant's finances "make other people's pale into insignificance". There is, however, little reference to this issue in the applicant's defence precognitions. At interview with the Commission the applicant explained that he had told his lawyers that there was no problem with his Swiss bank account and that he had consented to the Crown having access to the account records. The maximum amount held in the account was, he said, around \$900,000.

27.116 At interview Mr Beckett, Mr Duff and Mr Taylor all expressed concern about the Swiss bank account and referred to the attempts made by the Crown to access it through proceedings in Switzerland. According to Mr Beckett and Mr Taylor the defence successfully challenged a motion by the Crown to postpone the commencement of the trial, as this would have given the Crown sufficient time to obtain and lodge the bank records under section 67 of the Act. According to Mr Taylor, the fact that the trial was not postponed was a matter of "great relief".

27.117 Following the interviews with the former representatives, the Commission obtained from Crown Office and D&G further details about the applicant's Swiss bank account. This included a full statement of the account from 12 January 1987 (when it was opened) to 31 August 1999, documentation relating to a number of transactions on the account, and a report dated 1 July 2000 by one of the depute fiscals involved in the case (see appendix). Thereafter the Commission obtained a statement from the applicant, the terms of which he later agreed (see appendix of Commission interviews). During the interview the applicant referred to a document he had written for his representatives at trial which he said explained a number of the transactions in his account. The Commission subsequently obtained this document from the applicant's present solicitor, along with a letter containing the applicant's translations of the document (see appendix).

27.118 It is apparent that a number of the payments on the account relate to business transactions which are vouched by documentary productions in the possession of the defence or by witnesses precognosced by the defence. For example, there are payments into the account from Toyota and Honda in early 1989, which clearly relate to the Paris to Dakar rally. There are also transactions in 1987 regarding a letter of

credit which, on the basis of defence productions and the applicant's statement to the Commission, relate to a deal for the purchase of a million gas lighters from an Italian company.

27.119 However, potentially the most significant transaction is a payment into the account of \$972,532.50 on 13 October 1989 by the Libyan People's Office in Madrid ("the Madrid payment"). Immediately prior to that deposit, the balance on the account had been just under \$22,000, and the largest balance it had ever held was less than \$210,000 (most of which related to the letter of credit for the lighters deal in 1987). Following the Madrid payment, a number of large debits were made, as follows:

- on 14 December 1989 \$90,000 was paid to Najeb Sawedeg;
- on 28 May 1990 \$228,000 was paid by cheque to Al Huda Trading Co Ltd;
- on 9 July 1990 \$336,000 was paid by cheque to Al Huda Trading Co Ltd;
- on 1 October 1991 \$150,000 was paid by cheque to Mohamed A Akasha; and
- on 21 October 1991 \$100,000 was paid by cheque to Mr Fauzi Abd Gashut.

27.120 At interview the applicant was asked to explain these transactions. He stated that the Madrid payment was made at the instruction of Hinshiri who was Minister of Justice at the time but who had previously been Minister of Transport. According to the applicant the money belonged to the Ministry of Transport and it related to a transaction to purchase fifty cars for the Libyan government. Initially it had been proposed that the government purchase fifty Spanish cars for nearly \$1,000,000. However, Hinshiri had then been advised that Spanish cars had never before been used in Libya, so the applicant and Badri Hassan were asked to obtain offers for the sale of Peugeot cars instead. The applicant stated that he brokered a deal with a businessman named Mr Hejazi who offered to sell fifty Peugeot cars at a cost of \$11,300 each. Mr Hejazi owned the Al Huda Trading Company, and the two cheques to Al Huda related to this deal, the first cheque being for the initial twenty Peugeot cars, the second for the remaining thirty.

27.121 The applicant's explanation for the payments to Al Huda reflects the contents of his sixteenth supplementary precognition, in which he described purchasing about fifty Peugeot cars for the Ministry of Transport and the Ministry of Justice through the "El Hoda" company. According to the precognition, he made this deal himself.

27.122 As regards the payment of \$90,000 to Najeb Sawedeg, a director of the Swiss based company Metrovia, according to the depute fiscal's report Mr Sawedeg had informed Swiss officials that the sum was repayment of a personal loan he had made to the applicant to allow the applicant to build a house in Tripoli. A similar explanation was given by Mr Sawedeg in his defence precognition (see appendix). There he said that he had lent the applicant 100,000 dinars at the time the applicant was building his house, and that the applicant had repaid him in dollars outside Libya. If accurate, this would suggest that the applicant used money from the Madrid payment to settle a personal debt.

27.123 However, at interview the applicant refuted Mr Sawedeg's explanation. He stated that the money was to be paid to a British company that had been involved in a deal to supply spare parts for computers in the Libyan Ministry of Justice. The applicant stated that he wrote a letter of authority so that the money could be paid to Mr Sawedeg, who then transferred the money to the company in the UK. He stated that he could not arrange the transfer to the UK company himself as he was in Tripoli. He denied that Mr Sawedeg had ever lent him any money. He stated that he had once assisted Mr Sawedeg in obtaining permission from the immigration authorities for sixty labourers and that in return for this favour Mr Sawedeg bought him furniture for his house, but he said that there was never any suggestion that he should pay Mr Sawedeg back for this.

27.124 The applicant's explanation is reflected in the document he wrote for his representatives at trial. It is also of note that reference is made in Mr Sawedeg's defence precognition to a deal ABH did for spare parts for computers. Although he was unsure, Mr Sawedeg also thought the applicant had approached him about a possible deal for computer spare parts.

27.125 As regards the cheques for \$150,000 and \$100,000 paid in October 1991 to Mohamed Akasha and Fauzi Gashut respectively, the applicant told the Commission that both payments were made on the instructions of Hinshiri. The applicant knew Akasha, who he said was a neighbour of his and a relative of Hinshiri. He said that he was told the payment to Akasha was to allow Akasha to conduct business in Cairo. He had heard that Akasha had repaid the money, but he was not certain about these matters. He confirmed that Akasha worked at the Libyan Embassy in Brazil for some years, and that they had travelled to Brazil together on one occasion to speak to a Brazilian company about a proposal to build schools in Libya. However, the money paid to Akasha was not connected to the schools project. As regards Fauzi Gashut, he did not know this person and did not know what the payment was in connection with. He had simply paid the money as requested by Hinshiri.

27.126 A further transaction worthy of note, because of its proximity to the bombing and its connection to the applicant's movements, is the transfer of \$50,018.47 to the account of Abdulmajid Arebi ("Arebi") in Prague on 19 October 1988. According to the depute fiscal's report, this coincided with the applicant's arrival in Zurich from Prague. This transfer followed a payment of \$69,964.62 into applicant's account from the Libyan Arab Foreign Bank in Tripoli on 23 August 1988.

27.127 According to the applicant the payment in August 1988 from the bank in Tripoli was part of the commission payable to him, Badri Hassan, Arebi and Mohammed Dazza for their work in arranging the lighters deal mentioned above. The applicant explained that, as Arebi was setting up the Al Khadra business in Prague, they agreed that he should be paid his share of the commission from the dollars that had been credited to the applicant's account, hence the money transfer on 19 October 1988.

27.128 In his defence precognitions (see appendix) Arebi said the payment was in respect of a loan from the applicant to assist in the setting up of the Al Khadra business and that this was repaid in part in 1997 when Arebi bought the applicant a vehicle. This explanation was put to the applicant at interview and it was explained to him that in one of his own defence precognitions (the thirtieth supplementary precognition) he had agreed with it. The applicant's response at interview was first to

suggest that the money paid to Arebi might have been in part a loan and in part commission, and then to suggest that it was possible he might be mistaken and that the payment might in fact have been a loan.

Conclusions

The applicant's position on the Salinger interview

27.129 Before considering the significance of the applicant's various accounts, it is important first to set out his position on the Salinger interview, and his reasons for participating in it.

27.130 Detailed explanations for the applicant's participation in the interviews are contained in his thirty-fifth supplementary defence precognition and in the final, undated, precognition which follows it. According to these, by the time of the Salinger interview the applicant had not seen the indictment either in Arabic or in English and had only been given a summary of its contents by his lawyers. He claimed only to have found out that there was to be an interview on the morning that it took place and, as mentioned above, had been informed it would only be about himself and his family and would not touch upon the allegations against him. He understood that the interview had been set up through Ibrahim Bishari, who was the Foreign Minister at the time, and who apparently knew Salinger. He was informed that the Libyan judge who was investigating the case had agreed to the interview on the basis that it did not relate to the allegations, and the advice his lawyer gave was to avoid answering questions on the allegations.

27.131 The purpose of the interview, as he understood it, was to show the US that the suspects were still alive, as there had been rumours that they had been executed. There was also concern that the US might try to bomb Libya again. Indeed, in his undated final precognition the applicant suggests that there was a "state of terror" in Libya as to the possibility that the US might be planning a military operation. He also refers to himself and Mr Fhimah being under "hard emotional pressure" in their relationships with others. The applicant's wife and family were present when Salinger and his entourage arrived, but although he had been expecting

a lawyer and a translator to attend the interview, nobody else turned up. The applicant requested that the interview be delayed but Salinger told him that this was not possible, that it would be straightforward and that he should just do it in English.

27.132 As mentioned above, the applicant claimed to have been “very surprised” when Salinger proceeded to ask him questions about the allegations, but there was nobody present to advise him or to tell Salinger not to ask such questions. He felt put on the spot. As Salinger was a guest in his house, it was socially and culturally difficult for the applicant simply to refuse to answer questions or to ask him to leave. The reason he gave for denying the allegations he knew to be true was to avoid people assuming that, if he admitted some of the charges, they must all be true. In his final, undated precognition the applicant also said that if he was to admit such matters, it would have put his country in a “difficult position”.

27.133 The applicant also suggested that he felt at times during the interview that his English was not good enough to answer the questions properly. For example, he had wanted to say that he was “shocked” about the allegations but as he did not know the correct word he used the word “surprised”, which, according to the precognition, was clearly a “ridiculous understatement”. In his final, undated precognition the applicant said that he had answered questions “inappropriately”, had done his best to provide answers “without broaching any topics directly or rejecting them in one way or another in accordance with my understanding of the word ‘avoidance’” (referring to the lawyer’s advice that he “avoid” discussing the allegations) and that he had a limited ability to express himself. Having to do so in a foreign language during a highly sensitive interview and under “hard emotional pressure” led him to give answers which may not have been “the truth of what [he] really wanted to say”. However, according to the precognition, this did not mean that he was trying to deny or avoid some answers. When he was asked questions about matters he had been told he would not be asked about and should not discuss, he became “confused” and expressed his answers according to his “modest language and legal knowledge”.

27.134 The applicant explained to the Commission that, as he understood it, the purpose of the interview had not been to afford him the opportunity to deny the charges, and that he was shocked when Salinger asked him about them. He repeated

that at the time of the interview he had received only a summary of the charges against him. At first he suggested that he had not been told specifically about the dates 7 and 21 December 1988, but he then said that he could not recall whether he was told about these dates.

27.135 The applicant also reiterated that his lawyer had told him to “avoid” talking about his job or his travels, and that the interview was only to be about his family. As indicated, the applicant relied on the terms of this advice as a means of explaining why he lied to Salinger. He was therefore asked what he understood by the word “avoid”, in the context of his lawyer’s advice, and whether he had interpreted this as lying about the issues. He said in response that he had perhaps misunderstood the advice. He repeated that he was ashamed to have lied, but said that he did not know how to avoid the questions. Later in the interview he said that by lying he had followed his lawyer’s advice to avoid the questions, although he emphasised that none of his lawyers had ever advised him to lie. He also feared that if he had admitted any allegations further questions would have followed. When asked whether he considered stopping the interview he replied that this might have been viewed as escaping the questions and might have caused problems.

27.136 The applicant was also asked why he had shown Salinger his standard passport when he had received advice not to discuss his travels. According to the applicant the interview was already finished when he produced his passport.

27.137 The applicant accepted at interview that the Crown would have used the Salinger interviews to undermine his credibility if he had given evidence. He explained that his defence team had asked him what he would say when that happened, and he had told them that he could only apologise to everyone for lying and that he was ashamed to have done so.

Consideration

27.138 It is important to bear in mind in any assessment of the applicant’s accounts that each of them was given in English rather than in his native tongue. It is obvious from the Salinger and Commission interviews, for example, that on occasions the

applicant had difficulty expressing himself clearly. Caution is therefore required in analysing his accounts, particularly his defence precognitions, where the words which appear are perhaps those of the precognoscer rather than his own. On the other hand, the applicant speaks English relatively well, having previously studied the subject in Cardiff, and he did not request the assistance of an interpreter at any stage in his interview with the Commission. In these circumstances the Commission does not consider the inconsistencies in his accounts are merely the result of communication difficulties.

27.139 It is also important to acknowledge the lengthy periods between the bombing (December 1988) and the first notification to the applicant of the allegations against him (November 1991), between that time and the period in which he was precognosced (1999-2000) and between then and his Commission interview (2004). In the Commission's view one would expect to encounter inconsistencies and uncertainties in any case in which detailed accounts had been taken over so many years. On the other hand, there is little expression of such uncertainty across the applicant's precognitions, particularly in respect of the accounts given as to his movements on crucial dates in December 1988. While it is possible that the precognoscer has failed to record the applicant's hesitancy about such matters, this seems unlikely given that the principal purpose of obtaining these accounts would have been to assess how well the applicant would be able to account for himself in evidence.

27.140 Dealing first with the Salinger interview, in the Commission's view the circumstances in which this took place are extraordinary. Not only are television interviews of named suspects rare, the grave nature of the charges against the applicant, the international attention which they attracted, and the potential implications, political and otherwise, of the applicant's actions and responses to questions, made the situation unique. In terms of the applicant's accounts, following the issuing of the indictments there was widespread fear in Libya as to the possibility of a further US military attack. If true, this suggests that the purpose of the interview was diplomatic rather than to provide the applicant with an opportunity to state freely his position on the allegations. It would also suggest that the impetus for the interviews may have come from persons other than the applicant and Mr Fhimah

themselves. Some support for this conclusion is provided by Salinger himself who in evidence (72/8857) suggests that Bishari (then Libya's Foreign Minister) was instrumental in the matter. Indeed, according to the applicant's precognitions he and Mr Fhimah were under "hard emotional pressure" in connection with the interviews, which would no doubt be true if there was a nationwide fear of military repercussions.

27.141 For these reasons, the Commission does not consider it appropriate to draw any adverse inferences from the applicant's false denials at the Salinger interview and from the sharp inconsistencies between this account and those which he gave to his representatives and to the Commission.

27.142 The same cannot, however, be said of the applicant's other accounts, all of which were given freely. While the Commission acknowledges that the defence might have been able to lead evidence in support of some aspects of the applicant's accounts, in its view the inconsistencies and other difficulties in his accounts provide firm support for the advice given by his representatives not to give evidence (see chapter 18). In particular, the Commission believes that there was a real risk that the trial court would have viewed his explanations for his movements on 20 and 21 December 1988, and his use of the Abdusamad passport on that occasion, as weak or unconvincing. In addition, his acceptance that he was seconded to the JSO at one stage and retained close links with that organisation and its senior figures was likely only to fortify the court's conclusions in this area. The same would apply to the applicant's admissions as to his links to MEBO and his involvement in what, on any view, was "military procurement" (see the trial court's judgment at paragraph 88). More generally, his background as a flight dispatcher, station manager and member of the Tripoli airport committee would undoubtedly have added weight to the conclusion that he had at least some familiarity with airport security. The Commission can also see the potential for further criminative inferences had the applicant been subjected to cross examination as to the movements of large sums of money in his personal Swiss bank account, particularly in light of the fact that nearly \$1m was held and distributed by him on behalf of Hinshiri. Finally, an admission by the applicant in evidence that he could travel to Malta without leaving a trace of his movements might have rendered it unnecessary for the Crown to prove that the purchase of the clothing took place on 7 December 1988 (although see the earlier observations on this issue).

27.143 The effect of these conclusions upon the Commission's assessment of the interests of justice is addressed following the analysis of Mr Fhimah's accounts below.

(ii) Al Amin Khalifa Fhimah

General

27.144 The accounts of Mr Fhimah in relation to a number of areas of the Crown case are detailed in the following section. Notwithstanding his acquittal by the trial court, the explanations he offers remain relevant to the Commission's assessment of whether, overall, it is in the interests of justice for the Commission to refer the applicant's case to the High Court. Most obviously, Mr Fhimah accompanied the applicant on 20 December 1988, and there was evidence suggesting the applicant telephoned his apartment on the morning of 21 December. In addition, while the Commission acknowledges that the trial court, having acquitted Mr Fhimah, took the view that the entries in his diary were inadmissible against the applicant, the Commission believes Mr Fhimah's explanations for these entries remain relevant to its consideration of whether it is in the interests of justice that a reference is made.

27.145 As with the applicant, there are three main sources for the accounts given by Mr Fhimah.

27.146 The first is the interview by Pierre Salinger in November 1991 ("the Salinger interview"), the transcript of which formed Crown production 1728.

27.147 Secondly, MacKechnie and Associates provided the Commission with a copy of Mr Fhimah's defence precognition (see appendix). The precognition was compiled by Mr Fhimah's trial representatives, who had attempted to consolidate into one comprehensive precognition the accounts given by him at his various meetings with them. It is apparent from the terms of the document provided by MacKechnie and Associates, which is headed "Draft no.9", that it is not in final form. Subsequent to receiving it, the Commission obtained copies of electronic files from McGrigors,

which included a later draft of the precognition (“draft 10”, dated 26 September 2000). Where appropriate, reference is also made to that version of the precognition, and the relevant pages are included in the appendix. Also contained in the McGrigors files were a number of separate notes on consultations with Mr Fhimah, reference to one of which is made below.

27.148 Lastly, members of the Commission’s enquiry team conducted an interview of Mr Fhimah in Tripoli from 21 to 23 February 2005. The interview was not concluded at that stage owing to a member of Mr Fhimah’s family falling ill, but was completed over two days on 15 and 16 May 2005. The interviews took place in the presence of Mr Fhimah’s lawyer, Azza Maghur, and the Libyan Attorney General, Mohammed Al Maremi. The Chief Libyan Prosecutor, Dr Yousef Souf, was also present for some sections of the interviews. Mr Fhimah spoke Arabic during the interviews and his answers were translated by an interpreter employed by the Commission. The statements compiled by the Commission were approved and signed by Mr Fhimah, who read over them with his lawyer. Arabic versions of the statements were produced and Mr Fhimah also had access to these. Copies of the English versions of the statements are contained in the appendix of Commission interviews.

Mr Fhimah’s accounts

Background and connections to the applicant

27.149 The following brief details are taken from Mr Fhimah’s defence precognition and his first statement to the Commission.

27.150 Mr Fhimah joined LAA four years after the applicant and, like him, trained in the USA to become a flight dispatcher, obtaining the FAA qualification in 1977. He worked for LAA as a flight dispatcher and in other positions until 1982, when he was appointed station manager at Luqa airport. He knew the applicant as a colleague at LAA and in that capacity they were friendly. Mr Fhimah thought it possible that the applicant was on the committee which interviewed him for the position of station manager at Luqa, a post which he held until 1 November 1988. Towards the end of his time as station manager, there was an overlap period when he handed over

responsibility to his replacement, Mustapha Shebani. During his time at Luqa, Mr Fhimah saw little or nothing of the applicant, although the applicant may have visited Malta during that period. He came to know of the applicant's appointment to head of airline security while he was working in Malta.

27.151 On his return to Tripoli in November 1988, Mr Fhimah continued to work for LAA as a flight dispatcher, but applied for unpaid leave to pursue the setting up of Medtours tourist agency in Malta. In the period in which Mr Fhimah handed over as station manager at Luqa to Shebani, the applicant had come to know of Mr Fhimah's plans to establish Medtours, and the applicant agreed to tell his relative in ADWOC about the agency. The applicant also enlisted Mr Fhimah's help in obtaining items for his house from Malta, including a water pump and carpets (an arrangement which is relevant to Mr Fhimah's explanations for the trip to Malta on 20 December 1988, below). The applicant also suggested to Mr Fhimah that Medtours could become involved in organising the Paris-Dakar rally, and under that company's name, Mr Fhimah was involved in arranging the Libyan leg of the rally in 1989-1990, along with the applicant and others. He was also involved in organising the 1990-1991 rally, the profit from which he invested in a farm.

Salinger interview regarding movements in December 1988

27.152 In his interview with Pierre Salinger Mr Fhimah was asked about the applicant's movements in December 1988. He responded by referring to the fact that, immediately after he had ceased working in Malta, some time around November or December 1988, the applicant told him that he was building a house and required materials for it. Mr Fhimah referred specifically to the applicant having asked him to obtain a handrail for the stairs in the house. He confirmed to Salinger that he himself was in Malta for much of December. He referred to the need to commence paperwork for Medtours and to settle personal business there, such as paying utility bills. He was asked about the entry in his diary which referred to the applicant flying to Malta from Zurich and he stated that he did not remember accurately and that it would be better for him to see the diary for himself. Mr Fhimah was asked if he had seen the applicant at Luqa airport on 17 December and he responded that he had not, but that

the following day he received a message from the applicant through Mr Vassallo who passed on his regards.

27.153 Mr Fhimah was informed by Salinger that the indictment against him alleged that he travelled with the applicant to Malta on 20 December 1988 while the applicant was using a false passport in a false name, and that they were carrying a Samsonite suitcase. Mr Fhimah replied that he did not recall the incident in question and that all he remembered was that he had extended leave in Malta. He suggested that the Maltese authorities could confirm the information about the passport. He was asked about 21 December and he stated that he was in Malta preparing the paperwork for his company and that he was not at the airport or travelling on that day.

27.154 In his defence precognition and his Commission interview Mr Fhimah gave detailed accounts regarding his movements in December 1988 and his association with the applicant at that time.

Diary entry for 15 December 1988

27.155 As regards Mr Fhimah's diary entry recording the applicant's expected arrival in Malta on 15 December, in his defence precognition Mr Fhimah stated that he got a note of the applicant's expected arrival from the LAA office in Valetta. He stated that the applicant would have telexed the details or left a telephone message there for him (pp 122-3). He indicated that, until he received the message, he did not know that the applicant was in Zurich. The reason for the applicant leaving the message for him was, he said, that the applicant had asked him to buy a carpet for the applicant's new house, but he did not want to choose one on the applicant's behalf. He referred to the entries in his diary (under 28 November 1988 and at the end of the diary) which stated "contact the carpet salesman". He suggested that these related to the applicant's request and to his previous attempts to obtain a catalogue of carpets for the applicant to pick from (pp 118, 132).

27.156 Mr Fhimah stated a number of times in the precognition that he would not have met the applicant at the airport (pp 45, 123-4, 215). His position was that the note in his diary about 15 December was not to remind him to meet the applicant at

the airport but simply to remind him that the applicant was arriving. He referred to the fact that Shebani would be at the airport to meet the applicant. At interview with the Commission, on the other hand, Mr Fhimah suggested that the purpose in his being told of the applicant's arrival would have been so that he or Shebani would meet the applicant at the airport, despite the fact that he was no longer station manager there (p 33 of February statement). When asked why he might have wished to meet the applicant on 15 December he stated that it was possibly because the applicant was a friend, possibly because the applicant wanted his help to buy something or possibly because he wanted something from the applicant. He stated that he could provide a full explanation but that "it would take too much time" (p 34 of February statement).

17 December 1988

27.157 In relation to the applicant being in Malta on 17 December, Mr Fhimah confirmed in his precognition what he had said in the Salinger interview, namely that he did not know the applicant had been there until Mr Vassallo spoke to him the following day. However, contrary to what he said at the Salinger interview, he suggested that it was not the applicant but Shebani who asked Mr Vassallo to pass the applicant's message on to him (p 45). He described in the precognition Mr Vassallo asking him "Where were you last night?" before recounting the applicant's message. However, Mr Fhimah also described in his precognition having been in a meeting with Mr Vassallo and another individual, Sami, about Medtours on the night of 17 December. Accordingly it is not clear why Mr Vassallo only informed Mr Fhimah of the applicant's message on the following day, or why Mr Vassallo would question Mr Fhimah's whereabouts on the night of 17 December.

Events in Tripoli on 18-20 December 1988

27.158 Mr Fhimah gave a number of reasons in his precognition for flying to Libya on 18 December. He stated that he wanted to get away from Sami, who he had decided should not be allowed to become a partner in Medtours. He also suggested that he wanted to see his family. However, he stated that the main reason for travelling was to meet ADWOC and also to meet the applicant to discuss ADWOC

and the rally. He suggested that he telephoned both ADWOC and the applicant from his apartment on 18 December, in front of Mr Vassallo (pp 46-7, 127).

27.159 Mr Fhimah's account of contacting the applicant on 18 December is broadly reflected in his statement to the Commission in which he stated that his memory of this had been prompted by the entries in Mr Vassallo's diary and his own (pp 35-6 of February statement). He indicated that his trip to Libya was not connected in any way to his failure to meet the applicant on 17 December. He suggested that the entry in Mr Vassallo's diary for 18 December – "Lamin left for Tripoli. Talk with Mr Baset." (CP 531) – might have related to his desire to discuss with the applicant the applicant's contact at ADWOC or the carpets the applicant had asked him to buy (p 37 of February statement). He was asked why, if his main purpose in returning to Tripoli was to meet ADWOC, Mr Vassallo's diary recorded that it was to talk to the applicant. He said Mr Vassallo had made a mistake with this entry, and that Mr Vassallo had perhaps become confused because he overheard Mr Fhimah speaking to the applicant on the telephone when he was at Mr Fhimah's apartment on the morning of 18 December.

27.160 According to his defence precognition (pp 127-8) and his statement to the Commission (p 35 of February statement), Mr Fhimah flew back to Tripoli on the morning of 18 December on the ADWOC charter flight. He stated that he met with an individual named Abdussalam Alderbassi at the offices of ADWOC on the morning of 19 December (pp 47, 128) to discuss the possibility of Medtours and ADWOC doing business. Thereafter he telephoned the applicant and the applicant told him that it was too late for Medtours to become involved in the 1988/89 rally, and that he had not yet contacted his brother in law at ADWOC.

27.161 At page 47 of his defence precognition it is suggested that Mr Fhimah then had a meeting with the applicant and others about the rally when Mr Fhimah explained his plans for Medtours to ensure that he would be involved in the 1989/90 rally. However, at page 129 of the precognition there is no reference to such a meeting having taken place on this date, nor did Mr Fhimah mention such a meeting when interviewed by the Commission. Indeed, he specifically denied in his Commission interview that such a meeting took place, and when the passage from

page 47 of his precognition was put to him he reiterated that no such meeting had occurred in December 1988, although he said he had a meeting regarding the rally in April 1989.

27.162 Moreover, whilst both the applicant and Mr Fhimah stated that the agreement for them to travel together to Malta on 20 December was made while Mr Fhimah was in Tripoli, Mr Fhimah was inconsistent in his accounts regarding the reasons for the applicant travelling with him on that date.

27.163 At one stage in his precognition Mr Fhimah suggested that the visit by the applicant on 20 December was for the purpose of seeing Mr Fhimah's business and meeting Mr Vassallo (p 47), but elsewhere in his precognition (p 197), and at interview with the Commission (pp 42-3 of February statement), the purpose was said to be the buying of carpets. This is noteworthy as it reflects the pattern in the applicant's accounts, as described above, where initially the applicant also said the purpose of the trip was related to seeing Mr Fhimah's business, but in a later precognition stated the purpose to be the buying of carpets. This may be indicative of the fact that, as both the applicant and Mr Fhimah accepted, their accounts were influenced by their ongoing discussions with each other.

Flight to Malta on 20 December 1988

27.164 As regards 20 December, Mr Fhimah indicated at interview that his memory of the trip was good and that, because it was the first time he had travelled with the applicant, this assisted his memory of events (p 43; p 45 of February statement). Indeed, he stated that this made the trip "quite hard to forget" (p 39 of February statement). His position at precognition (pp 48, 129) and to the Commission (p 43 of February statement) was that he had arranged with the applicant over the telephone that if the applicant intended to travel with him to Malta, they should meet at Tripoli airport, which they had. His position was that as the arrangement to travel together on 20 December was only made at the airport, it was not a pre-planned trip (p 45 of February statement). He stated that he had planned to travel on the LAA flight but the applicant turned up in time for them to travel on the earlier Air Malta flight (p 130; p 45 of February statement).

27.165 In his precognition (p 130) and in his Commission interview (p 46 of February statement), Mr Fhimah stated that he did not himself check in any luggage on 20 December as he carried only hand luggage. He stated that he could not remember if the applicant carried any luggage (although in his precognition he is then recorded as stating specifically that the applicant did not check anything in or get anything tagged). He did not see the applicant's passport at this stage. They sat together on the flight but, unlike the applicant, he did not remember anything else about the journey.

27.166 Mr Fhimah's position was that, on arrival at Luqa, he and the applicant passed through the airport as normal. Contrary to the applicant's position at interview with the Commission, Mr Fhimah refuted the suggestion that in his position as former station manager he could have assisted the applicant through customs by lessening the chances of being stopped by officials. He also denied having his airport pass with him, stating that he kept it in Malta (pp 47-8 of February statement).

27.167 Mr Fhimah could not recall the applicant collecting anything from the luggage carousel on arrival and his position to the Commission was that he was certain the applicant did not have any luggage with him as their arrival through passport control was very fast. At this stage in the interview Mr Fhimah stated that they were "racing against time" at the airport as the applicant was on his way to buy carpets and if he had bags with him it would have caused a delay as he would have had to wait for his baggage to be searched (p 47 of February statement). However, when Mr Fhimah was questioned as to why he and the applicant visited Mr Vassallo's house if they were in such a hurry to get to the carpet seller, he stated that they were not in a rush as the carpet seller traded from a house and did not run a shop that opened only for set hours. He said that they never had it in their minds that they were in a hurry, as rushing was not going to affect the business they were in Malta to conduct (p 8 of May statement).

27.168 At precognition Mr Fhimah stated that he did not see Majid at Luqa airport and that he did not meet Mr Vassallo there (p 196). Moreover, he did not know Mohammed Abouagela Masud (p 159; p 8 of February statement, when he was shown

the photograph, allegedly of Masud, in CP 313) and had no dealings with him (p 226). He considered the name strange as it did not include a family name (p 159).

Visit to Mr Vassallo's house on 20 December 1988

27.169 Mr Fhimah was consistent in stating that he and the applicant went from Luqa airport to Mr Vassallo's house. Although initially in his precognition he suggested that they probably made their way there in his Hyundai car (p 48) he later suggested that it was highly likely they used Shebani's car because he would have been at the airport at the time of their arrival (and the applicant) would have sought him out. He was "pretty sure" Shebani offered them his car, which he and the applicant recalled was a white Volvo (pp 196, 202).

27.170 In the later draft of his precognition, Mr Fhimah is recorded as stating that he was "five million per cent certain" that he and the applicant met Shebani at the airport, and went on to state that Shebani offered them the use of his car, which again Mr Fhimah stated was the white Volvo (p 82-3 of the draft 10 precognition). However, in his interview with the Commission Mr Fhimah stated that he did not recall meeting anyone at the airport on 20 December, and that nobody was waiting for him there. He did not recall the applicant meeting Shebani at the airport (pp 48-9 of February statement).

27.171 The issue of the car he and the applicant took from the airport was another matter about which Mr Fhimah was markedly inconsistent. To cite one example, despite his final position in his defence precognition (above) being that he used Shebani's white Volvo, in his statement to the Commission he said he was "perfectly clear" that it was a Honda Civic that he drove on 20 December (pp 49-50 of February statement).

27.172 As regards the reasons for visiting Mr Vassallo on 20 December, as stated above, Mr Fhimah's initial position at precognition was that the applicant came with him to Malta to meet Mr Vassallo and to check out their business (pp 47-8). There are, however, also inconsistencies in Mr Fhimah's explanations of the reasons for the visit to Mr Vassallo, and as to whether or not it was a business visit. Although he

stated to the Commission that this was the purpose of the visit (pp 50-1 of February statement) he later said that the applicant's presence at Mr Vassallo's house was "incidental" (p 3 of May statement) and in a passage in his precognition he stated that there was no discussion of business at all (p 201).

27.173 On the other hand, Mr Fhimah, like the applicant, was consistent in describing the conversation that took place in Mr Vassallo's house about the applicant's need for a banister, and the applicant's admiration for the banister in Mr Vassallo's house. Fhimah confirmed that he subsequently visited the applicant's house in Tripoli with two Maltese carpenters to provide a quote for this work.

Events after leaving Mr Vassallo's house

27.174 At precognition Mr Fhimah stated that after leaving Mr Vassallo's house he and the applicant went to the Central Hotel which was close by, and he thought the applicant stayed in the car while he went into the hotel. He stated that en route from Mr Vassallo to the Central Hotel he pointed out to the applicant the offices he hoped to rent for Medtours (p 197). Later in the precognition he also suggested that after getting a key from the Central Hotel he went to get his own car, the blue Hyundai, while the applicant waited in the other car. They then transferred to the Hyundai, and Mr Fhimah drove them to the carpet seller (pp 202-3). He had clearly discussed this matter with the applicant, as he said his memory of events was based 75% on his own recollections and 25% on those of the applicant. He left Shebani's car (which, in the precognition, Mr Fhimah still described as the white Volvo) outside the Central Hotel, and left the key for it under a tyre.

27.175 Mr Fhimah's account to the Commission broadly reflects this version of events, except that he maintained it was the LAA's Honda Civic rather than the white Volvo which he drove. He said that Shebani had told him to leave the Honda in Mosta (where the Central Hotel was situated, p 10 of May statement) and that he had him this as soon as he arrived at Luqa airport. He was reminded that he had previously told the Commission he did not recall meeting anyone at the airport when he arrived, and that he did not recall the applicant meeting Shebani there. He responded that he must have met Shebani there in order to get the key for the car from

him, and that Shebani must have been at the airport as there was an LAA flight leaving (pp 18-19 of May statement). This reflects the applicant's position that although he could not recall meeting Shebani at the airport they must have done so in order to have use of his car (which the applicant said was the white Volvo).

27.176 It is of note that, in contrast to these accounts by both the applicant and Mr Fhimah, Shebani stated in a supplementary defence precognition (see appendix) that he would "definitely" remember meeting the applicant and Mr Fhimah if they arrived together off a flight in Malta. He stated that he did not meet them at the airport. He also said he "never" lent the white Volvo to Mr Fhimah.

27.177 Mr Fhimah indicated that he took the applicant to the carpenter's workshop en route to the carpet seller, but that it was closed (p 132 of precognition; p 5 of May statement). In his precognition he was consistent in describing visiting the carpet seller with the applicant after leaving Mr Vassallo's house, and he estimated they were there for around half an hour (pp 49, 132, 197-8, 203). The dealer displayed the carpets in his garage (p 197). At page 49 he stated that he thought the applicant bought a carpet but he could not be sure. However, in subsequent passages of the precognition he stated that there was not a good selection but that the applicant bought two carpets (pp 132, 198, 203). He maintained a similar account at interview with the Commission when he also stated that the carpet seller told them that he was waiting for another order of carpets to come in, and he gave the applicant a catalogue showing these carpets (pp 6-7 of May statement). Mr Fhimah could not recall how much the applicant paid for the carpets but he said that generally carpets of the size he thought the applicant bought (3x4 metres) were about 100 US dollars. He did not think the carpets the applicant bought were bulky as they were folded very professionally (p 9 of May statement).

Events at the Holiday Inn

27.178 Mr Fhimah was also consistent in his account to the Commission that after visiting the carpet seller he took the applicant to the Holiday Inn, where the applicant had chosen to stay in preference to the Central Hotel (p 48; p 9 of May statement).

27.179 In his precognition Mr Fhimah stated that the Holiday Inn employee at check-in was an ex-employee of LAA, and that he told the applicant to give her his LAA identification so he could obtain the airline discount. He recalled, however, that the applicant did not have his identification and the woman had to discuss with her manager whether to give the applicant the discount or not.

27.180 Mr Fhimah went on in his precognition to say that the applicant gave his passport to the woman and that Mr Fhimah saw that it was in a different name from the applicant's correct name. The precognition records that he thought this "odd". However, he said nothing about it to the applicant at the time, because he did not want to be involved in the applicant's business (p 49). Later in the precognition he suggested that although it was impossible to remember precisely who handled the passport he thought the woman passed the passport back to him first, and he noticed that it was "big and abnormal", like two passports stuck together, and he saw the name on it. He went on to state that by the time of precognition he appreciated the applicant's role in circumventing sanctions, and the applicant's need for a coded passport in that capacity. Mr Fhimah said that it would not have been uncommon to obtain such a passport but that he never done it, and it had never occurred to him that one could do it (p 72). He confirmed that he did not know the applicant had a passport in another name until he saw it at the Holiday Inn (p 159). In the subsequent draft of the precognition, Mr Fhimah confirmed that he was generally aware of the use of passports in false names and when he saw the applicant's passport he did not immediately jump to the conclusion that the applicant was an intelligence agent, but he thought it "rather strange" (p 87 of the draft 10 precognition).

27.181 At interview with the Commission Mr Fhimah gave a detailed account of events at check-in at the Holiday Inn. In relation to the applicant's passport, he stated that the woman handed the passport back to him rather than to the applicant who was further away. He noticed that the passport was thick; it felt like two or three passports together. He then opened it out of curiosity and saw the name on it before handing it to the applicant. He said that it did not arouse any suspicions in him that the name was different from the applicant's correct name. It was, he said, a personal matter for the applicant and he did not ask the applicant about it. He was asked if he was surprised about the passport not being in the applicant's own name and he said that he

was not, as so many people had been issued with coded passports. He said that the use of coded passports was known to him at the time, that everyone knew coded passports were used. He said he knew about them as station manager, particularly because they were used by foreigners (pp 13-15 of May statement). It was suggested to him that he had been recorded in his precognition as having thought the applicant having a passport in another name "odd", but he refuted this and said he knew about coded passports at the time and did not find it odd (p 17 of May statement).

27.182 Mr Fhimah went on to state to the Commission that he could not recall for certain if he went to the applicant's hotel room but it was possible. He stated that he perhaps stayed with the applicant at the Holiday Inn for an hour or less, that they "definitely" had drinks and that they were talking to each other as friends (p 16 of May statement). No such details were given in his precognition, in which he said he was "absolutely certain" that he stayed no longer than ten to fifteen minutes with the applicant, including the time it took to check in (pp 87-8 of the draft 10 precognition) and that, once he dropped the applicant off, it was like "getting rid of a burden" as, although he respected the applicant, they were not very alike (p 204).

27.183 At interview with the Commission Mr Fhimah stated that he did not know what the applicant did after they parted company at the Holiday Inn. The applicant was not waiting for anyone and he did not see anyone waiting for the applicant.

He stated that there was no arrangement for him to meet the applicant again that night or the following morning (p 19 of May statement). He said he went out drinking in Malta that night, although he was not consistent about precisely where he went.

Events on the morning of 21 December 1988

27.184 At page 50 of his precognition Mr Fhimah stated that when he left the applicant at the Holiday Inn it was agreed that the applicant would call him in the morning. After he went out drinking he stayed at the Central Hotel rather than his own apartment. He awoke at 9.30am, having slept in. After phoning the Holiday Inn and being advised that the applicant had checked out he telephoned Shebani at the airport. Shebani joked with him that he had “done it again”. He spoke to the applicant, who was at the airport, and apologised. He told the applicant to leave a shopping list with Shebani and the applicant said he would be back in the New Year. The applicant had tried to phone his flat and someone had answered who was not Mr Fhimah, so it was either a wrong number or a crossed line.

27.185 However, this fairly precise account of the morning of 21 December was contradicted later in the precognition. At page 198 Mr Fhimah is recorded as stating that when he left the applicant at the Holiday Inn there was no arrangement for them to speak to each other the following day. He said that they agreed that if he found the carpet seller had new stock he would contact the applicant. He gave the applicant the telephone number for his apartment. He was asked at precognition why he gave the applicant the apartment number when he was staying at the Central Hotel and he stated that there was no point in giving the applicant the number for the Central Hotel as it “would not be the way to do things. If you give someone a number to a hotel it is almost like saying you don’t really want him to call you.” He went on to say that he thought the applicant would contact him if he did not get back to the applicant about the carpets and the staircase and if he gave the applicant the hotel number the applicant would have called there first. He stated that the applicant knew he could be contacted at the apartment or at the LAA office.

27.186 This account of events is clearly somewhat confused. It is followed by a note in the precognition, inserted by Mr Fhimah’s representatives, stating that Mr Fhimah was “very vague” on this point and that his explanation for why he gave the applicant the apartment number, and why the applicant would phone the apartment when Mr Fhimah was checked into the Central Hotel, was “not at all convincing” and was “definitely a weakness”.

27.187 At page 205 of the precognition Mr Fhimah indicated that although he had previously been relatively certain that he stayed at the Central Hotel on the night of 20 December, since “new things” had arisen he was no longer sure. It is not clear what the new matters were that caused him to doubt whether he stayed at the Central Hotel that night, but in the subsequent draft of the precognition he was said to be “almost 100% certain” that he stayed there (p 89 of draft 10 precognition) and his position to the Commission was that it was “most likely” that he stayed there (p 20 of May statement).

27.188 In relation to the telephone call the applicant made to Mr Fhimah’s apartment on the morning of 21 December Mr Fhimah had said at page 50 of the precognition that there was an arrangement for the applicant to call him that morning. However, at page 198 he denied that there was such an arrangement. At page 208 he stated that there was an arrangement on 20 December that he would speak to the applicant about the carpets and the stairs “within a couple of days but not the next day”. He suggested that the applicant might have telephoned the apartment to remind him about the staircase and to make sure he did not forget. He stated that the applicant was an early riser so 7am would not be early for him (p 200).

27.189 However, Mr Fhimah informed the Commission that he had asked the applicant about the phone call and why the applicant contacted the apartment when he knew Mr Fhimah was staying at the Central Hotel. According to Mr Fhimah, the applicant said he had tried both the apartment and the hotel, but there was no answer at the hotel. Mr Fhimah’s explanation at precognition was put to him, namely that he did not give the applicant the hotel number as there would have been “no point” and “it would not be the way to do things”, but he maintained that the applicant had all his telephone numbers. He went on to state that the reason he gave the applicant the apartment number was so that the applicant could contact him over the following months, not the following morning, and that by the time the applicant called him he might have moved back into his apartment (pp 21-23 of May statement).

27.190 Mr Fhimah was also asked at interview if he knew why the applicant was trying to contact him on the morning of 21 December. He stated that the applicant

had told him the reason was to obtain the telephone number for flight enquiries, as the applicant had wanted to find out about any delays to his flight. However, although the applicant was himself inconsistent as to the reasons for the call (as described above), at no time in any of his accounts did give this explanation.

27.191 Mr Fhimah was also asked at interview about who had answered the telephone at his flat when the applicant called if, as Mr Fhimah indicated, there was nobody staying there. The only explanation offered by Mr Fhimah in the precognition was that it was a wrong number or a crossed line (p 50), and at interview he repeated those explanations, although under reference to Crown productions 540 and 725 he accepted that the number dialled was the number for his apartment (pp 21-2 of May statement).

27.192 Mr Fhimah stated to the Commission that he had no idea who answered the telephone, but he referred to the fact that he would let friends and colleagues stay at the flat when they were in Malta. He also said that the owner of the flat had a key and that his neighbour knew he left a key on the ledge above the door in case of emergency. He seemed to recall an occasion or two when his neighbour said she had opened his door to answer his phone (pp 23-4 of May statement). It was put to him that he had not offered such explanations in his precognition. (In fact he did refer to the owner having a key and the neighbour knowing about the key on the ledge (p 155), but there was no suggestion that his neighbour had ever answered his telephone. Moreover, a consultation note dated 7 August 2000 (see appendix), indicates that he specifically stated that nobody stayed in the flat on 20 December and that it was not possible that it had been another Libyan who had answered the telephone.) He repeated to the Commission that, when asked by his representatives about this matter during the preparations for trial, he thought the number must have been mis-dialled or was a crossed line, and he said he himself had experienced crossed lines in Malta. He was informed of the applicant's position that, when he dialled the number, a man answered who he thought was drunk. Mr Fhimah was asked if he might have stayed in the flat but he said that he never did so on the first night back from Libya, and he would not use the flat when he was drunk (p 25 of May statement).

27.193 As to other events on 21 December, in contrast to his initial account of having telephoned the Holiday Inn and then Shebani at the airport and having spoken to the applicant (p 50 of precognition), Mr Fhimah stated later in his precognition that he did not recall anything about that day. Although there were entries in his diary about preliminary arrangements for the Medtours office, he did not know what he did that day. He stated that he had no wish to see the applicant and that he definitely did not go with him to the airport that morning (p 199).

27.194 Mr Fhimah told the Commission that he could not recall what he did on 21 December but he stated that, based on diary entries, he had a particular programme to follow. He said that he could not recall if he went to the airport on 21 December, but that he would have gone there only if he was travelling (p 26 of May statement). Later, he stated that he did not recall if he spoke to the applicant at any time that day. He was asked if he recalled speaking to Shebani and he said that he could not remember but that it was possible, and that he might have asked Shebani whether or not the applicant had left. The account in page 50 of his precognition was put to him but he did not recall any of the details recorded there (p 57 of May statement).

27.195 Again, it is noteworthy that the pattern of explanations offered by Mr Fhimah appears to some extent to mirror those of the applicant. The applicant's position in his initial precognition was that he arranged to meet Mr Fhimah on the morning of 21 December and that Mr Fhimah gave him the number for his apartment the night before, but when he called Mr Fhimah on the morning of 21 December a drunken person answered. He therefore decided to go back to Tripoli and, when he got to the airport, Shebani received a call from Mr Fhimah apologising and explaining that he had slept in at the hotel and had contacted the Holiday Inn and found that the applicant had checked out. This account closely reflects Mr Fhimah's version of events at page 50 of his precognition. However, as with Mr Fhimah, in subsequent precognitions of the applicant, and in his interview with the Commission, this somewhat precise recollection fell away.

Diary entries regarding tags

27.196 As well as his recollections of events in December 1988, the other aspect of Mr Fhimah's accounts which the Commission considers to be important in its review of the applicant's case concerns the entries in his diary which relate to tags. One entry, under 15 December 1988, was translated as "Take TAGGS from Air Malta OK" (CP 1614). This was the same date under which Mr Fhimah had recorded that the applicant was arriving from Zurich. The second, an entry at the end of the diary on page 59, was translated as "Take/collect tags from the airport (Abdulbaset/Abdussalam)". The Crown invited the trial court to infer that these entries related to Mr Fhimah obtaining tags from Luqa airport for the applicant.

27.197 Mr Fhimah was asked about entries in his diary during the Salinger interview. He responded that he had not seen his diary for a long time and could not remember what he had written in it. He suggested that he would have to see the diary to explain the entries. As regards the allegation that he had written a reminder to obtain Air Malta baggage tags, he responded that tags did not mean anything to airlines and could be easily accessible to anybody, that they were available on the counter. This included Libyan and Air Malta tags. He was asked if it could be the case that Abdelbaset was the man who asked him for tags and he responded that it was possible, but that he knew many people called Abdelbaset and that it was not significant. He also suggested that if the diary had been important he would not have left it to be found by the police.

27.198 In his precognition and his interview with the Commission Mr Fhimah offered further explanations for the diary entries. He denied that the entries related to the applicant. He stated to the Commission that the securing of a regular supply of luggage tags was an almost permanent problem for the LAA station at Luqa. The tags would be dispatched from the main store of the administration in Tripoli airport, but constant requests had to be made there to send more tags. He explained that there was an arrangement with Air Malta whereby Air Malta would supply tags for use on LAA flights if the stock of LAA tags at Luqa ran out (pp 44-5 of May statement).

27.199 Mr Fhimah went on to tell the Commission that the entries in his diary regarding tags had nothing to do with any conspiracy. He said that when he left his post as station manager he was aware that the station needed tags, so in order to try to resolve this problem for Shebani he tried to arrange for a large quantity of boxes of tags to be sent from Tripoli, and the entries in his diary were to remind him of this (pp 48-9 of May statement). He further stated that the entry for 15 December related to a request to an Air Malta supervisor for tags, again to help Shebani. The fact that it was entered under 15 December did not mean the request was made that day. He was referred to Shebani's defence precognition which suggested that Shebani himself spoke to Air Malta about the tags, and he was asked why, if Shebani was trying to resolve the issue, he was also involved in obtaining tags, given that he was no longer station manager. He stated that it was Shebani's request that he be involved, and he was simply assisting a colleague (pp 51-53 of May statement).

27.200 This explanation broadly mirrors the contents of his defence precognition. There Mr Fhimah stated that the entry under 15 December meant "get tags from Air Malta" and that the "OK" meant he had to do something and had done it. He explained that Shebani asked him to talk to an Air Malta official to ensure Air Malta would continue providing tags until the problem could be resolved of LAA not providing enough tags to the station in Malta. He stated that when he finished at Luqa he left some stationery for Shebani but the tags were running out. He felt obliged to solve this problem for Shebani. He said he was sure he would have made a phone call about this as there was no question of him taking the tags. He reiterated that it was simply a matter of ensuring that Air Malta would continue to allow LAA to use their tags. He said the person he would have spoken to at Air Malta would have been Mario Ghio. He thought that he would have made the call to Mr Ghio on 15 December, but if Mr Ghio was not there he would have spoken to somebody else (pp 118, 124-5).

27.201 As regards page 59 of the diary and the entry "Take/collect tags from the airport (Abdulbaset/Abdussalam)", Mr Fhimah stated to the Commission that Abdelbaset and Abdussalam were the names of two different people and the airport in question was Tripoli airport. He stated that these individuals were in charge of the lost and found property department at Tripoli airport ("the lost and found") and that

they dispatched labels and tags. He stated that the entry in the diary was to remind him that when he went to Tripoli he should speak to these people to arrange for them to load tags onto his flight when he was returning to Malta, so that he could pass the tags on to Shebani. He stated that he spoke to Abdussalam (i.e. Abdussalam El Ghawi) about this but was not sure if he spoke to Abdelbaset about it (pp 53-4 of May statement). He stated that the Abdelbaset in question was not the applicant and that there were never any circumstances whatsoever in which he might have obtained tags for the applicant (p 55 of May statement).

27.202 Mr Fhimah's explanations here broadly reflect parts of his precognition. There he stated that the diary entry related to taking tags from Tripoli airport. He thought that the list of entries on page 59 of the diary, of which the note about tags formed part, would have been written when he was just about to leave Malta for Tripoli, which he did on 29 December. He said it was a list of things requiring to be done, some in Malta and some in Libya. He said that the two individuals, Abdelbaset and Abdussalam, worked in the lost and found (pp 126, 134). However, he was inconsistent about whether, having obtained the tags from Tripoli airport, he subsequently accompanied the tags to Malta. At one stage in the precognition he said he could not recall whether he sent the tags or took them with him to Malta (p 134), but earlier he had stated that he did not take the tags from Libya to Malta (p 126). The indication he gave to the Commission was that he arranged for the tags to be returned on the flight with him (p 54 of May statement).

27.203 It is worth noting briefly the contents of defence precognitions of the two individuals, Abdussalam El Ghawi and Abdelbaset Shukri (see appendix), who were suggested to be the people to whom Mr Fhimah's diary entry referred.

27.204 El Ghawi confirmed in his first defence precognition that in 1988 he was a shift supervisor in the lost and found section at Tripoli airport. His recollection was that sometime in 1988, after Mr Fhimah had finished as station manager at Luqa, he received a telephone call from him requesting tags for Shebani. El Ghawi suggested that when the telephone call had first come in from Mr Fhimah to the lost and found, it had been Abdelbaset Shukri who had answered. He said in this precognition that Shukri worked in the lost and found. He described entering the lost and found office

and seeing the handset of the telephone lying off the hook, and when he picked it up Mr Fhimah was on the line. He said that he was sure Mr Fhimah was in Tripoli at the time, and that after Mr Fhimah had requested tags he had gone to the store and obtained three boxes of tags which he passed to Mr Fhimah at the airport later that day. He accompanied Mr Fhimah to a check in desk and saw him arranging to have the boxes of tags put on a flight to Malta. He assumed that Mr Fhimah also travelled on that flight to Malta.

27.205 Although El Ghawi suggested in this first precognition that Shukri worked in the lost and found, in supplementary precognitions he stated that Shukri worked in ramp control and did not work in the lost and found. Indeed, he stated that there was nobody named Abdelbaset working in the lost and found in 1988. He suggested that Shukri must have been passing the lost and found office by chance and picked up the telephone when Mr Fhimah called.

27.206 Shukri confirmed at precognition that he worked in ramp control at Tripoli airport in 1988 but that he never worked in the lost and found, although he said he was often in that department and if the phone rang there, he would have answered it. He did not rule out having received a call there from Mr Fhimah about tags, but he had no memory of it.

27.207 It was pointed out to Mr Fhimah during his interview with the Commission that although El Ghawi had provided a precognition supporting Mr Fhimah's explanation about obtaining tags, El Ghawi had also said there was nobody named Abdelbaset working at the lost and found at that time. Mr Fhimah was also informed that Shukri worked in ramp control, not the lost and found. Mr Fhimah's position was that El Ghawi was the important person to speak to about the tags, that he was the most senior person at the lost and found and that he was a member of staff whom Mr Fhimah knew well (pp 53-5 of May statement).

27.208 The difficulties that the precognitions of El Ghawi and Shukri caused to Mr Fhimah's explanation for the reference to Abdelbaset in his diary appear to be reflected in the later draft of his pre-trial precognition. There, although Mr Fhimah maintained that he spoke to El Ghawi about tags, he stated that the only explanation

he could provide about the name Abdelbaset was that he had spoken to someone in the lost and found by that name, whom he also told about the problem with tags, and that he wrote both names down to remind him to speak to one or other of these two people when he went to see them at Tripoli airport. He stated that he could not recall the second name of the Abdelbaset in question. When it was suggested to him that it might be Shukri, who worked in ramp control, who picked up the phone in the lost and found office and spoke to him, he said that this might have occurred but he could not be sure. He said that he was sure he spoke to someone named Abdelbaset there, because he wrote that name down (pp 143-4 of the draft 10 precognition).

Commission's consideration of Mr Fhimah's accounts

27.209 As with the applicant, the Commission acknowledges that in any assessment of Mr Fhimah's position allowance must be given for the lengthy periods between the dates on which he gave his accounts to Salinger, his representatives at trial and the Commission, and between those dates and the events he was being asked to recall. Again, however, whilst some uncertainties in his accounts must be expected, in the main Mr Fhimah's precognition did not record any hesitation on his part. Indeed, his position to the Commission was that he had a good memory of events on 20 December. As such, the demonstrable inconsistencies about matters such as the reasons for the applicant travelling with him on 20 December, the car/s he drove that night, the reasons for visiting Mr Vassallo's house and the matters discussed there cannot be convincingly explained by the passage of time.

27.210 Moreover, given that the applicant and Mr Fhimah both acknowledged that they had discussed these matters and had influenced each other's recollections, the inconsistencies that persist between their accounts must also have some bearing on the view to be taken of Mr Fhimah's accounts.

27.211 In considering what Mr Fhimah has said about the case the Commission has taken account of what his own representatives considered to be unconvincing explanations about the reasons for the telephone call the applicant made to his apartment on 21 December, and the fact that Mr Fhimah said he was not at the airport that day, or in the applicant's company after leaving him at the Holiday Inn on 20

December. In the circumstances, the Commission is of the view that Mr Fhimah's accounts in relation to the events on these dates, although generally supportive of the applicant's innocence, are not compellingly so.

27.212 Likewise, although the accounts Mr Fhimah gave of the entries in his diary are supported to some extent by the precognitions of other witnesses and exclude any connection to the applicant, there remain difficulties with his explanations. Not least is the indication that, contrary to Mr Fhimah's position, there was nobody named Abdelbaset working at the lost and found in Tripoli airport in 1988.

(iii) Conclusions regarding the interests of justice

27.213 The Commission has considered the versions of events offered by the applicant and Mr Fhimah. In particular, the Commission notes the unsatisfactory nature of aspects of their explanations and the various contradictions which are apparent both within and between their accounts. Although it is possible there are innocent reasons for these deficiencies, they do lead the Commission to have reservations about the credibility and reliability of both as witnesses.

27.214 It cannot be said, however, that the applicant's accounts amount to a confession of guilt.

27.215 The Commission's assessment of whether or not it is in the interests of justice to refer the applicant's case has not been restricted to a consideration of the accounts of the applicant and Mr Fhimah. For example, the Commission has considered the terms of the letter from Libya to the United Nations Security Council (see appendix), referred to in chapter 1. In the letter Libya stated that it "has facilitated the bringing to justice of the two suspects charged with the bombing of Pan AM 103, and accepts responsibility for the actions of its officials" and that it agreed to pay compensation to the relatives of the victims. Having taken into account both the wording of the letter (which simply mirrors the requests to Libya by the UK and USA included in UN resolution 731), and the political and diplomatic context in which it was submitted, the Commission does not consider it appropriate to regard the letter as amounting to confirmation by Libya of the applicant's guilt.

27.216 In accordance with the principles set out at the beginning of this chapter the Commission has also considered whether, notwithstanding its conclusion that a miscarriage of justice may have occurred, the entirety of the evidence considered by it points irrefutably to the applicant's guilt. The Commission's conclusion is that it does not.

27.217 In these circumstances the Commission believes not only that there may have been a miscarriage of justice in the applicant's case, but also that it is in the interests of justice to refer the case to the High Court. The Commission accordingly does so.