**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2020] HCJAC 54**
**HCA/2020/5/XM**

Lord Justice General
Lord Menzies
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the applications in the appeal against conviction following upon a Reference from the

Scottish Criminal Cases Review Commission

by

THE REPRESENTATIVE OF THE LATE ABDELBASET ALI MOHAMED MEGRAHI

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

and

THE ADVOCATE GENERAL

Haver

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**Haver: Duguid QC; the Office of the Advocate General**
**Respondent: Clancy QC, AD; the Crown Agent**
**Special Counsel for the Appellant: Dewar QC**

20 November 2020

**Introduction**

[1] This is a sequel to the Opinion of the Court dated 26 August 2020 ([2020] HCJAC 39) which allowed the appellant to found his appeal on certain matters, but not others,

concerning the disclosure of documents, which had not been referred to the Court by the SCCRC. It ordered the production to the court of two protectively marked documents in respect of which a public interest immunity certificate had been issued by the Secretary of State for Foreign and Commonwealth Affairs in 2008. A new certificate from that Officer of State was issued on 17 August 2020. The court continued the appellant's application to allow the two PMDs to form part of that ground of his Note of Appeal which is based on non-disclosure. Part C of the Note refers to these documents and the appellant's contention that they refer to the possibility of other parties having timers of the type used in the explosion. In the event of disclosure, the appellant would consider a ground of appeal based on the bad faith of the Crown and "abuse of process".

[2] The primary question for the court at this stage is whether to order recovery by the appellant of the two PMDs, notwithstanding the terms of the PII.

**The Trial**

[3] During the trial, the court had considered evidence relating to the source of the MEBO MST-13 timer, which was found to have been used in the detonation of the bomb within a Toshiba radio cassette recorder. This timer had been one of a batch which had been delivered by MEBO (Messrs Meister and Bollier) to the Libyan Jamahariya Security Organisation, in which Mr Megrahi held the position of head of airline security. MEBO had leased part of their offices in Zurich to a firm, in which Mr Megrahi was a principal. The court said:

> "[49] … we cannot exclude the possibility that other MST-13 timers may have been made by MEBO and supplied to other parties, but there is no positive evidence that they were. Equally, despite the evidence of Mr Wenzel that after the fall of the Berlin wall he had destroyed all timers supplied to the Stasi, we are unable to exclude the possibility that any MST-13 timers in the hands of the Stasi left their possession,

although there is no positive evidence that they did and in particular that they were supplied to the PFLP-GC."

[4] Turning to the involvement of the PFLP – GC, the court said:

[73] … it was clear from other evidence that we heard, in particular from officers of the German police force, the BKA, that a cell of the PFLP-GC was operating in what was then West Germany at least up until October 1988. The evidence which we accept showed that at least at that time the cell had both the means and the intention to manufacture bombs which could be used to destroy civil aircraft. On 26 October 1988, after a period of surveillance, the BKA made a series of raids and arrested a number of individuals in an operation code-named Autumn Leaves. In particular they raided premises at Sandweg 28, Frankfurt and the home of Hashem Abassi in Neuss and they seized a car which had been used by Haj Hafez Kassem Dalkamoni, apparently the leader of the cell. In these premises they found radio cassette players, explosives, detonators, timers, barometric pressure devices, arms, ammunition and other items, including a number of airline timetables and seven unused Lufthansa luggage tags. From other evidence it appeared that one of the airline timetables was a PanAm timetable. There was considerable evidence of bombs being manufactured so as to be concealed in Toshiba radio cassette players. The models being used were, however, different from the RT SF-16 used in the PA103 disaster, and the timers were of a type known as ice-cube timers. These were quite different from MST-13s, much less sophisticated and much less reliable, and the intention was no doubt to use them in conjunction with the barometric pressure devices to detonate the explosive.

[74] While all this material was seized by the BKA on 26 October 1988 and the principal members of the PFLP-GC cell in West Germany were arrested on that date, the evidence was that most were released shortly thereafter. Dalkamoni, however, was not, and he was later convicted in relation to bomb attacks on a railway line in Germany in 1987 and 1988 and possession of the weapons found at Sandweg 28. He was sentenced to imprisonment for fifteen years. It is possible, of course, that the cell could have re-grouped and re-stocked with the necessary materials by 21 December. In April 1989 three further explosive devices were recovered at Hashem Abassi's new address in Neuss, but the indications were that these were items which had formed part of the stock in October 1988. There was no evidence that the cell had the materials necessary to manufacture an explosive device of the type that destroyed PA103. In particular there was no evidence that they had an MST-13 timer. For the reasons given elsewhere, while a small quantity of such timers was supplied by MEBO to the East German Stasi, there is no evidence at all to suggest that any of them found their way into the hands of organisations such as the PFLP-GC. On the evidence which we heard we are satisfied that the explosive device which destroyed PA103 was triggered by an MST-13 timer alone and that neither an ice-cube timer nor any barometric device played any part in it. It is also to be noted that the cell's

> principal bomb-maker was one Marwan Khreesat who was in fact an agent who infiltrated the cell on behalf of the Jordanian Intelligence Service. His instructions from them were that any bomb he made must not be primed. Moreover, while he himself did not give evidence, there was evidence of a statement given by him to FBI agents (production 1851) in which he said that he never used radio cassette players with twin speakers (such as the Toshiba RT-SF 16 had) to convert into explosive devices."

**The SCCRC References**

***2007***

[5] Two documents came to the attention of Mr Megrahi's agents following the earlier Reference to the court by the SCCRC in 2007. Chapter 25 of that Reference stated that in 2006 the Crown Office had informed the SCCRC of the existence of the documents. A member of the SCCRC team had viewed the documents on 21 September 2006 at Dumfries police station; the police holding the documents on the HOLMES system. The Reference refers to the Crown writing to the SCCRC on 27 April 2007 confirming that a positive decision had been taken not to disclose the documents. This was on the basis, *inter alia*, that they did not require to do so because:

> "…it has never been the Crown's position… 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".

No further inquiries had been carried out by the Crown in relation to the information in the documents, which presumably, on the basis of the Crown's letter, had something to do with the possession of MST-13 timers.

[6] The SCCRC concluded, somewhat (but understandably) cryptically, that:

> "… the Crown's decision not to disclose one of the documents… indicates that a miscarriage of justice may have occurred…".

Although it did not state in terms to which of the two PMDs it was referring, or which aspect of the case was involved, the Reference proceeded partly on the basis of a miscarriage of justice possibly occurring as a result of non-disclosure of one of the PMDs. The PMDs might usefully, for the purposes of this opinion, be referred to as the first document; a single sheet which attached the longer second document. It is relatively clear that the SCCRC were referring to the first document when suggesting that a miscarriage of justice based on non-disclosure may have occurred. The Reference contained no reasoning on why the failure to disclose this first document might have given rise to a miscarriage of justice. It is again relatively clear that it was because of the prospect that its content might have had a bearing on the court's findings on possession of the MST-13 timers in paragraphs [49], [73] and [74] of its opinion. The SCCRC expressly refer to these paragraphs in Chapter 25, which deals exclusively with the PMDs.

[7] In due course Mr Megrahi abandoned the appeal, which followed this Reference. No decision on whether the PMDs should have been disclosed was taken. The content of the documents ought to have remained a mystery to those outwith the UK Government, the Crown Office, Dumfries & Galloway Police and the SCCRC.

***2020***

[8] In contrast to the earlier Reference, the Reference which preceded the current appeal does not include failure to disclose the PMDs as leading to a potential miscarriage of justice. The SCCRC were again permitted to view the PMDs. On 29 February 2019, officers of Police Scotland delivered them to the SCCRC. "The Commission, after viewing the documents, returned them to the officers" (para 10.9.3). They had not been allowed to take notes of their content. The SCCRC concluded (para 10.9.4) that the "crucial information" which was

found in one of the PMDs was secondary hearsay and therefore not admissible as evidence. Although not specified for understandable reasons, the SCCRC are referring to the content of the first document in this passage. On the basis that the evidence was not admissible, the SCCRC said that they could not sustain a reference on non-disclosure grounds. Even if the documents ought to have been disclosed, the SCCRC had no way of knowing what investigations might have been carried out by the defence and to reach a view on that would be speculative.

[9] The SCCRC asked the Crown why they had not pursued the matter further. It ought to have been obvious that "crucial piece of information" would, if correct, have strengthened the defence case. The Crown told the SCCRC that they had contacted officials of a "foreign authority" who, in 2000, had told them that the information in the relevant PMD was incorrect. The SCCRC considered that the response explained why the information in one (the second) of the PMDs had not been regarded as disclosable. It did not explain why the other (first) document, which contained the crucial information, was not. According to the SCCRC (para 10.9.13), the impartial and informed observer would regard the Crown's view as "at best, curious". Although the SCCRC had already ruled out the possibility that this failure met the test for a miscarriage of justice by way of non-disclosure, the same non-disclosure could, according to the SCCRC (para 10.9.15), open up a ground of appeal based upon oppression. The court commented adversely on the relevance of such a contention in its earlier opinion ((*supra*) at para [27]).

**The Press and Mr MacAskill**

[10] Meantime, the nature and existence of a document (singular) had been the subject of some speculation in the press. On 1 June 2012, about a month after the death of Mr Megrahi,

the *Herald* newspaper referred to the existence of a "highly classified document" which had originally come from Jordan and had indicated that the Popular Front for the Liberation of Palestine – General Command, had been involved in the explosion. This document was said by the *Herald* to cast doubt on the safety of the conviction of Mr Megrahi. A "source" had said that the contents of the document were very important. Although it did not rule out Libyan involvement, it suggested that others persons were too. The *Herald* commented that the document could "fatally undermine" the case against Mr Megrahi. The *Herald* balanced the article by including statements from the UK Government on the reasons for the PII certificate. It quoted the Crown Office as saying that the involvement of the PFLP - GC had been fully considered by the trial court following the incrimination of the group.

[11] The story was essentially repeated by the *Herald* in November 2012 with quotations from a parent of one of the victims (Dr Swire), the author of *Megrahi: You are my Jury*, Patrick Harvie MSP and a Scottish Government spokesman who had said that the Crown had wished to release the information during the course of the second appeal.

[12] In May 2016, Kenny MacAskill, the former Cabinet Secretary for Justice, who had been instrumental in the release of Mr Megrahi on compassionate grounds in August 2009, published a book: *The Lockerbie Bombing, the Search for Justice*. This narrated (p 199) that the PII certificate related to a letter which had been sent to the Prime Minister by the King of Jordan. Although he had never seen the document, Mr MacAskill stated that he was aware from other sources that the letter had indicated that it had been the Palestinians, notably the PFLP-GC, who had been "the perpetrators". Mr MacAskill was undoubtedly correct in saying that the use of the PII fuelled conspiracy theories. The book later (p 285) referred to it being well known in "influential political and Pentagon circles that the Iranians had offered

up a bounty of $10 million after the downing of [an Iranian] airliner by the USS *Vincennes* in July 1988".

[13] Extracts from Mr MacAskill's book were serialised in *The Sunday Times*. They contained passages which stated that Mr Megrahi had not acted alone but on the authority and under the direction of others, notably Abdullah Senussi, who was the head of Libyan intelligence, and ultimately President Gadaffi. It had not just been the evidence before the court which had implicated Libya. President Gadaffi had accepted the culpability of the Libyan regime, not only by paying compensation to the victims, but also in an interview with the Washington Times in July 2003. He had said that the original plan had been for an Iranian retaliatory attack, but this was subcontracted to others including the PFLP-GC. The break-up of the PFLP - GC cell in October 1988 had badly incapacitated them and they had called for help. That call was answered by the Libyans.

[14] Mr MacAskill wrote that, even if Mr Megrahi had not bought the clothes from the shop in Malta, he "was certainly involved". He explained why that was; perhaps using the content of the opinion of the trial court. He concluded that:

> "Libya did it, Megrahi was part of it and other states and terrorist organisations also played their part. It was revenge for the downing of the Iran Air flight by a US naval ship. It was, therefore a coalition of the willing that brought down Pan AM 103".

[15] Since then, there has been continued speculation about the content of what was said to be a letter from the King of Jordan to the Prime Minister stating that the PFLP – GC were responsible. For example, the *National* newspaper reported (12 April 2019) that the Megrahi family's solicitor had said that this was a "vital piece of evidence".

**The Petition for Recovery and the PII Certificate**

[16] The appellant states that, although he is unware of the content of the PMDs, the statements emanating from the Crown Office suggested that they were "related to the distribution and possession of MST-13 timers and also incrimination" (petition stat 6). The terms of the trial court's opinion supported the inference that the MST-13 timers had been supplied by the Libyan intelligence services to another party or that another party had had possession of MST-13 timers

[17] As set out in this court's opinion of 26 August 2020, the new PII states that the Foreign Secretary accepts that the content of the documents was relevant to the appeal process. His clear view is that the disclosure of the documents would cause real harm to the United Kingdom's international relations. It would cause real harm to the national security of the UK because it would damage counter-terrorism liaison and intelligence gathering between the UK and other states. The documents had been provided in confidence to the Government. Their disclosure would reduce the willingness of the state, which produced the documents, to confide information and to co-operate with the UK.

[18] The Foreign Secretary recognises the public interest in open justice, the need to safeguard the rule of law and accountability. This required to be balanced against the real risk of serious harm to the public interest which would be caused if the documents were disclosed. Notwithstanding the passage of time since the 2008 PII certificate, the public interest in non-disclosure continued to outweigh the public interest in the disclosure of the material. The Foreign Secretary had considered whether it might be possible to permit some form of restricted disclosure, such as allowing access only to the appellant or his legal representatives or supplying the gist of the documents. None of these methods would

protect the identity of the state involved. The release of any information, which was provided in confidence, would itself carry the real risk of harming relations with that state.

**Submissions**

***Advocate General***

[19] A hearing took place *in camera*. The Advocate General expanded upon the potential threats to the national security of the UK and the current situation in relation to terrorist activities. Although there had been speculation about the content of the documents, they had not been published. That was significant (*Sankey* v *Whitlam* (1978) 21 ALR 505 at 531; *R* v *Governor of Brixton prison, ex p Osman* [1991] 1 WLR 281 at 290). One important question was whether the appellant could found a ground of appeal based on the documents. Much of that content had already been considered by the trial court. The question was whether the interests of justice merited overriding the PII's certificate. That could only arise if the non-disclosure could give rise to a miscarriage of justice.

***The Crown***

[20] The Advocate depute was in favour of disclosure to the appellant. The first question was whether the documents were disclosable in terms of *McLeod* v *HM Advocate* 1997 JC 67; that is whether they would be likely to be of material assistance to the proper preparation or presentation of the defence. Is the material such as may weaken the prosecution case or strengthen that of the defence (*R* v *H* [2004] 2 AC 134 at 155)? If the defence had been given the information, they may have found evidence to support their incrimination of the PFLP – GC. This, however, had been explored at the trial and nothing in the critical document (ie the first document) went beyond the evidence which had been disclosed to the defence at

the trial. In particular, the defence had been given access to a statement which had been given by Marwan Khreesat (see trial court's opinion para [74] (*supra*)) to the Federal Bureau of Investigation with regard to the activities of the PFLP – GC cell in Germany. The defence were given facilities to procognosce that person. They had done so. The defence had led evidence of the statement at the trial. The contents of the first document were consistent with the Crown case that the timer had come from Libya. The defence could not have used this document without accepting that, as the Crown maintained, that was the source of the timer. Such evidence would have been incriminatory of Mr Megrahi.

[21] The second document did contain disclosable material, in that there was some information in it that had not been contained in the German evidence concerning the Autumn Leaves operation in October 1988. The latter had been obtained in 1996 and it had been disclosed to the defence in 1999 as had Marwan Khreesat's statement. The authors of the second document had, by 2000, said that they were no longer supporting its correctness. On that basis the Crown had considered that it was not disclosable. Even if, following *Fraser* v *HM Advocate* 2011 SC (UKSC) 113), it were, no concession on its materiality was being made.

[22] In relation to the PII certificate, if the UK Government's concerns were justified, it was significant that there had been no adverse reaction when, amongst other publications, Mr MacAskill's book had referred to the existence of a document emanating from Jordan. It was difficult to square the certificate with the fact that much of the material in the second document had been the subject of evidence at the trial. The UK Government had thrown a blanket ban over this document, despite that fact that much of it was already in the public domain. In 2008, the Crown had made repeated attempts to agree the disclosure of a redacted version or a gist/summary. On each occasion, the response had been that nothing

was acceptable. If the documents were disclosed, an order under section 11 of the Contempt of Court Act 1981 could impose reporting restrictions.

***The Appellant***

[23] The appellant was represented by special counsel who had the requisite security clearance to view the documents. He adopted the submissions of the Advocate depute in so far as they favoured disclosure. The golden rule was that disclosure should be made of all material which weakened the prosecution case or strengthened that of the defence (*R* v *H* (*supra*) at para 14). This was another way of expressing *MacLeod* (v *HM Advocate* (*supra*)) disclosability. There was no doubt about what documents were being referred to. Both documents weakened the Crown case and strengthened that of the defence. It was difficult to separate the two documents. Although there was no need to disclose the authorship of the documents, since that was not directly relevant, the content of both documents ought both to be disclosed, subject to the considerations surrounding the PII certificate.

[24] Finality was important. The Crown had taken a pragmatic approach. It was important that this court should cover matters exhaustively. Disclosure could prevent the need for another reference. If the documents were disclosed, the appellant should be given an opportunity to pursue a ground of appeal based upon them. Disclosure was particularly important in criminal cases, where liberty was at stake (*Sankey* v *Whitlam* (*supra*) at 529; *R* v *Governor of Brixton prison, ex p Osman* (*supra*) at 289). If there had been no repercussions following the disclosures by Mr MacAskill, there was no reason to anticipate that disclosure would have a significant impact.

**Decision**

[25] Whether to order the disclosure in the face of a public interest immunity certificate involves the court balancing the competing public interest with the fairness of the proceedings (see generally *Al Rawi* v *Security Service* [2012] 1 AC 531, Lord Neuberger at paras 24 to 26). Fairness is particularly important in criminal cases where a person's liberty is at stake. The minister's view, in relation to the public interest, as expressed in the PII must be taken *pro veritate* unless it is patently unreasonable or its basis is plainly erroneous (*AB* v *Glasgow and West of Scotland Blood Transfusion Service* 1993 SLT 36, Lord Morison at 37 approved in *Scottish Ministers* v *Stirton and Anderson* 2014 SC 218, LJC (Carloway), delivering the opinion of the court, at para [99]).

[26] The court does have some concerns about the content of the PII certificate and the supplementary material from the Foreign Secretary which was produced at the hearing. In particular, first, there is no mention of the minister having taken into account the extent to which there was already material which was in the public domain and purported to describe the first document. The press reports of the existence of an important document and the description of the document by Mr MacAskill in his book does not feature in the minister's reasoning. The court wonders whether this material was brought to the attention of the minister and, if so, with what advice as to its import. Secondly, there is force in the Advocate depute's submission that much of the material in the second document was explored during the course of the trial and thus in the public domain. Nevertheless, these considerations have not led the court to hold that the minister's view, as expressed in the PII, is unreasonable or that it proceeds on an erroneous basis. The court therefore accepts that disclosure of the PMDs would cause real harm to the United Kingdom's international relations. It would cause real harm to the national security of the UK because it would

damage counter-terrorism liaison and intelligence gathering between the UK and other states. That is a matter of considerable importance to be placed in the balance.

[27] The context for the disclosure argument is the appeal process. That involves an assessment of whether, in the trial process, a miscarriage of justice occurred. That exercise in turn requires an analysis of the evidence against Mr Megrahi at the trial and a consideration of the content of the PMDs. Questions of who, or what organisation or state, was ultimately behind the explosion, in the sense of identifying the originators of the decision to destroy a civilian aircraft, or what other persons may have been involved in the planning or preparatory processes, are not necessarily of direct relevance to whether Mr Megrahi was involved. For example, the fact that Iran or the PFLP – GC were instrumental in the plot does not eliminate the involvement of Libya and/or Mr Megrahi. It would be different if the incrimination of the PFLP – GC would, or at least could, lead to the conclusion that Mr Megrahi was not involved.

[28] The issue is not simply whether the documents, or one or other of them, ought to have been disclosed during the trial process. For the argument on non-disclosure to succeed, it requires to pass the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28. That is (Lord Hope at para [20]) whether, taking into account the full circumstances of the trial, there is a real possibility that the court would have reached a different verdict if the material had been disclosed. A trial is not to be seen as unfair merely because of non-disclosure of material. At the stage of an appeal, the court has to decide whether the non-disclosure resulted in an unfair trial and consequently a miscarriage of justice (*ibid*).

[29] The court has been at pains to understand the significance of the documents from the defence perspective in order to see whether their non-disclosure was material and, if so, in what way. A detailed analysis of the undisclosed material has been carried out by the

SCCRC on two occasions. The court agrees with the assessment of the SCCRC in the current Reference.

[30] First, in relation to the second document, its content was, or at least ought to have been, within the knowledge of the defence at the time of the trial. The material was either public knowledge, part of the Autumn Leaves documentation and/or ascertainable from Marwan Khreesat's statement and/or precognition. On this basis, it could not form part of a successful non-disclosure appeal. The content of this document was either disclosed or immaterial. This appears to be broadly in line with the SCCRC's reasoning on this document.

[31] The first document contains what is correctly described by the SCCRC as secondary hearsay and, as such would have been inadmissible as evidence. To be more accurate, it is the hearsay of a person to whom a second person had reported certain things which must in turn have been reported to him by third parties. The ultimate source of the information is unknown. That in itself may not be conclusive. The fact that material is secondary hearsay, and thus inadmissible, is not a good reason for non-disclosure if it might have led the defence to make appropriate inquiries and perhaps thereby discover evidence which was admissible. The SCCRC recognised this. The court again agrees with their assessment that to reach a view on the prospects of such evidence being uncovered would be speculation.

[32] At the core of all of this is the potential involvement of the PFLP – GC. They were incriminated by Mr Megrahi at the trial. Their involvement was duly explored at trial; in particular in relation to the statement of Mr Khreesat who was, after all, best placed to give evidence about that involvement. The statement was led by the defence for this purpose. The court also agrees with the Advocate depute that the first document would not, in any event, have been adduced in evidence by the defence at the trial because it would have

pointed towards Libya as the source of the timer; a matter which the defence were anxious to deny.

[33] Accordingly, having regard to the nature and content of the two documents, notably the fact that most of it was already known to the defence, and that which was not would neither have been of use to the defence nor would it have been adduced by the defence, and balancing the very limited value of that content with the danger to the public interest as set out in the public interest immunity certificate, the court will refuse to order recovery of the protectively marked documents. For completeness, the court has considered whether the documents might be disclosed in a redacted form or whether their gist might be revealed, but it does not consider that this would be of assistance to the appellant having regard to the nature of their content.

[34] It must follow that Part C of Ground 2 in the Note of Appeal will not form part of the appeal.