Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

Written submission from Matt Berkley

Part 2

1. In July 2009 I attempted to warn Mr MacAskill by email, through his adviser Dr Burgess and in person as a Lockerbie air crash victim’s relative, that the situation risked inducing the prisoner to drop his appeal.¹

2. In September 2009 I compiled information from official documents for the Scottish Parliament Justice Committee relevant to the question “Did the Justice Secretary take adequate care, through promptness of action and appropriate information to the appellant, to avoid influencing the court process?”

3. Having watched the evidence sessions on Part 2 of the Bill, I would like, with the Committee’s permission, to make some observations.

4. The Committee might consider, if it has not already done so, using the opportunity of questioning Mr MacAskill to

   a) scrutinise the Scottish Government’s performance on its commitment to maximum openness on the Megrahi case, and
   b) consider what principles should be applied in decisions relevant to that commitment.

5. As I understand it, the Committee’s main purpose is scrutiny of Scottish Government policies and performance.

¹ Email to the Cabinet Secretary 6 July 2009:

“Scottish Ministers have expressed a preference for the judicial process in the al-Megrahi case to continue. However, he could drop his appeal at any time for any reason, well- or ill-founded.”

“The current situation - the decision being in your hands without an indication of your thinking - could act as a kind of inducement for the prisoner to drop the appeal. That might be especially likely if he thinks that the timing of the ratification was related to the start of the second appeal, or otherwise thinks that for political reasons the situation is special in his case.”

“It would be unfortunate if the outcome for Scottish justice were to be decided by one prisoner's ill-informed gamble.”

“The inducement to drop the appeal is still there even if the Scottish Government does not explicitly say "if you drop the appeal we will let you go to Libya". The inducement is already implied by the situation, and not avoided by avoiding the explicit statement.”

http://www.mattberkley.com/warningmacaskill.htm
6. The Government’s stated policy - not an aspiration, but a commitment - is wider than the release of the SCCRC report.

7. The Government has presented release of the report not as an aim in itself, but as a means to achieve the aim of maximum openness.

8. It is therefore perhaps appropriate for the Committee to ask the Government what consideration has been given by the Government to other ways of achieving that aim, and to ask itself how the policy aim might best be achieved. Inevitably, there is some overlap in what I discuss here with the petition for a public inquiry.

9. The Policy Memorandum to the Bill refers to aims of openness and transparency five times, for example: "the provisions...take forward the Scottish Government’s commitment to be as open and transparent as it can be in respect of [the Al-Megrahi] case."

10. The purpose in the public interest of enabling the release of the SCCRC report, and of any other material on Mr Megrahi’s case, must surely be to reveal to the public evidence relevant to:

    i) whether he is guilty; and
    ii) whether actions by investigating and prosecuting authorities have been proper.

11. The Megrahi case is about far more than one person. The concerns about this case are not accurately characterized in terms of “supporting Megrahi”. It is not his character, or his words, or his actions, which have influenced people to doubt the conviction or its fairness. It is the evidence in court, the evidence available but not to the court, the new evidence since then, the withholding of evidence by police, the CIA, the US Department of Justice, and/or Scottish prosecutors from the defence and the judges, the evidence casting doubt on the integrity of aspects of the investigation, and the quality of reasoning by the judges.

12. There are also multiple concerns about the circumstances of the dropping of the appeal.

13. On the verdict, there are two separate concerns.

14. One concern is about Mr Megrahi’s guilt.

15. Another is whether the processes – investigation, prosecution, and trial – were fair.

16. If Mr Megrahi was unfairly convicted, then is it not the case that something in the Scottish legal system needs examination?
17. If in addition he is innocent, then the real perpetrators have gone unidentified and unpunished.

18. If the questions of guilt and fairness are unresolved, is it right that the decision of an ill man in a diplomatic storm should have the power to end official resolution?

19. If Members choose to consider the principles on which the Government should decide how to proceed, they may be interested in the following circumstances of the abandonment of Mr Megrahi’s appeal.

   a) The judges specifically stated that they allowed Mr Megrahi to drop the appeal in light of what his counsel told them about his health and desire to return to Libya.

   “We proceed upon the basis that leave is required. In light of the circumstances laid before us by Ms Scott on behalf of the appellant, we grant that leave.”

   His counsel had said the circumstances were illness and a desire to further applications to enable him to return to Libya. ²

   b) Considering those words of the judges, it was unfortunate that the convict abandoned his appeal without procedural gain, only for Mr MacAskill to make a decision the very next day which removed the procedural incentive.

   It is not clear to me as a layman that it was not open to the judges either:

   i) to suggest that the appellant only abandon subsequent to an arrangement with the Crown whereby the Crown would also abandon, thus giving some point to the dropping of the conviction appeal in line with the purpose to which the judges referred, or

   ii) to refuse leave (within the confines of the legal context that it was debatable whether their permission was needed) until such an agreement took place.

   c) Mr Megrahi only abandoned the appeal after the judges delayed a date when they could have freed him. It would thus be inaccurate to state “Megrahi abandoned his appeal before it reached the stage when it could have been decided”. The judges were entitled to free him on 7 July 2009 on arguments already heard. It was only after the judges announced, on that date, delay and unforeseen illness of one judge that Mr Megrahi gave up the appeal. We

² The proceedings can be viewed at: http://www.itnsource.com/shotlist/ITN/2009/08/18/R18080901/
do not know whether the judges would have freed him on that date had they kept to their schedule. ³

d) Mr Megrahi only abandoned the appeal after the Scottish Government broke a promise to Parliament to expedite the PTA application, assigning it a priority of "routine", failing to contact key respondents for several weeks, and taking 90 days over an application that was at all stages impossible to grant. I analysed the relevant official documents in detail for the Justice Committee inquiry into the release in 2009:⁴ “Did the Justice Secretary take adequate care, through promptness of action and appropriate information to the appellant, to avoid influencing the court process?”

e) There was a political context to abandonment. A suggestion, for example, that Mr Megrahi did not know Colonel Gaddafi wanted him in Libya shortly for the 40th anniversary celebration would seem far-fetched. There was also the fact that the UK Government expressed internally a desire for Mr Megrahi to return under the PTA, which required abandonment.

Given all those factors, the possibility that Mr Megrahi might have sensed a need to do something in order to get home is not surprising.

20. One of the SCCRC's reasons for referral was based not on evidence received but on the reasonableness of an "important" part of the judgment itself - the issue of the date of purchase of clothes. Anyone can read the relevant part of the judgment. I suggest that a discussion on the release of SCCRC material might need discussants reading the SCCRC and the Opinion of the Court on that matter.

21. Is it appropriate that a verdict and process which have failed to gain endorsement from either the international observers or the Review Commission should be left to victims' relatives to deal with by attempting all the stages required for a new appeal?

22. The Convener may remember an email I sent on 23 August 2009, with the idea that the Commission could refer the case a second time. I appear to be the first person to have published the idea. But that does not mean I think it is appropriate for the Government to rely on it as an option for resolution of the case. The High Court currently has two powers to refuse to hear an appeal, even if the Commission refers a case. The Court can say that the person does not have a suitable relationship to the convict, or currently, as Committee members know, that it is not in the interests of justice.

23. As regards the relatives of Mr Megrahi, no-one foresaw in 1998 at the time of the international agreements setting up the trial a time when the case would not have reached the final stage of appeal but the Megrahi family would not have had the

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financial or other support of a Gaddafi-faction government for any legal or other resources required.

24. The view that "this should only be sorted out in court" might need some detailed argument as to precisely what that would entail - or alternatively, legislative proposals ensuring such a course would be in practice reasonable.

25. Having watched the session of 7 February I would like to, rather humbly, submit the following options for the Committee’s consideration. I say “humbly” because I am neither a politician nor a lawyer, and the Committee will no doubt be able to think of both better formulations and better alternatives.

26. I also suggest that irrespective of the merits or otherwise of these proposals, it may be of interest to the Committee to consider whether it is acceptable that the principles they incorporate should be ignored by a fair justice system.

27. The Committee may wish to consider the fact that the Megrahi case meets all three criteria. The ideas are presented as examples for legislation, to stimulate further thought on principles and how they might apply in the Megrahi case. The context is of the Scottish Government’s commitment to be as open and transparent as possible.

28. Firstly:

    “Any trial which fails to be certified as fair by relevant observers invited by the Secretary-General of the United Nations or similar authority shall automatically be fully, publicly, internationally and independently investigated, regardless of the outcome of criminal proceedings.

    A mechanism shall be set up, approved and/or carried out by representatives of independent nations or their judiciary or appropriate non-governmental organisations, automatically to

    a) resolve such a criminal case by examining the verdict; and

    b) investigate any parts of the criminal proceedings which failed to gain certification by the observers as fair.”

29. The provision would apply especially to any criminal trial for which an extradition treaty is not in force but for which the accused agree to appear on the understanding that international observers or monitors will attend to ensure fairness.

30. Secondly:

    "An automatic mechanism for examination of any verdict where

    a) an appeal is abandoned; and
b) it is not clear that such abandonment has taken place without clear admission of guilt, and/or that any admission of guilt is free from undue outside influence.\(^5\)

31. Thirdly:

“A preliminary assessment mechanism in cases where a significant proportion of victims or relatives of victims state that they do not have confidence in the verdict, the fairness of the trial or both.

The assessment is to be whether there is a case for further investigation.

Cases where there is a demonstrably unsuitable relationship between the convict and the victim would be rejected.\(^6\)

32. Comment: It is perhaps far more usual for relatives of murder victims to take comfort in the conviction of a person who is later cleared, than for them to voice doubts after a conviction about either fairness or guilt.

33. It could be that a large proportion of UK-based Lockerbie crash victims' relatives were in a relevant sense mad to begin with - which perhaps seems statistically unlikely. It could alternatively be that many relatives have somehow been led astray, or have descended into some relevant type of madness. But in the absence of such a theory being made explicit (and in this particular case the inclusion in such a theory of doubters among non-relatives as well), it is not clear why concerns on the part of victims who have studied the case might not be thought to indicate something in need of serious consideration.

34. Perhaps Mr Megrahi's position – wanting the release of secret documents as a condition of his consent - is more understandable given the indisputable facts that:

a) the Crown withheld information from the defence at trial;

b) it is a matter of public record in the court transcripts that the CIA, perhaps with the assistance of the US Department of Justice, attached false labels to


"If, in respect of any criminal case, a significant number of persons who a) are deemed by the court to be victims of a crime, and b) have no clear potentially corrupting relationship to the convict, state that they consider the conviction to be unsafe, then that conviction will be investigated judicially by a process available independently of, and alternative to, the standard process of appeal by the convict, and with the power to quash the verdict."
censored passages in their documents for the eyes of the defence and the judges; and

c) there are other concerns as alluded to in the Justice for Megrahi submission made in relation to Petition PE1370.\textsuperscript{7}

35. It is my submission that there are matters of principle which need to be recognised explicitly, beyond discussion of this particular case. The fact that the case is highly unusual does not mean that the Committee cannot consider questions on, for instance, the principles which should apply where a trial has international observers who fail to endorse its fairness or there is evidence that Scottish prosecutors were unable or unwilling to uphold their integrity when faced with the wishes of a more powerful nation.

36. The Government has made its policy aim clear. This document suggests that the Government might be held to its promise with a thorough review of the options.

Matt Berkley
16 February 2012

\textsuperscript{7}http://www.scottish.parliament.uk/S4_JusticeCommittee/Meeting\%20Papers/Papers_20111108.pdf