The Firm Magazine: Dr Hans Kochler speaks out.

http://www.thefirmmagazine.com/news/901/UN_Observer_to_the_Lockerbie_Trial_says_%E2%80%98totalitarian%E2%80%99_appeal_process_bears_the_hallmarks_of_an_%E2%80%9Cintelligence_operation%E2%80%9D_.html

The Firm Magazine: Jim Swire – "castrate Scottish law".

'Secret documents and security vetted advocates look like a badly disguised attempt to castrate Scottish Criminal Law, and bring it under the control of central government'.

It is often held that the law functions most efficiently on the sure foundation of precedence. This week, their Lordships of the High Court have had to grapple with a problem without precedence.

Nor does the difficulty of their work become easier when one considers the significance of what they are being asked to decide. It is no less a thing than whether the UK government is justified in interfering in the proven processes of Scotland's law. To accept that for this case would surely be to establish a baleful precedent indeed.

Nearly 20 years ago, when the Lockerbie aircraft was blown out of the sky, the Lord Advocate was ***ex officio*** (though I do not claim to have the Latin for the Judging),a member of the UK government. Only under the present state of the devolution arrangements has that ceased to be the case.

Under the Thatcher government of 1988 the criminal investigation into the attack was made the province of the Dumfries and Galloway police, heavily reliant of course upon other forces and, most notably, the government security services of Britain and America.

Following a Fatal Accident Inquiry at Dumfries under the late Sheriff John Mowat it was found that:

the aircraft had been **loaded with a bomb at Heathrow airport**.

The plane was **under the Host State Protection of the United Kingdom.**

The outrage had been preventable.

It is of course not the job of an FAI to apportion blame.

Successive UK governments have refused to this day to agree to any inquiry as to why they had failed in their primary duty to protect the lives of their citizens.

Following the trial of the 2 Libyans accused in the modifed Scottish jury-less court at Zeist and the subsequent first appeal, a request for a further appeal was referred to the SCCRC.

This body after 3 years deliberation decided that there was a risk that the trial in Zeist might have been unfair, and the case was referred back to the appeal court. A major plank in this decision appeared to have been their access to 2 documents 'from a Foreign Power' which had been passed to the UK Government and these automatically were available to the Lord Advocate of the day and therefore the Crown Office and therefore also the Zeist prosecution, in addition they had been copied to the Dumfries and Galloway police force, all some years before the trial began, but which had never been made available to the defence.

Following the SCCRC decision, Megrahi's defence petitioned the High Court in three major areas.
1.) Access to the two foreign power documents.
2.)Full access to the material from the Zeist court, including permission to carry out forensic testing on it if appropriate.
3) Permission to broaden the scope of the evidence to be led at the appeal beyond that examined and commented upon by the SCCRC. Some of this may have accrued since the matter was referred to the SCCRC

These 3 petitions each require a High Court diet, 2 and 3 being within the parameters of the Scottish criminal system. The first however has been converted into something of even greater significance for which there is no real precedent.

The 'Foreign Power' documents had also been supplied to the Dumfries and Galloway police,(by 1996, more than 4 years before the Zeist trial)) as well as the SCCRC later.
However the request by the defence to see them was rejected, and upon referral to the Foreign and Commonwealth Office by the Advocate General, PII certificates were issued by the F&CO refusing permission for the contents to be divulged, either to the public **or the defence.**

What we have then in 1.) above are two documents central to the SCCRC's decision to refer the case back to appeal now 'protected' by a PII certificate and which are still denied to the defence, even though they are already in the hands of the prosecution and the D & G police force, and have been for years. From a lay position it seems unlikely that the second appeal can proceed fairly against this inequality of arms.

In the High Court, the diet proceeded, discussing various degrees of compromise as to how far the documents should be disclosed to the defence (and by implication therefore the public), if the PII certificate was to remain in force.

The options appear to include a decision to reject the imposition of the PII certificate with full disclosure ordered by the High Court in defiance of the F & CO. (This of course would have to be preceded by assessment of the documents by their Lordships, the High Court judges as to the justification or otherwise for the imposition of the PII in the first place) or some form of 'partial disclosure'.

The High Court issued an order that the Advocate General must supply it with the documents for perusal within 7 days, and this will be followed by some closed hearings.

The Advocate General proposed the introduction of security vetted 'special representatives' as a substitute for the petitioner's own defence team. These might, he thought, be drawn from a pool of such people already in existence in England who are funded by HMG and normally supported by special 'vetted' solicitors. It was not clear whether such solicitors wouldm even be competent in Scots law. The security vetting is performed by something referred to as the UK **Defence vetting agency**. Whether the vetting would be to ensure the ongoing secrecy surrounding the security services themselves, or simply the perceived interests of HMG in this case, is an interesting question. It is not clear why all these vetted individuals suddenly need to be introduced by an arm of the Westminster government, when the entire Crown Office, and the Dumfries and Galloway police force, have had the documents already since 1996 and the members of the SCCRC, from more recently, all with no known 'security vetting' procedures.

It was even suggested that the special advisers might linger on **' to monitor the appeal itself'.** The writer is a total layman in law terms, but knows that in quantum physics, the mere observation of an event can change its outcome.

Why should the petitioner's own chosen defence team be singled out for exclusion? He surely has the right to a defence representation of his own choice, under both Scottish and European law. This team already exists and must now have a huge and ever growing store of materials which they have had years to study. It is hard to believe that drafted in 'special representatives' would be in as good a position to integrate any fallout that there might be from the 'Foreign State' documents, for the strengthening of the appellant's case, even if one could be persuaded that such representatives would not bring, even subconciously, some bias towards their employers and mentors, the UK government.

One can see that there could be an argument for barring the contents from public access, if those contents really could justify such unwelcome secrecy about the events of nigh on 20 years ago, . That is a key question which their Lordships of the High Court will now decide but why, if a closed court session were required, would it be necessary also to employ special vetted representatives rather than the defence team themselves? Since the Crown prosecution team and all to whom they have long ago passed the documents have not been vetted hitherto surely the horse has long bolted.

The more one looks at these propositions, the more they look like an attempt, channeled through the Advocate General's office, to castrate Scottish criminal law and bring it under the control of central government. Their Lordships of the High Court may be entering a strategic fight to the death, rather than a tactical skirmish.

Under Scots (and European) law I believe the appellant is entitled to representatives of his own choice. How can his rights be met if instead he has foisted upon him 'special representatives' supplied supported and funded by a source, the UK government, which itself seems to have a great deal to conceal as to exactly how and why it failed us all in 1988.

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