

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE GENERAL, THE LORD JUSTICE
CLERK AND LORDS COMMISSIONERS OF JUSTICIARY

THE PETITION OF

THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION, Portland House, 17 Renfield
Street, Glasgow G2 5AH

for

the Opinion of the Court in terms of section 194D(3) of the Criminal Proceedings (Scotland)
Act 1995

HUMBLY SHEWETH

1. That the petitioner is the Scottish Criminal Cases Review Commission, a body corporate constituted by section 194A(1) of the Criminal Procedure (Scotland) Act 1995 ("the Act").
2. The petitioner is charged under part XA of the Act with the statutory duty of investigating possible miscarriages of justice. It has power on consideration of any conviction to refer the case to the High Court under section 194B of the Act. Section 194D(3) provides:

"In considering whether to make a reference the Commission may at any time refer to the High Court for the Court's opinion any point on which they desire the Court's assistance; and on a reference under this subsection the High Court shall consider the point referred and furnish the Commission with their opinion on the point".
3. Abdelbaset Mohmed Ali Al Megrahi ("the deceased") was convicted on 31 January 2001 of the murder of the 259 passengers and crew on board Pan American World Airways flight PA 103 from London to New York, and 11 residents of Lockerbie on 21 December 1988. He appealed against conviction. His appeal was refused in 2002.
4. The deceased applied to the petitioner in 2003. The petitioner referred the matter to the High Court of Justiciary Appeal Court in 2007. The deceased abandoned his appeal in 2009. He was released from prison on compassionate grounds. He was suffering from terminal cancer. He died in 2011.

5. The petitioner has received a further application in relation to the deceased's conviction. The application bears to be made on 5 June 2014 by (1) Dr Jim Swire, the Reverend John F Mosey and other relatives of passengers who died on board Pan Am flight 103; and (2) immediate family members of the family of the deceased ("the Megrahi family"); (collectively "the applicants"). The application is produced, and its terms referred to for the sake of brevity. The details as to the identities of each of the applicants are contained in Schedules 1 and 2 to the application. The application requested that the petitioner not disclose publicly the names of the relatives of passengers, other than Dr Swire and the Reverend Mr Mosey, and that the names of the Megrahi family also not be disclosed publicly. Schedules 1 and 2 to the application are therefore produced in sealed envelopes. The application records that the applicants are represented by Aamer Anwar & Co, Solicitors and Notaries, ("AA & Co"). No addresses are given for any of the applicants in the application other than Dr Swire and the Reverend Mr Mosey. The application requests that correspondence be directly with AA & Co.

6. AA & Co have represented to the petitioner that one of the Megrahi family ("AB") is the executor of the deceased. The question of whether he is the executor of the deceased is significant for two reasons. First, the executor would have standing to institute appeal proceedings in the event that the petitioner were to refer the case to the Court. Second, there is an issue in this case as to the circumstances in which the deceased abandoned his appeal. Those circumstances may be relevant to whether it is in the interests of justice for the petitioner to make a reference: section 194C(1)(b) and (2) of the Act. The petitioner has sought to recover papers from the former solicitors of the deceased with a view to investigating those circumstances. They have declined to supply them on the grounds that they are bound by professional legal privilege, which now vests in the estate of the deceased, and which can be waived only by the executor of the deceased. That second matter in particular caused the petitioner actively to make inquiries of AA & Co in relation to the provision of vouching of AB's position as executor.

7. Since 4 August 2014 the petitioner has repeatedly requested vouching that AB is the executor of the deceased, or in a position functionally equivalent to an executor in terms of the law of Libya. No such vouching has been produced. The petitioner has asked the following questions: "(1) What is the legal basis for [AB's] belief that he is his father's executor? (2) Does a certificate of confirmation or its Libyan equivalent exist? (3) If not, does his father's will appoint an executor? (4) if these documents exist, are they completely inaccessible? Is there any prospect that they will become accessible in the next few months?" No answers to those questions have been forthcoming.

8. In the course of correspondence about this matter AA & Co have cited various reasons why no vouching has been produced, including the situation in Libya and the poor infrastructure there. AA & Co have disclosed to the petitioner that the Megrahi family has travelled to the United Arab Emirates (“UAE”) and back to Libya during the period since 4 August 2014. Infrastructure and communications in the UAE are of high quality. It is reasonable to expect that if there were difficulties in communicating from Libya, the Megrahi family would have provided instructions to AA & Co during the visit to the UAE. AA & Co have told the petitioner that they do not have a forwarding address for AB. The communications from AA & Co have led the petitioner reasonably to infer that the Megrahi family, including AB, is not currently providing AA & Co with instructions.
9. The petitioner is not satisfied, on the basis of the information available to it, that the Megrahi family, including AB, is currently providing instructions to AA & Co. The petitioner is not satisfied, on the information provided to it by AA & Co, that AB is the executor of the deceased, or in a position functionally equivalent to an executor under the law of Libya.
10. Before determining whether to undertake investigations in relation to the miscarriage of justice alleged in the application, the petitioner requires to consider whether the applicants are persons with standing to institute an appeal which could have been instituted by the deceased. The petitioner requires to consider whether there is a person with standing to institute an appeal and who would actually be willing to do so in the event of a reference to the Court by the petitioner. If there is no such person, there is no point in the petitioner’s investigating the matter further, and if so advised making a reference to the Court. Further investigation, and a further reference, would involve significant expenditure of public funds.
11. Section 303A of the Criminal Procedure (Scotland) Act 1995 provides, *inter alia*,
 - (1) Where a person convicted of an offence has died, any person may, subject to the provisions of this section, apply to the High Court for an order authorising him to institute or continue any appeal which could have been or has been instituted by the deceased.
 - (2) An application for an order under this section may be lodged with the Clerk of Justiciary within three months of the deceased's death or at such later time as the Court may, on cause shown, allow.
 - (3) Where the Commission makes a reference to the High Court under section 194B of this Act in respect of a person who is deceased, any application under this section must be made within one month of the reference.
 - (4) Where an application is made for an order under this section and the applicant—

(a) is an executor of the deceased; or
(b) otherwise appears to the Court to have a legitimate interest,
the Court shall make an order authorising the applicant to institute or continue any appeal which could have been instituted or continued by the deceased; and, subject to the provisions of this section, any such order may include such ancillary or supplementary provision as the Court thinks fit.”

12. There is no definition in the Act of the expression “legitimate interest” in section 303A(4)(b). In the absence of an applicant who is an executor, the petitioner requires to consider whether there is any person who otherwise has a legitimate interest to institute an appeal. The Court has held that the interest may be founded on a family relationship with the deceased, although there may be cases in which despite a family relationship there is not sufficient to demonstrate a legitimate interest: *Gormley v HM Advocate* [1999] ScotHC 245 (17th November, 1999). The Court has granted authority to individuals with a family relationship with the deceased in several other cases, for example: *McInnes v HM Advocate* [2005] HCJAC 121; *Porter v HM Advocate* 2005 SCCR 13; *Cowan v HM Advocate* 2001 GWD 18-692. As hereinbefore condescended upon, the petitioner is not satisfied on the information available to it that the Megrahi family is providing instructions to AA & Co.
13. There is no decided case in which relatives of victims of a murder of which a deceased person has been convicted have been held to have a legitimate interest in terms of section 303A(4)(b) of the Act. The issue has not arisen before. The petitioner therefore requires to seek the assistance of the Court in relation to the proper construction of the words “legitimate interest” in the context of section 303A(4)(b) of the Act. The petitioner seeks the assistance of the Court as to whether or not it falls to be construed so as to comprehend any interest on the part of persons such as Dr Jim Swire and the Reverend John F Mosey who are relatives of victims of a murder of which the deceased has been convicted.
14. Service is sought on the Lord Advocate in the public interest, and upon Dr Jim Swire and the Reverend John F Mosey for such interest as they may have. The petitioner has no contact addresses for any of the other applicants, and service is accordingly sought upon Aamer Anwar and Co, Solicitors and Notaries, for such interest as the other applicants may have.

MAY IT THEREFORE please your Lordships to appoint this petition to be intimated on the Walls in common form; to appoint the petition to be served in common form upon the

persons named and designed in the Schedule hereto; to ordain them if so advised, or any other person having an interest herein to lodge answers hereto, if so advised, within 21 days after service; thereafter, on resuming consideration hereof, with or without answers, to furnish the petitioner with the Opinion of the Court on the proper construction of the words "legitimate interest" in section 303A(4)(b) of the Criminal Procedure (Scotland) Act 1995, and in particular whether they fall to be construed so as to comprehend any interest on the part of persons who are relatives of victims of a murder of which a deceased person has been convicted; and to decern; or to do further or otherwise as to your Lordships shall seem proper

ACCORDING TO JUSTICE etc.

Schedule

1. The Rt Hon Frank Mulholland QC, Her Majesty's Advocate, Crown Office, Chambers Street, Edinburgh, EH1 1LA
2. Dr Jim Swire, [address supplied]
3. The Reverend John F Mosey, [address supplied]
4. Aamer Anwar & Co, Solicitors and Notaries, Carlton Buildings, 63 Carlton Place, Glasgow G5 9TW