

Justice Committee

Inquiry into decision on Abdelbaset al-Megrahi

Letter from Matt Berkley

Suggestion for Megrahi inquiry: question of Departmental influence on prisoner through delay and/or problematic information

My brother died in the crash of Pan Am 103. Before Mr MacAskill's decisions, I met him twice and had three telephone conversations with his adviser Dr Burgess.

I am writing to suggest that the Committee might consider, for its discussion on the remit or later, a question similar to this:

"Did the Justice Secretary take adequate care, through promptness of action and appropriate information to the appellant, to avoid influencing the court process?"

Scottish Ministers emphasised that they would have preferred Mr Megrahi's case to continue without the possibility of prisoner transfer. The wider interests of justice were perhaps best served by the process continuing.

UK Families Flight 103, which represents most UK families, made it clear to the Minister that the overwhelming wish was for the appeal to continue.

There are two areas which may be of interest. The first concerns timeliness, and the second appropriateness of information given to the prisoner. The issue is whether both in combination could reasonably have been foreseen to influence the prisoner's decision to abandon the appeal.

It is perhaps uncontentious that for an ill prisoner in a foreign jail, the longer Mr MacAskill took to decide, the more incentive there was to abandon the appeal. More on this is in an Appendix.

1. Timeliness

The Department had good indications for two years that this prisoner transfer application was likely. Officials had been discussing it with the Libyan Government for months beforehand. There had been relevant contact with the US and UK Governments. It is not therefore clear whether Mr MacAskill acted responsibly when, given a 90-day timescale, he:

- a) **delayed contacting relatives for 43 days;**
- b) **did not meet relatives of victims from Lockerbie until the 79th day;**

- c) **delayed contacting the FCO for 48 days;**
- d) **waited until the end of his 90-day period for the FCO to provide information, when the FCO had already failed to do so since February;**
- e) **delayed for 21 days replying to Mr Megrahi's acceptance of a meeting;**
- f) **visited the prisoner after the 90-day period had already expired;**
- g) **took 41 days to think after hearing UK and US relatives and the US Attorney General talk of the relevance of an international agreement; and**
- h) **delayed decision beyond the 90-day period on the grounds that he was waiting for information not listed in the criteria, even though the actual criteria were clearly not met.**

The note of the meeting with the Libyan delegation on 12 March states, "Mr Gordon confirmed that this matter ...would be dealt with expeditiously". The First Minister made a similar statement in May. Yet despite the prisoner's worsening illness and the possible consequent increase in temptation to abandon the appeal in the hope of going to Libya to die, the actual priority given by Dr Burgess in May and June was "routine".

It is perhaps unfortunate for the course of justice that **Mr MacAskill's delay beyond the time when the appeal was live was in addition to:**

- **several years' delay** in agreeing the form of the trial;
- **delay beyond the normal 110 days' pre-trial detention** to around 400;
- **the SCCRC taking two-and-a-half years longer** than their usual target of one year;
- **delay to the second appeal due to the UK Government withholding evidence;**
- other delays to the second appeal; and
- **delay from the judge's illness.**

The point is about cumulative frustration as well as illness: it is not about guilt or innocence, but fairness. It is not about anyone's motivation, but about the effect on a judicial process.

Consideration of these factors together might lead to the conclusion that even an innocent man might drop the appeal under the circumstances. There may be a legitimate question as to whether all innocent people, in a situation where the prison governor had by then already described them as deserving of compassionate release because they were dying, would have continued with the appeal.

Bearing in mind that

- a) the prisoner was terminally ill;
- b) he may have wished before he died to see his aged mother who was not perhaps easily able to come to Scotland, and
- c) the Cabinet Secretary could not transfer unless the appeal was dropped,

it is perhaps not clear that the abandonment of the appeal was related to an acceptance of guilt or of weakness in his legal case.

It is perhaps not beyond doubt that the explanation for abandonment is other than that the appellant became desperate, and/or believed that the Minister was waiting for him to abandon before transferring him.

Perhaps it is worth asking whether the Minister could reasonably have foreseen effects of his delay on the prisoner's attitude towards his appeal, given i) the history of previous delays in this case and ii) the apparent belief on the part of the Libyan authorities from 2007 that Mr Blair had at least not discouraged the expectation that Mr Megrahi would be transferred.

The aims of prisoner transfer agreements relate to cost, rehabilitation and conditions for the prisoner. Since in this case only the last of those was a consideration for the Scottish Ministers, it was surely against the intention of such agreements for the situation of a prisoner to be at risk of worsening by abandonment of an appeal not being followed by transfer.

2. Information given to the prisoner

i) Apparent selectivity of information to the prisoner

At the prison, there were **seven facts** Mr MacAskill could have told the appellant **on the relevance of the conviction appeal to the decisions:**

- a) he would have to drop it to be transferred;
- b) he would not have to drop it for the Minister to refuse transfer;
- c) he would not have to drop it for the Minister to release him;
- d) if he did drop it, he could not be transferred unless the Crown decided to drop their sentence appeal;

- e) the Crown would decide independently;
- f) the Minister currently had no information on what the Crown would do;
- g) the Minister would not find out in advance what the Crown would do.

Mr MacAskill appears to have mentioned only one of these – (a), that he would have to abandon the appeal to be transferred – while omitting both the possibilities which did not need the appeal to be dropped and the one which would defeat his stated purpose of doing so. This impression from the Department's note is bolstered by Mr MacAskill's statements in Parliament on 2 September in reply to Margo MacDonald, that what he said to Mr Megrahi was in the note and "no further matters beyond that were discussed".

ii) A statement to the prisoner on transfer conditions which, as recorded, was strictly speaking incorrect

The note of the meeting says, "Mr MacAskill stated it was necessary to highlight that when he makes his decision on prisoner transfer, he can only grant a transfer if there are no court proceedings ongoing. Mr MacAskill stressed that **this was a decision for Mr Al-Megrahi and his legal team alone**".

A decision by Mr Megrahi was not the only decision which was relevant.

If the word "this" refers to the non-existence of court proceedings, then the statement would seem to be false, since in reality the Crown would also have to give up their appeal. It is not clear what the referent might otherwise be.

To the extent that Mr Megrahi took notice of it, in a context where Mr MacAskill arrived at the prison having already failed to make a decision within the target period, it might be reasonable to think that the message the prisoner understood was that if he dropped the appeal he would be likely to be transferred: "Mr MacAskill stressed that this was a decision for Mr Al-Megrahi and his legal team alone Mr Al-Megrahi stressed that he understood this point he felt he should be allowed transfer". The question of what if any influence Mr Megrahi believed or hoped the Minister had with the Crown is a matter for speculation.

iii) A statement to the prisoner with no obvious basis: "Mr MacAskill stressed that he could not give any indication of his likely decision".

The basis of this assertion in the note of the prison visit is not clear. This issue is discussed in the Appendix below. There are no grounds in the treaty for saying a Minister could not give an indication.

Mr MacAskill does not make clear whether his statement is a legal, quasi-legal, procedural, or moral point.

A basis for the first three of those is not apparent. Morally, if a prisoner states a desire to return home as the reason why they might drop their appeal, it is not clear why it would be against the interests of justice for a Minister to indicate that doing so would not, or would not be likely to, achieve their aim. The section above under "timeliness" concerning the intention of prisoner transfer agreements is relevant here.

It is not clear from discussions with Mr MacAskill and Dr Burgess, or the published documents, that Mr MacAskill:

- a) acted in keeping with promises made, in the context of the prisoner's illness, **to expedite the transfer decision**;
- b) acted in keeping with the principle that **his actions should not influence the course of criminal proceedings**;
- c) acted in keeping with **Ministerial statements** that they would prefer the judicial process to continue undisturbed; or
- d) provided **accurate, fair and balanced information** to the prisoner.

Matt Berkley
28 September 2009

Notes

On the 105th day, the prisoner's appeal ended. On the 106th day, Mr MacAskill decided against transfer. It may be that the end of the 90-day period prompted the prisoner to become more desperate, or more prone to gambling.

If Mr MacAskill had refused transfer within 90 days on the clearly-sufficient grounds that the prisoner's and Crown appeal meant the criteria were not met, **then the prisoner would have had no technical reason to drop the appeal** unless he were, despite the obstacle of the Crown appeal, intending judicial review or reapplication.

It might be asked **why Mr MacAskill was obtaining representations at all from a prisoner who was not eligible for transfer.**

It is not clear to me that any reference by a Minister to a prisoner's possible dropping of an appeal would be appropriate.

For what it is worth, my impression from the meetings was that Mr MacAskill was surprisingly relaxed in a situation where the prisoner might drop the appeal.

Mr Megrahi could have been freed on 7 July, but we will never know where the judges arrived in their reasoning, because they announced that they had stopped work as one of them was ill. It would perhaps not be surprising if the prisoner intended to give more serious consideration to dropping the appeal in the event that he were not freed on or soon after 7 July.

Appendix: problem of possible indirect or involuntary inducement

Extracts from email: Matt Berkley to Kenny MacAskill, 6 July 2009

[Notes: Emphasis in main text below added later. The Justice Department has not yet published written representations from relatives.]

"Immediate problem in al-Megrahi case; possible solutions

... 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 ...

To keep quiet could let Mr al-Megrahi form or perpetuate a misguided idea.

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.

At the moment it would seem that Mr Megrahi does not know what is in your mind, and you do not know what is in his. For your part, you cannot know how long you have to decide.

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

In these circumstances, it seems to me arguable that telling a prisoner he was unlikely to be transferred could lessen rather than increase the effects of political manoeuvring on justice.

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 ...

If you would like to see the appeal continue, then you must act while it is still live."

Comment: **Mr MacAskill's response** as recorded in the Department's note of the meeting of 6 July was that “**to give an indication** [to the prisoner of his likely decision] **would be factually and judicially wrong.**”

Since there is no guidance about this in the treaty, **it is not clear how it is a factual or judicial matter.** Nor is it clear why Mr MacAskill thought it was right to talk about dropping an appeal to a prisoner who said his purpose in doing so would be to go to Libya to die, but wrong, if there was little prospect of that succeeding, to warn a dying man of the fact.

Prisoner transfer agreements are aimed at improving cost, rehabilitation or prison conditions. It seems that their spirit would not be met by a prisoner being tempted to drop their appeal and then not being granted transfer. **Mr MacAskill did not mention anything in law or guidelines preventing him from communicating a suitable message to the prisoner which might be in the interests of justice for the prisoner, victims or the wider public.**