

UPDATE FROM JIM SWIRE

19th August 2008.

Many of you will already have seen this letter from Prof. Hans Koechler of Vienna to Miliband, currently Foreign Secretary.

Today a closed session of the High Court in Edinburgh is being held.

The protagonists are:-

1. Their Lordships, the High Court judges themselves.
2. The Crown Office Lockerbie (prosecution) team.
3. The Advocate General whose job is to provide the link between Whitehall and the Scottish legal systems.

The public and the defence team are excluded, and it is believed that the Prosecution team still oppose passing the 'document(s) from a Foreign power' to the defence.

It is established that the High Court does have the power to set aside the PII certificate imposed by Miliband. Thus it is the Scottish system that decides the issue today: the UK Government has already applied through Miliband's PII certificate, to block the fairness of the Scottish criminal process.

It is also known that both the Zeist prosecution and the Scottish police were in possession of the 'Foreign power document(s)' from before even the start of the Zeist trial, whereas the defence were denied access.

No matter what the content of the document(s) may be, and they may for all we know be quite trivial, the principle that there be 'equality of arms' between the prosecution and defence in a criminal case is fundamental to a fair trial/appeal. Justice and truth could not be provided by any system where the political executive intervenes in the fair distribution of information between the prosecution and defence.

One of the vital functions of any free country's judicial system is to ensure, free from interference by the executive, that the individual can rely upon it to decide issues where that political executive is alleged to have acted unfairly in disadvantaging that individual,

It is against that background that I commend Professor Koechler's letter below. Especially the last two sentences, which I have highlighted below. He is to be congratulated on his determination in support of a just and truthful outcome to the case.

Like the professor I do not believe that a meaningful and fair further appeal could be held under the Scottish criminal justice system, should the High Court today decide against sharing this information with the plaintiff's defence team.

Dr Jim Swire.

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Prof. Koechler's letter to Miliband:

"As international observer, appointed by the United Nations, at the Scottish Court in the Netherlands I am also concerned about the Public Interest Immunity (PII) certificate which has been issued by you[Miliband] in connection with the new Appeal of the convicted Libyan national. Withholding of evidence from the Defence was one of the reasons why the Scottish Criminal Cases Review Commission has referred Mr. Al-

Megrahi's case back to the High Court of Justiciary. The Appeal cannot go ahead if the Government of the United Kingdom, through the PII certificate issued by you, denies the Defence the right (also guaranteed under the European Convention on Human Rights) to have access to a document which is in the possession of the Prosecution. How can there be equality of arms in such a situation? How can the independence of the judiciary be upheld if the executive power interferes into the appeal process in such a way?

In that regard, I have the honour to draw your attention to the recent decision of Trial Chamber I of the International Criminal Court (ICC) to stay the proceedings in the case of the Prosecutor v. Thomas Lubanga Dyilo because of the non-disclosure of exculpatory material ("Decision on the consequences of non-disclosure of exculpatory materials ..." of 13 June 2008). The judges stated that "The Chamber has unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material" and referred to an ICTY [International Criminal Tribunal for the former Yugoslavia] ruling according to which "the public interest [...] is excluded where its application would deny to the accused the opportunity to establish his or her innocence". (In a further decision, dated 2 July 2008, Trial Chamber I of the ICC ordered the release of Mr. Dyilo.) I sincerely hope that the British Government will not ignore the basic principle of fairness as expressed in these rulings of international criminal courts and will not insist on a measure that would, if upheld, effectively prevent the Scottish High Court of Justiciary to go ahead with Mr. Al-Megrahi's Appeal. It is fair to expect that the standards of criminal justice adhered to in the United Kingdom (and within the devolved justice system of Scotland, for that matter) should not be lower than those of international criminal courts and should definitely be in conformity with the requirements of Art. 6 of the European Human Rights Convention.

Should further appeal proceedings become impossible because of the forced non-disclosure of evidence to the Defence, not only myself, who followed the proceedings in the Netherlands as international observer, but the relatives of the victims of the Lockerbie tragedy will be prevented from any further chance of knowing the truth about those responsible for the midair explosion of Pan Am flight 103 over Lockerbie. Many who, like myself, initially trusted in the integrity of the judicial process under Scots law, will feel betrayed. There is no justice without truth – and there can be no truth if evidence is withheld in a criminal case by governmental decree."

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