CCRC

Criminal • Cases • Review • Commission

Private and Confidential

Mr M J Smith

Your ref:
Our ref: 00946/98

8 July 2008

Dear Mr Smith

Final decision on your application

We wrote to you on 6 July 2006 letting you know the Commission's provisional view of your application for review of conviction and sentence, and giving you until 18 August 2006 to make any further submissions to us. We agreed to extend this date after discussions with you and your representatives.

We have now considered the further submissions that you made to us and have decided that there are no grounds to refer your conviction and/or sentence for a fresh appeal. The Commission has therefore reached a final decision not to refer your case to the Court of Appeal.

Our response to the points that you raised with us is in the enclosed final Statement of Reasons. Please read this document carefully as it explains why we have reached this decision. I have made the final decision and have signed the Statement of Reasons on behalf of the Commission.

We also enclose the following documents (which are set out at paragraph 2 (viii) and (ix) of Annex B):

1. Second letter of instruction to Mr Martin Winstone, dated 22 March 2007;

2. Second report by Mr Martin Winstone (undated).

You have already received with the Commission's second provisional Statement of Reasons copies of those documents set out in paragraph 2 (i) to (vii) of Annex B.

The file on your case has now been closed.

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The Commission has received a number of emails from you recently from which it notes the present situation regarding the status of your applications for Judicial Review. The Commission does not propose to take any action in respect of those proceedings nor does it consider that any matters raised within them prevents the Commission from making a final decision in your case.

Your file has now been closed. For the next three months we will keep at our offices any material you sent to us. The files will then be moved into storage for a minimum of four years and nine months before being eventually destroyed. If you need any of your material to be returned please get in touch immediately.

Yours sincerely,

Ewen Smith
Commissioner

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CRIMINAL APPEAL ACT 1995

FINAL STATEMENT OF REASONS
FOR A DECISION NOT TO MAKE A REFERENCE
TO THE COURT OF APPEAL

CCRC Reference:	**00946/98**
Applicant:	**Mr Michael John Smith**
Applicant's Representatives:	Unrepresented

In the exercise of its powers under the Criminal Appeal Act 1995 ("the Act") the Criminal Cases Review Commission ("the Commission") has considered the application of Mr Michael John Smith for review of his conviction and sentence.

The Commission has reached a final view that there are no grounds on which to refer Mr Smith's conviction or sentence to the Court of Appeal.

Details of Conviction and Sentence

Date:	18 November 1993
Court:	Central Criminal Court
Offence	**Sentence**
Count 1: Communicating material to another for a purpose prejudicial to the interests of the state contrary to section 1(1)(c) Official Secrets Act 1911	8 years' imprisonment
Count 2: Communicating material to another for a purpose prejudicial to the interests of the state contrary to section 1(1)(c) Official Secrets Act 1911	8 years' imprisonment, consecutive
Count 3: Making a sketch or note for a purpose prejudicial to the interests of the state contrary to section 1(1)(c)Official Secrets Act 1911	Acquitted
Count 4: Obtaining or collecting material for a purpose prejudicial to the interests of the state contrary to section 1(1)(c)Official Secrets Act 1911	9 years' imprisonment, consecutive
	Total sentence: 25 years' imprisonment (reduced to 20 years' imprisonment on appeal)

Summary

i. The Commission may refer a conviction to the Court of Appeal only if there is a real possibility that the conviction will be overturned. The reference must be based on some new evidence or argument that was not raised at trial or appeal, unless there are exceptional circumstances.

ii. The Commission may refer a sentence to the Court of Appeal only if there is a real possibility that the sentence will be reduced. The reference must be based on some new information or an argument on a point of law that was not raised at trial or appeal.

iii. The Commission may refer a conviction or sentence only if the applicant has already appealed or applied for leave to appeal against that conviction or sentence, unless there are exceptional circumstances.

iv. Further details of the Commission's powers are outlined in Annex A.

v. Mr Smith was notified on 9 April 2003 of the Commission's provisional view that there was no real possibility that this conviction and sentence would be quashed. Mr Smith was given until 17 October 2003 to make further submissions to the Commission.

vi. The Commission received further submissions on 17 October 2003. Having considered both the initial and further submissions, and having undertaken extensive additional investigations, the Commission made a second provisional decision not to refer the conviction or sentence to the Court of Appeal in August 2006. The Commission's decision is explained in the "Analysis and Reasons" and "Further Analysis and Reasons" sections of this Statement of Reasons.

vii. Mr Smith made further submissions in response to this provisional view, in particular on 12 February and 7 December 2007. The Commission's response to these further submissions is contained in the "Subsequent Analysis and Reasons" section of this Statement of Reasons.

viii. Having considered all the initial and further submissions the Commission has decided, for the reasons set out in this Statement of Reasons, not to refer the conviction or sentence to the Court of Appeal.

ix. The position in relation to disclosure of material is set out in Annex B.

The Trial

This section summarises the background to the case and the evidence and arguments put forward by the prosecution and defence at trial. It does not necessarily reflect the Commission's view of that evidence or of those arguments.

1. From December 1985 Mr Smith was employed by GEC as an Audit Manager in the Quality Assurance Department at Hirst Research Centre (HRC), an establishment involved in Ministry of Defence contracts. HRC is a 'prohibited place' under the provisions of Section 3(b) Official Secrets Act 1911.

2. The Crown alleged that Mr Smith was an agent of the Russian intelligence services. Between September 1990 and his departure from GEC in July 1992 Mr Smith communicated to his Russian controllers technical material and information relevant to the United Kingdom's actual and potential defence capability.

3. Counts 1 and 2 of the indictment were specimen counts concerned with the period January 1990 to April 1992. There was no specific documentary evidence available in relation to either Count.

4. Count 4 concerned the period 30 April to 8 August 1992 and related to the specific documents and material found in the boot of Mr Smith's car on the day of his arrest.

5. The Crown put its case on the basis that Mr Smith was recruited as a Soviet spy in the early 1970s at a time when he was an active member of the Young Communist League. He was recruited by Viktor Oschenko, a KGB officer in London, who targeted those with the potential to gain access to scientific and technological information.

6. Shortly after being recruited Mr Smith left the Young Communist League and severed all links with the Communist Party. It was alleged that he did this on the instructions of the KGB.

7. It was alleged further that some time after recruitment Mr Smith was 'put on ice' until he was reactivated by a letter sent to him in September 1990. At trial, this letter was exhibited and referred to as the 'Williams letter'. It read:

Dear Mike,

A lot of water has passed under the bridge since our last appointment, I am sure we should have a chat in the nearest future. I would be happy to meet you, as previously, at the recreation in October.

With best wishes,
Yours sincerely
Williams.

8. Having been reactivated, Mr Smith began to engage in acts of espionage that gave rise to the specific counts on the indictment, for which he was paid a total of £20,000.

9. It was alleged that from the date of his reactivation Mr Smith had clandestine meetings with a Russian handler who gave him instructions about the way meetings should take place, fall-back arrangements and signs and signals to be used in case of danger or cancellation.

10. Papers seized at the time of Mr Smith's arrest were alleged to include notes of meetings with his handler, including shopping lists of information required. Mrs C gave evidence for the Crown, and told the jury that the notes bore all the hallmarks of KGB tradecraft, designed to avoid detection by the Security Services. Oleg Gordievsky, a KGB defector, gave evidence that the notes gave the appearance of having been dictated to a well-disciplined agent working for the KGB.

11. Mr Smith denied that he was involved in any form of espionage for the Russians. It was his case that he was engaged only in industrial espionage and had been handing over information to a man named 'Harry', who was acting on behalf of a commercial competitor of GEC. He had been unable to trace 'Harry' for the purposes of the trial.

Background to Mr Smith's involvement with the KGB

12. After being recruited by the Russians Mr Smith obtained employment at EMI in Feltham. He concealed his former membership of the Communist Party and obtained security clearance up to and including 'secret'. He signed an Official Secrets Act declaration. Between 1976 and 1978 he worked on a secret weapons project at EMI.

13. In August 1977 Mr Smith travelled to Oporto in Portugal. At trial, the Crown asserted that the purpose of this visit was to engage in a KGB training exercise.

14. In 1978 Mr Smith's previous links with the Communist Party eventually reached the attention of the authorities. He lost his security clearance and was moved to a non-military branch of EMI.

15. In 1979 Mr Smith actively sought to regain his security clearance. He sought an interview with the Ministry of Defence and signed a security questionnaire indicating that he had never had links with Communism. In 1980 Mr D of the British Security Services (posing as a Ministry of Defence official) interviewed him. Initially Mr Smith denied his past link with Communism, but eventually admitted it. Mr Smith's security clearance was not restored.

16. In 1985 Mr Smith was made redundant from EMI, but secured employment almost immediately with GEC at the HRC. He was given clearance to 'confidential' level on a 'need to know' basis and signed a further Official Secrets Act declaration.

17. In May 1992 Mr Smith was given three months' notice of redundancy from GEC. He left work on 31 July 1992 and took with him a large quantity of confidential documents.

Events surrounding Mr Smith's arrest

18. On 25 July 1992 Oschenko defected to the West, and arrived in England on 31 July 1992. The effect of such a defection would inevitably cause any appointment with a contact known to Oschenko to be aborted because of the threat the defection posed to KGB agents in the field.

19. On 8 August 1992 a British Security Services Officer (referred to at trial as Mr B) telephoned Mr Smith at home. The subsequent telephone conversation was tape-recorded. Adopting an eastern European accent, Mr B introduced himself as 'George'. He then went on to say "I am a colleague of your old friend Victor. Do you remember him?" Mr Smith answered that he did. Mr B said that he needed to talk to Mr Smith urgently and suggested he should go to a nearby telephone kiosk where he would call him.

20. Mr Smith was observed leaving his home and making his way to the telephone kiosk. A call was made to the kiosk, but Mr Smith arrived too late to receive it. He was observed for some time in the area

around the kiosk before setting off to return home. On his return journey he was intercepted and arrested by Special Branch Officers.

21. Mr Smith's car and home were searched. In the boot of his car was a sports bag containing a large number of documents and some components. Under the carpet in the car was a handwritten list. In a drawer in his bedroom were documents said to be KGB 'tradecraft' documents and the 'Williams letter' postmarked 24 September 1990, along with £2,000 in cash.

22. In addition, some maps of Portugal and a map of central Oporto with four crosses marked on it were seized. The Crown called evidence from Mrs C and Gordievsky who both said that the map of Oporto was capable of being evidence of KGB instructions to an agent to follow a particular route.

23. Mr E gave evidence that Oschenko had recruited him (Mr E) as a spy in 1977. In July 1979 he had been sent to Lisbon in Portugal either by Oschenko or by 'George' his KGB successor, with instructions to deliver an envelope, which he duly did.

24. It was the Crown's case that Mr Smith's reaction to the telephone call to his home on 8 August was fully consistent with the behaviour to be expected of a spy who had originally been recruited by 'Victor' and who knew that he had been supplying information to the Russian intelligence services.

25. On 6 August 1992, two days prior to his arrest, surveillance officers observed Mr Smith. He was seen driving to Harrow on the Hill. He then took a route and behaved in a manner that led the Crown to allege that he had gone there with the intention of handing over the documents he had stolen from GEC to a Russian handler. That meeting was aborted as the handler had been frightened off by Oschenko's defection a few days earlier. In was in those circumstances that Mr Smith returned home with the documents to await further instructions; this was why he reacted so positively to the call from 'George' on the morning of 8 August 1992.

Expert evidence relating to the documents in Mr Smith's car

26. At trial, the Crown called a total of seventeen experts. The cumulative effect of their evidence was that the material contained in the boot of Mr Smith's car at the time of his arrest was material capable of damaging the security interests of the United Kingdom.

27. The defence called one expert, Dr Maher, who conceded that some part of the information was capable of having that effect. Once he had made that concession, the question of whether the material in question might have been useful to an enemy ceased to be an issue in the case.

28. The essential issue for the jury was whether Mr Smith intended to supply this information to the Russians, or to a commercial competitor of GEC.

Financial matters

29. There was evidence that Mr Smith had received some fairly large sums of cash in the months prior to his arrest. His Building Society account showed cash deposits totalling £1,925. From receipts found at his home it was shown that he had made unexplained cash purchases totalling £10,653.70. He had purchased groceries and major household items with cash. Together with £2,000 in cash found at his home, these sums totalled some £20,000.

30. Mr Smith accepted in evidence that he had received approximately £20,000 from Harry.

The Appeal

This section summarises the arguments raised on appeal and the outcome of the appeal.

31. Mr Smith applied direct to the full Court of Appeal for an extension of time, and leave to appeal against conviction and sentence. His application for extension of time was granted, and the Court (Lord Taylor of Gosforth, Mr Justice Tucker and Mr Justice Forbes) considered the merits of his applications on Thursday 8 June 1995. The following grounds were raised:

Conviction:

32. **Ground 1**: The final verdicts on Counts 1, 2 and 4 were rendered unreliable, unsafe and unsatisfactory by the premature, incomplete and provisional verdicts of guilty returned by the jury on Counts 2 and 4 at around 3.10 pm on 17 November 1992. These two verdicts were delivered in public in a case of national importance. Notwithstanding that they were in fact revoked (with a direction to they jury to consider all verdicts afresh) any further deliberations by the jury may have been inhibited or influenced by a fear (whether conscious or unconscious) that the reversal of these verdicts in the public glare might be followed by nationwide condemnation and ridicule.

33. **Ground 2**: There was a material irregularity in the course of the trial as the learned judge was wrong to admit into evidence the tape of the telephone conversation between Mr B and Mr Smith on 8 August 1992. Mr Smith's admission that he remembered an old friend named Victor went to the heart of the case. This admission was obtained by an unfair trick. It was the cornerstone upon which the Crown built its case that Mr Smith was recruited by Oschenko in the early 1970s and thereby made relevant (on the Crown's case) the EMI evidence, the trip to Portugal, and Mr Smith's efforts to retrieve his security clearance.

34. **Ground 3**: There was a material irregularity in the course of the trial as the learned judge was wrong in admitting evidence concerning Oschenko's activities from 1972 – 1979 and his defection and subsequent movements in 1992.

35. **Ground 4**: There was a material irregularity in the course of the trial as the learned judge was wrong to admit evidence concerning Mr Smith's employment on a secret weapons project at EMI from 1976 – 1985 and the linked evidence concerning his loss of and

subsequent efforts to retrieve his security clearance. This evidence was irrelevant and wholly prejudicial.

36. **Ground 5**: There was a material irregularity in the course of the trial as the learned judge incorrectly admitted evidence concerning Mr Smith's trip to Portugal in 1978 and evidence concerning Mr E's trip to Portugal. This evidence was irrelevant and prejudicial.

37. **Ground 6**: The KGB defector Gordievsky, who gave evidence at trial, wrote a book entitled 'Next Stop Execution' which was published in March 1995, some time after the trial but three months before the hearing of the appeal. At page 395 he claimed that Mr Smith was arrested as a result of information provided by him. At trial, the Solicitor General stated that in the opinion of British Intelligence Gordievsky's information did not enable MI5 to arrest Mr Smith. The information relating to Gordievsky's book was not, of course, available at trial. It was submitted that this information would have had a significant effect upon his credibility.

38. **Ground 7:** Towards the end of the first day of the appeal hearing, counsel secured an adjournment to consider two further documents that had been disclosed by the Crown at a very late stage during the appeal. The documents were statements made by Mr MacCulloch, the Deputy Director of Security at the Ministry of Defence.

39. The first document was dated 7 March 1994 in which Mr MacCulloch expressed views as to the importance of the material found in the boot of Mr Smith's car. He wrote that they would have "caused some damage to the United Kingdom, but not serious damage".

40. The second document was dated 16 May 1995. Following further investigations and discussions with colleagues at the Ministry of Defence Mr MacCulloch had revised his opinion and now stated;

> "...Smith's activities have caused some considerable damage in the case of [one project]. Some of this damage is potential, in that countermeasures to these systems could be developed, but we have no way of knowing if the Russians have or not".

41. Mr MacCulloch was interviewed during the adjournment and produced a further document dated 5 June 1995, stating that the documents:

> "might have caused some considerable damage to the United Kingdom's interests. ...it could be used with collateral data to enable a potential enemy to develop a

capability which would erode the current United Kingdom advantage".

42. Mr MacCulloch went on to say that in relation to two particular projects, more serious damage might have been caused. Information in relation to those matters might enable an enemy "to optimise countermeasures" and could "allow an intelligent enemy to deduce key systems parameters" for a particular piece of equipment which, in turn, would "allow the development of countermeasures".

43. Mr Smith's counsel at the appeal accepted that the issue of the potential damage caused by the material in the boot of Mr Smith's car could not be resurrected, as it had to an extent been settled by the concession of Dr Maher, the defence expert. However, he submitted that if only some of the information in Mr Smith's car might have been useful to an enemy, there would have been greater scope for the jury to conclude that perhaps Mr Smith did not have a criminal intent and did not intend to pass the information to the Russians, but may have been intending to pass the information, for commercial reasons, to a competitor of GEC.

Sentence:

44. In relation to sentence, it was argued that the total sentence of 25 years was manifestly excessive in all the circumstances.

Summary of outcome of appeal

Conviction:

45. In respect of Ground 1, the Court held that the trial judge acted correctly in revoking the two provisional verdicts and directing the jury to reconsider them when they retired to further consider the other counts. There was nothing to suggest that the jury's further deliberations may have been improperly influenced in the manner suggested by counsel.

46. In respect of Ground 2, the Court held that an important reason for the police making the telephone call was to test and record Mr Smith's reaction to an apparent call from his Russian handler. In the circumstances of this case it was appropriate for the security services to take steps to secure this evidence in they way they did. No pressure was placed upon Mr Smith to react as he did; he was not intimidated, he was in the security of his own house and was on equal terms with the person to whom he was speaking. It was not unfair to admit evidence of the telephone conversation and the trial judge's decision to do so could not be faulted.

47. In respect of Grounds 3, 4 and 5 the Court held that in each case the evidence was both relevant and admissible. Each of the various matters established by that evidence had a contribution to make to the overall picture from which the Crown invited the jury to infer that the applicant was not an industrial spy, as he claimed, but a reactivated Russian spy who had been recruited in the early 1970s.

48. In respect of Ground 6 the Court noted that Gordievsky did not claim to have been directly involved in Mr Smith's arrest. He may have believed that he was instrumental in Mr Smith's arrest, but that did not prove that he was prepared to lie to the British public.

49. In respect of Ground 7 the Court held that the statements of Mr MacCulloch would not have made the slightest difference to the jury's deliberations or the outcome of the case.

Sentence:

50. After considering submissions relating to the sentences imposed in other espionage cases, the Court of Appeal agreed that the sentence of 25 years' imprisonment imposed initially was excessive, and it was reduced to 20 years' imprisonment

The Applicant's Submissions

51. Mr Smith applied to the Commission on an application form dated 19 October 1998. His solicitors submitted an advice from counsel dated 10 April 2002 which raised further issues. Mr Smith raised a number of additional issues in correspondence with the Commission. Further issues have been raised as a result of Mr Smith's correspondence with Dr Jenny Tonge, a Member of Parliament.

52. The submissions made to the Commission can be summarised as follows:

Issues raised in the application

53. In relation to Count 4 on the indictment there was no evidence presented to Court and therefore the burden and standard of proof required was not met.

54. The only evidence produced to the Court for any of the charges was distorted. A letter received by Mr Smith's solicitors from Richard Tomlinson now confirms this.

55. The prosecution failed to prove elements of the allegations. There was nothing to show that anything done was detrimental to the country or the company for which Mr Smith worked.

56. An expert prosecution witness perjured himself in Court; he admitted in Court that he was not an expert.

57. Mr Smith's solicitors told him they were not able to find any expert to criticise the Crown evidence.

58. Victor Oschenko was not at Court to give evidence and be cross-examined but counsel for the Crown produced his evidence in his opening speech.

59. The trial judge allowed the Crown to adduce evidence that was inadmissible and prejudicial.

60. Most of the technical evidence referred to by the Crown was readily available in libraries. Mr Smith's expert proved this.

61. The papers allegedly collected by Mr Smith were left in his desk by his predecessor, who has since died. The papers left in the desk

were not regarded as "secret".

62. The defence was restricted in obtaining information.

63. The trial judge warned off the defence in cross-examination, because there may be restricted information.

Issues raised in letter to Dr Jenny Tonge, MP dated 10 June 1999

64. A Territorial Army Captain named Carole Maychell was arrested shortly after Mr Smith in 1992. Charges of espionage against her were discontinued in September 1993. In 'The Mail on Sunday' on 3 January 1999 it was claimed that Ms Maychell was wrongly accused of spying for the Russians. She was set up in an elaborate entrapment, which led to her being introduced to a Russian intelligence officer named 'Victor' in Berlin in Spring 1990. Mr Smith believes that this was Victor Oschenko. The Crown presented evidence at Mr Smith's trial that Oschenko was not a British agent before his defection in July 1992 but it seems he was working for British intelligence in the Maychell case 2 years beforehand. This shows that the Crown presented false evidence to the court. It also shows that there were other MI6 entrapment operations going on prior to Mr Smith's case. Mr Smith believes that the Crown withheld vital evidence from the Court in this regard.

65. A Portugese journalist who is writing a book about Mr Smith's case has criticised the police evidence about Mr Smith's trip to Oporto as inaccurate. He has found a photograph of Mr Smith and a friend, John Watson, which Mr Smith sent to a Portugese Club in 1977. The police have the original photograph.

66. Mr Smith contends that the Ministry of Defence misled the Court in relation to the importance of the only 'restricted' document in the case, in particular by the evidence of Dr Meirion Francis Lewis, an expert for the Crown. Dr Jenny Tonge MP is said to have raised this matter with the Ministry of Defence, which has refused to answer.

67. Mr Smith states that the key MI6 agent involved in his case was a man named Richard Watson who had been used to set up a bogus espionage operation between some of his contacts in the UK and Oschenko in Paris. An article in the Guardian Magazine dated 10 April 1999 confirms that Mr Watson was murdered in December 1996. Mr Smith alleges that this murder was ordered by the British Security Services. An inquest into Mr Watson's death was due to be held on 22 April 1999 but nothing has subsequently appeared in the

media, probably due to a D-notice.

68. Leslie Morris (reported in the Guardian on 23 January 1999) was convicted of supplying information to Iraq relating to Tornado radar frequencies, yet he received a sentence of only 12 months imprisonment.

Issues raised in a letter from Mr Smith to the Commission dated 21 July 1999

69. Mr Smith expresses doubt that the Criminal Cases Review Commission will be able to investigate certain aspects of his case due to the sensitivity of some of the information involved.

70. In June 2000 security officers from the Ministry of Defence visited Mr Smith at HMP Full Sutton, searched his cell and removed important legal papers and notes. This matter is awaiting further legal challenge.

71. The Crown claimed that a classified document marked 'restricted' - a key exhibit at trial - contained sensitive information about Britain's ALARM missile. The trial judge allowed a witness to rely upon hearsay evidence, as the witness claimed the document's use on ALARM had been confirmed to him in a telephone conversation.

72. The only 'Restricted' document in Mr Smith's case was exhibited at pages 51-59 (hereinafter referred to as "document 51-59") produced at Marconi Space & Defence Systems, Stanmore, Middlesex. The CPS disclosed very few witness statements relating to this document. Mr Smith disputes that this document relates to the ALARM missile project. He asserts that somebody at Marconi with knowledge of the ALARM project must have been interviewed about the use and sensitivity of the 'restricted' document but no such witness statements were disclosed.

73. MI5 had more information about the background to Mr Smith's case than they presented to the Court. Mr Smith believes he was under surveillance by MI5 or Special Branch for many months prior to his arrest. This would be relevant to the Crown's claim that he was meeting with Russian intelligence officers during this period.

Issues raised by counsel in an advice dated 10 April 2001 forwarded to the Commission by Mr Smith's solicitors on 17 August 2001

74. The taped telephone conversation was tantamount to an interview because Mr Smith was questioned about an essential element of the

case. By this device the Police avoided cautioning Mr Smith or advising him in any way of his rights. This breached Mr Smith's right not to incriminate himself as enshrined in the European Convention on Human Rights. The importance of this right was reiterated in *Saunders v UK* (1996) 23 EHRR 313.[1]

75. It was unfair to Mr Smith that the Crown linked the timing of his arrest to Oschenko's defection without calling Oschenko to give evidence. This was a device to adduce hearsay and therefore inadmissible evidence.[2]

76. Although the Crown was permitted to adduce evidence of the alleged link between Mr Smith and Oschenko, Mr Smith was unable to cross-examine Oschenko or in any way directly challenge the truth of his assertion. Accordingly, Mr Smith was denied the right to a fair trial. This constituted a breach of Article 6 of the European Convention on Human Rights.[3]

77. The police interviewed Mr Smith 33 times between 8 August and 11 August 1992. The Crown relied upon inconsistencies in Mr Smith's interviews to show that he had lied about various questions, thus providing material for the Crown in cross examination and in its final speech to the jury, and this is reflected in the Judge's summing up. The overall conduct of the interviewing process taken as a whole was oppressive. The following examples are cited:

a) At times Mr Smith was apparently tired and hungry.
b) The questioning was often repetitive in the extreme.
c) The Police did not make proper advance disclosure to Mr Smith's legal representatives about the nature of the evidence. (For example, Mr Smith was questioned several times on 8 August 1992 about the contents of the taped telephone call where it is apparent that he was unaware that the conversation had been tape-recorded.)
d) In interview 4 (which can be regarded as setting a pattern for the following 28 interviews) the interviewing officer told Mr Smith that he must answer all questions he was asked.
e) In the same interview Mr Smith asked for the interview to be stopped but this request was declined and the interview continued.

78. As a result Mr Smith was denied his right to a fair trial. This constituted a breach of Article 6 of the European Convention on

[1] Submission para 6
[2] Submission para 10
[3] Submission para 11

Human Rights.[4]

79. Mr Smith believes he was under surveillance for some time prior to his arrest. The Crown denied that this was the case. The Commission is invited to ascertain whether Mr Smith had been under observation prior to the date of his arrest, and to ensure that all unused material which should have been disclosed has been so disclosed.[5]

80. The Commission is invited to review the formal non-disclosure of material pursuant to the Public Interest Immunity Certificate issued by the Secretary of State and ratified by the Trial Judge, and to ensure that all material which should have been disclosed was in fact disclosed.[6]

81. Of all the documents relied upon by the Crown to show that Mr Smith had been passing sensitive material to the Russians, there was only one restricted document dating from 1982. At trial the Crown adduced evidence from Dr Lewis that this document related to the ALARM missile system. This was unsatisfactory for the following reasons:

a) The link was not made in advance of the trial and was not disclosed in advance of the trial, so the defence was unable to address the issue or obtain evidence to rebut the link.
b) Dr Lewis said he made the link after speaking with the technical director at Marconi, who told him that the document related to the ALARM missile system. This was hearsay evidence and therefore inadmissible.
c) Dr Lewis admitted in evidence that he was not an expert in the relevant field.
d) The trial judge stopped cross-examination of Dr Lewis on the subject, therefore the defence were denied the opportunity to meet the case against Mr Smith properly.

82. The Commission is requested to contact Marconi and in particular the technical director to whom Dr Lewis spoke, and to ascertain precisely what the restricted document related to.[7]

83. In relation to sentence, it is submitted that the sentence of 20 years remains excessive despite the reduction made by the Court of Appeal in June 1996.[8] The following reasons are cited:

[4] Submission paras 14-17
[5] Submission para 18
[6] Submission para 19
[7] Submission paras 20-23
[8] Submission paras 24-22

a) The sentence on Count 1 appears to be excessive as compared to the sentence imposed on Count 2.

b) In 1992 when Mr Smith was arrested there had been a considerable thawing of relations between the West and the former Soviet Union and this was reflected in the evidence given at trial. The need for a deterrent sentence was no longer in existence and certainly no longer applies today.

c) The overall sentence of 20 years remains excessive in all the circumstances given that there was only one document marked restricted in all the documents found in Mr Smith's car. He did not have access to any documents marked secret or top secret, and there was nothing to prove the nature of any documents or material that had been passed on previous occasions.

d) The Court of Appeal noted that between 1950 and 1955 there had been only two cases where sentences greater than 25 years had been imposed for treachery and spying and that those cases involved the loss or possible loss of life of agents acting on behalf of the United Kingdom. This case was in a wholly different and less serious bracket and the total sentence of 20 years was therefore too long.

e) The length of sentence is unfair and disproportionate in view of the fact the Government and the Crown Prosecution Service have decided not to prosecute two disclosed spies, Melita Norwood and John Symons. These decisions leave the length of the sentence imposed upon Mr Smith grossly disproportionate.

The Commission's Review

84. The Commission has issued formal Notices under section 17 of the Criminal Appeal Act 1995 in order to examine all the material held by the following public bodies:

a) The Crown Court
b) The Court of Appeal
c) MI5
d) MI6
e) The Ministry of Defence
f) The Crown Prosecution Service
g) Metropolitan Police Special Branch

85. The Commission has considered the following HMSO documents:

a) Report of the Security Commission: July 1995 Cm 2930.
b) The Intelligence and Security Committee's Mitrokhin Enquiry Report: June 2000 Cm 4764.

86. Following receipt of Mr Smith's further representations in response to the issue of provisional statements of reasons, the Commission has re-examined certain aspects of the evidence at trial; consulted the Ministry of Defence; consulted the Royal Air Force; conducted interviews with Dr Meirion Francis Lewis, Mr Reginald Humphryes and Mr Martin Winstone, and spoken to Mr Frank McClemont. Two reports have now been obtained from Mr Winstone, as well as a copy of the report of Mr McClemont dated 11 October 2007 which was prepared for Mr Smith.

Analysis and Reasons

Issues raised in the application

Issue 1

In relation to Count 4 there was no evidence presented to Court and therefore the burden and standard of proof required was not met.

87. The trial judge gave the jury a short but accurate direction as to the burden and standard of proof at a very early stage in the summing up, before commencing his review of the evidence.[9]

88. The documentation found in Mr Smith's possession at the time of his arrest was reflected in Count 4: obtaining or collecting material for a purpose prejudicial to the interests of the state contrary to section 1(1)(c) Official Secrets Act 1911 between 30 April 1992 and 8 August 1992.

89. There was significant evidence before the court, confirmed by the trial judge's directions as to how the jury should approach their consideration of this Count:

> "...the Crown have to satisfy you that at least some of them were calculated to be or might have been or were intended to be directly or indirectly useful to an enemy. You have heard from a number of Crown witnesses ... that some of this information in their view was clearly useful to an enemy. You have also heard from Dr Maher, who has said that some of the information, but a very small amount, was useful to an enemy. ... enemy means 'potential enemy'.[10]

90. The trial judge went on to direct the jury that they must look at other aspects of the evidence in the case when considering Count 4:

> "...the Crown have to satisfy you that this defendant obtained or collected these articles and/or documents for a purpose... prejudicial to the state. In deciding whether the defendant had this purpose, you must take into account ...the circumstances of the case, the relevant conduct and character of this defendant. These include, turning to his conduct and character, his early membership of the

[9] Summing up: 3-4
[10] Summing up: 5-6

> Communist Party and the fact that he severed his links with them as he did with the Young Communist League..."[11]

91. The trial judge also directed the jury that they must be sure that Mr Smith knew that he was selling information to the Russians, and not to a commercial competitor:

> "I should make it clear to you that unless you are satisfied ...that the person to whom the defendant either handed over the information ... or intended to hand over information ...was a member of the Russian Intelligence Service to his, the defendant's knowledge, you should acquit."[12]

92. In the Commission's view the evidence adduced by the Crown in respect of Count 4 was more than sufficient to discharge the burden of proof to the required standard of 'beyond reasonable doubt'.

Issue 2

The only evidence produced to the Court for any of the charges was distorted. A letter received by Mr Smith's solicitors from Richard Tomlinson now confirms this.

93. Mr Richard Tomlinson wrote to Mr Smith's solicitors on 5 October 1998 and a copy of the letter has been supplied to the Commission. The letter bears the address of a hotel in Geneva.

94. Mr Tomlinson indicates that, at the time of Mr Smith's arrest in July 1992, he was working in the Soviet Operations Department at MI5. Some of his immediate colleagues were involved in the management of Oschenko's defection and the subsequent prosecution of Mr Smith, although he himself was not. Mr Tomlinson states:

> "Shortly after Mr Smith's arrest I saw ... an MI5 report summarising the debriefing of Oschenko... It concluded that Mr Smith had not given any important or damaging information to Oschenko. I joked with a colleague that it looked like Mr Smith had merely given Oschenko 'a few pages of Jane's Defence Weekly'. We concluded that Mr Smith would probably only receive a fine or not be prosecuted at all. I was therefore very surprised when I learned of MI5's claims at Mr Smith's trial of the extent of the damage allegedly caused by him, and the extraordinary sentence which he subsequently received."

[11] Summing up: 7-8
[12] Summing up: 8:F

95. Mr Tomlinson goes on to state:

> "I suspect that the evidence of the initial debrief of Oschenko was over-ruled and exaggerated at a higher level in MI5 in order to ensure that Mr Smith received a heavy sentence. The intelligence services depend on disproportionate sentences for breaches of the OSA to cultivate the mystique of the importance of their work. I believe that Mr Smith has been made a victim of this tactic."

96. The Commission notes that Mr Smith's case at trial was that he had provided some information to an industrial spy named 'Harry' but that he had no dealings with the Russians or any one by the name of Oschenko. Mr Tomlinson's letter could be interpreted as indicating that in the MI5 report he read it was stated that Mr Smith did indeed provide information to Oschenko, although it was regarded as relatively low grade. This information would not support Mr Smith's contention that he had never supplied information to the Russians.

97. Counts 1 and 2 on the indictment were specimen counts concerned with the period January 1990 to April 1992. There was no specific documentary evidence available in relation to either Count. The precise nature of any information passed to the Russians prior to Mr Smith's arrest was never established, as Oschenko did not give evidence. There was no speculation as to the type of information that had been passed.

98. Count 4 related to the information recovered at the time of Mr Smith's arrest. This was assessed by a number of experts and found, in part at least, to have been potentially useful to an enemy and therefore damaging to the interests of the United Kingdom.

99. There is no evidence that the report allegedly seen by Mr Tomlinson was the only report that existed in respect of Mr Smith's case; there may have been others. In the Commission's view, this information cannot assist Mr Smith's application for review of conviction. It cannot assist his application for review of sentence, as Mr Smith denies any contact with Victor Oschenko or the Russians generally.

100. Even if Mr Tomlinson was able to give evidence in accordance with the content of his letter, he does not have possession of the report to which he refers. The information in his letter is capable of more than one interpretation, and as indicated above one interpretation would not assist Mr Smith's case.

101. In any event, in the Commission's view Mr Tomlinson would not be regarded as a credible witness. He was dismissed from MI6 and has himself been imprisoned for breaches of the Official Secrets Act. His long running grudge against the Security Services, which continues to this day, is well documented in the media.

102. Accordingly the Commission does not intend to take any steps to trace and interview Mr Tomlinson.

Issue 3

The prosecution failed to prove elements of the allegations. There was nothing to show that anything done was detrimental to the country or the company for which Mr Smith worked.

103. It was not necessary for the prosecution to prove that anything done was detrimental to the country, or the company by which Mr Smith was employed. The Commission has examined a transcript of the trial judge's summing up and is satisfied that the jury was directed correctly in relation to the constituent elements of the offences charged. In particular, the trial judge directed that:

> "No defendant charged under this Act is entitled to be acquitted because the safety or interests of the state in fact were not actually prejudiced, that is harmed or damaged. The point that you have to concentrate on is whether this defendant had any of these items for a purpose prejudicial to the safety or interests of the state".[13]

104. In the Commission's view there is no substance to Mr Smith's submission that the prosecution failed to prove elements of the offences charged.

Issue 4

An expert prosecution witness perjured himself in Court; he admitted in Court that he was not an expert.

105. Mr Smith has not indicated the name of the expert prosecution witness although the Commission understands that he is referring to Dr Lewis.

106. The Commission notes that each witness called for the Crown was asked to state his area of expertise and credentials before giving evidence. There was a degree of overlap between the areas of expertise of the experts who were called. The fact that an expert in

[13] Summing up: 7B-D

one area may have accepted that he did not have expertise in another area does not constitute perjury.

Issue 5

Mr Smith's solicitors told him they were not able to find any expert to criticise the evidence.

107. The papers discovered in Mr Smith's possession covered a wide range of scientific matters. Accordingly it was necessary for the Crown to instruct a significant number of experts to comment upon the content of individual documents.

108. Mr Smith's solicitor did find and instruct an expert: Dr Maher, who had very wide-ranging scientific expertise, and who gave evidence for the defence. He was able to comment authoritatively upon the evidence given by each of the Crown experts.

Issue 6

Victor Oschenko was not at Court to give evidence and be cross-examined but Counsel for the Crown produced his evidence in his opening speech.

109. The Crown case was put on the undisputed factual basis that Victor Oschenko was a KGB controller in London during the 1970s. The Crown outlined Mr Smith's undisputed early involvement with communism, and the trial judge directed the jury that the Crown was suggesting "it is likely that this defendant was recruited by Victor Oschenko[14]" although Mr Smith denied that this was so. There was no direct evidence to support this contention as Oschenko declined to give evidence at trial. The Crown relied upon indirect evidence; for example, the evidence of Mr E about his own recruitment by Oschenko, and Mr Smith's ultimate reaction to the telephone instruction from "George, a colleague of your old friend Victor".

110. The trial judge directed the jury that the question of whether Mr Smith was recruited by Oschenko or not:

> "...is not the main issue in this case. The main issue is: was he supplying or intending to supply to a Russian? So whether it is Victor Oschenko in the background, as the Crown contend, may be a strong plank in their case – it may not be such a strong plank – but it is not at the heart of their case."[15]

[14] Summing up: (I) 20E
[15] Summing up: (I) 21A

111. The Commission considers that the Crown was entitled to put its case upon the basis outlined above.

Issue 7

The trial judge allowed the Crown to adduce evidence that was inadmissible and prejudicial.

112. Mr Smith does not identify any specific area(s) of such evidence. Applications were made to the trial judge by the defence for certain items of evidence to be excluded. The trial judge gave reasons as to why, in the exercise of his discretion, those applications were refused.

113. In the course of its review of Mr Smith's conviction, the Commission has not noted any item of evidence put before the jury (other than the apparent hearsay evidence referred to in Issue 19 below) that was inadmissible.

Issue 8

Most of the technical evidence referred to by the Crown was readily available in libraries. Mr Smith's expert proved this.

114. It was Mr Smith's case that much of the information in the documentation recovered by the police was in the public domain and could have been obtained without recourse to any form of espionage. The trial judge directed the jury in relation to the 'public domain' issue:

> "It may be in the public domain. ... whether the Russians have the capability to obtain all the information in the public domain from every single research establishment like HRC, read all the scientific journals and correlate all that they can ... we have not heard any direct evidence about it."[16]

115. Dr Maher, the defence expert provided examples of information in Mr Smith's possession at the time of his arrest that was already in the public domain.

116. However, the Commission notes that it was accepted at trial that there were still some documents that were not in the public domain, which Mr Smith was not entitled to have in his possession, and which were potentially useful to an enemy: for example, document 51-59.

[16] Summing up: (I) 112A

117. This issue was aired at trial and Mr Smith has not provided any new information, argument or evidence upon it.

Issue 9

The papers allegedly collected by Mr Smith were left in his desk by his predecessor, who has since died. The papers left in the desk were not regarded as "secret".

118. Mr Smith gave evidence that some of the papers found in his possession had been left in the desk allocated to him when he started work at HRC. A Dr Dowie Lewis, who worked at HRC prior to Mr Smith's arrival, may have occupied this desk. When Mr Smith left HRC he stated that he had cleared out the desk and took the old documents with him. By the time of the trial Dr Lewis had died so the defence could not adduce any evidence from him to this effect.

119. The jury heard evidence from Mr Crichton, who worked with Mr Smith in the Quality Assurance Department, to the effect that Dr Lewis once worked in the micro-devices department, and not Quality Assurance. However Dr Lewis left HRC but returned as a consultant. He then had office accommodation within Quality Assurance, and therefore might have been the previous occupant of Mr Smith's desk.

120. It was not possible to identify which of the documents in Mr Smith's possession might have originated from the desk. The Crown conceded at trial that none of the papers in Mr Smith's possession were classified as 'Secret'.

121. This issue has already been aired at trial. The jury heard Mr Smith's account of the matter, and there was some indirect evidence to support his account. There is no new information, argument or evidence in respect of this matter.

Issue 10

The defence was restricted in obtaining information.

122. Mr Smith does not specify the nature of any such restriction. However, it is clear that all the information and documentation upon which the Crown sought to rely in order to prove its case was disclosed to the defence in advance of the trial.

Issue 11

The trial judge warned off the defence in cross-examination, because there may be restricted information.

123. Following an in camera pre-trial application on 8 July 1993, at which Mr Smith's interests were represented by counsel, the trial judge ruled that the scientific evidence and the evidence relating to KGB tradecraft should be given in camera. There was no restriction on the questions that could be asked by the defence, provided they were relevant, while the Court was in camera.

124. The trial judge interrupted the evidence of the defence expert, Dr Maher, on several occasions. Having examined the transcript of Dr Maher's evidence the Commission is satisfied that these interruptions were appropriate, and that they were not made to prevent the defence putting its case. For example, one such interruption was because Dr Maher was giving scientific detail beyond that which was necessary for the jury to decide the issues in the case.

125. The Commission notes that the trial judge set his interruptions of Dr Maher's evidence in context when he explained to the jury that:

> "You are not having to decide whether any of this information was in fact damaging, prejudicial, capable of damaging the safety or interests of the state in a military sense. You are having to consider first of all whether it was calculated to be or might have been or was intended to be directly or indirectly useful to an enemy. Secondly, are you sure that this defendant handed them over to a Russian for a purpose prejudicial to the safety or interests of the state? So it is immaterial whether they were actually prejudicial.
>
> Somebody who is spying for a potential enemy has no defence because in fact the documents he is handing over turn out to be of no value because the Russians have got them already. So we are not looking at the contents. You are deciding what was in his mind. Did he have the purpose of damaging the safety or interests of the state? Were the documents calculated to be or might have been or intended to be directly or indirectly useful to an enemy? That is why in the end the details, you may think, are not of such great importance."
>
> It was for that reason that I think Mr Tansey, as he said in his speech, felt that I had been trying to stop Dr Maher. Well, if I did, blame me; do not let it rub off on the defence, because that would be quite wrong. But it is the purpose you have to keep your eye on, not the precise details."[17]

[17] Summing up: (I) 84-85

126. Accordingly, the Commission does not consider that there was any prejudice to Mr Smith as a result of the restrictions imposed upon the publicity of certain aspects of the evidence in the trial, or the interruptions of the trial judge during the course of Dr Maher's evidence.

Issues raised by Mr Smith in letter to Dr Jenny Tonge, MP dated 10 June 1999

Issue 12

A Territorial Army Captain named Carole Maychell was arrested shortly after Mr Smith in 1992. Charges of espionage against her were discontinued in September 1993. In 'The Mail on Sunday' on 3 January 1999 it was claimed that Ms Maychell was wrongly accused of spying for the Russians. She was set up in an elaborate entrapment, which led to her being introduced to a Russian intelligence officer named 'Victor' in Berlin in Spring 1990. Mr Smith believes that this was Victor Oschenko. The Crown presented evidence at Mr Smith's trial that Oschenko was not a British agent before his defection in July 1992 but it seems he was working for British intelligence in the Maychell case 2 years beforehand. This shows that the Crown presented false evidence to the court. It also shows that there were other MI6 entrapment operations going on prior to Mr Smith's case. Mr Smith believes that the Crown withheld vital evidence from the Court in this regard.

127. The Commission has seen no evidence to support Mr Smith's contention in this regard.

Issue 13

A Portugese journalist who is writing a book about Mr Smith's case has criticised the police evidence about Mr Smith's trip to Oporto as inaccurate. He has found a photograph of Mr Smith and a friend, John Watson that Mr Smith sent to a Portugese Club in 1977. The police have the original photograph.

128. The issues surrounding the purpose of Mr Smith's visit to Portugal in 1977 have already been aired at trial and the Commission is not aware of any new evidence in relation to this aspect of the case. Mr Smith told the court that he had been to Portugal with John Watson. A photograph of Mr Watson and Mr Smith together in Portugal would not constitute new evidence capable of affecting the safety of Mr Smith's conviction.

Issue 14

Mr Smith contends that the Ministry of Defence misled the Court in relation to the importance of the only 'restricted' document in the case, in particular by the evidence of Dr Meirion Francis Lewis, an expert for the Crown. Mr Smith's MP has raised this matter with the Ministry of Defence but it has refused to answer.

129. The documentation classified as 'Restricted' in this case related to an anti-radar missile and was contained in document 51-59. Dr Lewis for the Crown and Dr Maher for the defence gave evidence in relation to this document.

130. Although there were significant areas of disagreement between Dr Lewis and Dr Maher, Dr Maher eventually conceded that the document "would be useful to an enemy and prejudicial to UK interests".[18] It was an issue of fact for the jury to judge the significance of the document, having heard the experts give their evidence in court.

Issue 15

Mr Smith states that the key MI6 agent involved in his case was a man named Richard Watson who had been used to set up a bogus espionage operation between some of his contacts in the UK and Oschenko in Paris. An article in the Guardian Magazine dated 10 April 1999 confirms that Mr Watson was murdered in December 1996. Mr Smith alleges that this murder was ordered by the British Security Services. An inquest into Mr Watson's death was due to be held on 22 April 1999 but nothing has subsequently appeared in the media, probably due to a D-notice.

131. Mr Watson was shot dead outside his home in West Sussex in December 1996. He owned a computer company and was a millionaire. Mr Watson's third wife, Linda, stood to inherit a large sum of money from Mr Watson's estate. Linda and her daughter Amanda were eventually charged with hiring a contract killer to murder Mr Watson. When the case was listed for trial at the Old Bailey, the Crown Prosecution Service dropped the charges.

132. Media reports suggested that Mr Watson had business interests in Eastern Europe and links with the 'Russian Mafia'. He had won a contract to supply the computer library system at the Moscow telephone exchange and was owed £40,000 still outstanding on the deal.

[18] Summing up: (I) 119G

133. Mr Smith wrote to his MP in January 1999 claiming that Oschenko and Richard Watson worked together. He claimed that Watson was behind the operation involving him, that MI6 had used Oschenko and Watson to infiltrate and spy on British organisations and that Watson was the link between "Harry" and the Russians.

134. The Commission has seen no evidence capable of supporting Mr Smith's claim in this regard, which would appear to be purely speculative.

Issue 16

Leslie Morris (reported in the Guardian on 23 January 1999) was convicted of supplying information to Iraq relating to Tornado radar frequencies, yet he received a sentence of only 12 months imprisonment.

135. The tribunal with full knowledge of the facts will sentence a defendant in the criminal courts. The facts of Mr Morris' case are wholly different to those in Mr Smith's case.

136. The fact that a media report indicates that defendant has received an apparently lenient sentence in another case, even if it might be similar, does not afford a reason for referral of Mr Smith's case to the Court of Appeal.

Issues raised in a letter from Mr Smith to the Commission dated 21 July 1999

Issue 17

Mr Smith expresses doubt that the Criminal Cases Review Commission will be able to investigate certain aspects of his case due to the sensitivity of some of the information involved.

137. The Commission has wide-ranging investigative powers under Section 17 Criminal Appeal Act 1995 to require any public body to produce relevant material. This includes, for example, material held by the security services and material subject to a public interest immunity certificate.

138. The Commission can use any such information to inform its decisions. The Commission decides whether it is necessary to disclose any such material to an applicant. As part of that process the Commission applies the test established in *R v Secretary of State for the Home Department, ex parte Hickey & Ors* (No.2) (1995) 1 All ER 489 to determine whether such information would assist an applicant in putting his case.

139. Section 25 Criminal Appeal Act 1995 provides that a public body producing material to the Commission can withhold consent for information to be disclosed, but consent may not be unreasonably withheld.

140. None of the information sought by the Commission during the course of its review of Mr Smith's conviction has been refused.

Issue 18

In June 2000 security officers from the Ministry of Defence visited Mr Smith at HMP Full Sutton, searched his cell and removed important legal papers and notes. This matter is awaiting further legal challenge.

141. This is not a matter in respect of which the Commission has any jurisdiction.

Issue 19

The Crown claimed that a classified document marked 'restricted' - a key exhibit at trial - contained sensitive information about Britain's ALARM missile. The trial judge allowed a witness to rely upon hearsay evidence, as the witness claimed the document's use on ALARM had been confirmed to him in a telephone conversation.

142. Dr Lewis gave evidence to the effect that he was requested to consider document 51-59. He saw that it related to a bandpass filter assembly. He thought it was part of the radar receiver of an anti-radar missile but did not know which one.

143. During the course of the expert evidence Dr Lewis was called for further cross-examination. He told the Court that he had sent some written questions to the Technical Director of the Marconi Company. One of those questions was whether the receiver was for use in the ALARM missile. He telephoned for the answers to the questions, and it was confirmed to him that the receiver was for use in the ALARM missile system.[19] Dr Lewis gave evidence to this effect on two occasions without objection by the defence, but the Commission accepts that the admission of such evidence appears to infringe the general evidential rule against hearsay.

144. However, the overall point being made by Dr Lewis was that he was able to identify the information in document 51-59 as relating to a sophisticated anti-radar missile, and he had reached this conclusion

[19] Evidence of Dr Lewis: 82D

before being made aware of the actual missile to which the documents related. The Judge summarised part of Dr Lewis's evidence as follows:

> "if he personally had the expertise to identify that the information contained in the document referred to an anti-radar missile, then he believed there were other scientists, Russian scientists, high quality scientists, who could make this deduction just as well as he could. ...[He] remained firmly of the opinion that this information would be useful to a potential enemy".[20]

145. In the view of the Commission the question of exactly which anti-radar missile to which this information related was not of crucial importance to the prosecution case.

Issue 20

The only 'Restricted' document in Mr Smith's case was document 51-59 produced at Marconi Space & Defence Systems, Stanmore, Middlesex. The CPS disclosed very few witness statements relating to this document. Mr Smith disputes that this document relates to the ALARM missile project. He asserts that somebody at Marconi with knowledge of the ALARM project must have been interviewed about the use and sensitivity of the 'restricted' document but no such witness statements were disclosed.

146. The Commission has examined all the material held at Special Branch, the Crown Prosecution Service, the Security Services and the Ministry of Defence. There are no such undisclosed statements.

147. The only evidence the Commission has identified relating to the linking of the ALARM missile to the document in question is the evidence given by Dr Lewis at trial, which has already been commented upon above. The Commission has found no written statement to the same effect.

Issue 21

MI5 had more information about the background to Mr Smith's case than they presented to the Court. Mr Smith believes he was under surveillance by MI5 or Special Branch for many months prior to his arrest. This would be relevant to the Crown's claim that he was meeting with Russian intelligence officers during this period.

148. The Commission has examined all the material held by the Security Services and the Metropolitan Police Special Branch. There are no

[20] Summing up: (1) 113-115

surveillance reports other than those disclosed to the defence for the trial. These relate to a short period of time prior to Mr Smith's arrest.

Issues raised by counsel in an advice dated 10 April 2001 forwarded to the Commission by Mr Smith's solicitors on 17 August 2001.

Issue 22

The taped telephone conversation was tantamount to an interview because Mr Smith was questioned about an essential element of the case. By this device the Police avoided cautioning Mr Smith or advising him in any way of his rights. This breached Mr Smith's right not to incriminate himself as enshrined in the European Convention on Human Rights. The importance of this right was reiterated in *Saunders v UK* (1996) 23 EHRR 313.[21]

149. At trial, the defence made application to exclude the taped telephone conversation. It was submitted that it should be excluded as it had been obtained in breach of Code C 10 (a) Police and Criminal Evidence Act 1984 and/or that it was obtained by an unfair trick.

150. The relevant part of Code C:10 reads:

> "A person whom there are grounds to suspect of an offence must be cautioned before any questions about it ... are put to him for the purposes of obtaining evidence which may be given to the Court in a prosecution. He therefore need not be cautioned if questions are put for other purposes."

151. The trial judge ruled that:

> "...the conversation was quite clearly on equal terms. There was no pressure. George, in the conversation, was not holding himself out as a person in a position of authority, as defined in the Police & Criminal Evidence Act 1984 and in the Codes, or indeed decisions relating to the Codes. I do not accept the argument that the Codes of Practice apply."[22]

152. The trial judge went on to review the authorities. In particular he noted the judgment of the Lord Chief Justice in *R v Christou and Wright* (1992) 95 Cr App R 264:

> "It is not every trick producing evidence against an accused which results in unfairness. There are, in criminal

[21] Submission para 6
[22] Ruling: 2G

> investigations, a number of situations in which the police adopt ruses or tricks in the public interest to obtain evidence. For example, to trap a blackmailer the victim may be used as an agent of the police to arrange an appointment and false or marked money may be laid as bait to catch the offender. A trick, certainly; in a sense too, a trick which results in a form of self-incrimination, but not one which could reasonably be thought to involve unfairness."

153. In all the circumstances, the trial judge found the evidence of the conversation with "George" was not obtained during an interview and it was not unfair, so it was admissible.

154. The substantive issues of whether the telephone conversation was an interview and whether it was fair that it should be admitted in evidence have already been argued. The one new point raised by Mr Smith's representatives relates to the decision of *Saunders v UK* which held that the admission of compulsorily obtained answers had been a violation of the right to a fair trial.

155. In *R v Kansal* [2001] UKHL 62 the House of Lords held by a majority (4:1) that on an appeal brought after 2 October 2000 (when the Human Rights Act 1998 came into force) the Human Rights Act does not operate so as to permit a convicted person to rely on a violation of a Convention right occurring in a trial before that date. This principle governs a case where the prosecutor caused the violation of the Convention right as well as where it was caused by a judge, and applies to both mandatory and discretionary acts.

156. The ECHR has always had an interpretative value. If the Commission was satisfied that primary or secondary legislation could be interpreted so as to produce compatibility with the ECHR, it would still be possible to refer a case to the Court of Appeal if such a possible interpretation had been overlooked at trial. In Mr Smith's case, in respect of this issue, the Commission takes the view that there is no question of a further possible interpretation of primary or secondary legislation which would assist Mr Smith.

157. The rules of evidence are not generally a matter for the European Court of Human Rights:

> "The Convention does not lay down a comprehensive set of rules for the admissibility of evidence, which is primarily a matter for regulation through national law. The Court's function is to determine whether the proceedings in question, taken as a whole, were fair and whether the rights of the

parties were adequately respected."[23] *Barbera, Messegue and Jabardo v. Spain* (1989) 11 EHRR 360 (para 68) and *Mialle v France* (1996) 23 EHRR 491 (para 43).

158. The Commission concludes that the points raised in relation to this issue cannot provide any basis for referral.

Issue 23

It was unfair to Mr Smith that the Crown linked the timing of his arrest to Oschenko's defection without calling Oschenko to give evidence. This was a device to adduce hearsay and therefore inadmissible evidence.[24]

159. The Commission has already addressed this matter at Issue 6 in this statement of reasons.

Issue 24

Although the Crown was permitted to adduce evidence of the alleged link between Mr Smith and Oschenko, Mr Smith was unable to cross-examine Oschenko or in any way directly challenge the truth of his assertion. Accordingly, Mr Smith was denied the right to a fair trial. This constituted a breach of Article 6 of the European Convention on Human Rights.[25]

160. The fact that Mr Oschenko did not give evidence did not, in the Commission's view, deprive Mr Smith of a fair trial. There was a clear prima facie case without Mr Oschenko's evidence.

161. As indicated in Issue 22 in this statement of reasons, the HRA does not apply retrospectively. Mr Smith, whose trial occurred in 1993, is therefore unable to rely upon the HRA as a basis for his application to the Commission for the reasons already stated.

Issue 25

The police interviewed Mr Smith 33 times between 8 August and 11 August 1992. The Crown relied upon inconsistencies in Mr Smith's interviews to show that he had lied about various questions, thus providing material for the Crown in cross examination and in its final speech to the jury, and this is reflected in the Judge's summing up. The overall conduct of the interviewing process taken as a whole was oppressive. The following examples are cited:

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[23] Human Rights Practice, Emmerson B at 6.149
[24] Submission para 10
[25] Submission para 11

(a) **At times Mr Smith was apparently tired and hungry.**

(b) **The questioning was often repetitive in the extreme.**

(c) **The Police did not make proper advance disclosure to Mr Smith's legal representatives about the nature of the evidence. (For example, Mr Smith was questioned several times on 8 August 1992 about the contents of the taped telephone call where it is apparent that he was unaware that the conversation had been tape-recorded.)**

(d) **In interview 4 (which can be regarded as setting a pattern for the following 28 interviews) the interviewing officer told Mr Smith that he must answer all questions he was asked.**

(e) **In the same interview Mr Smith asked for the interview to be stopped but this request was declined and the interview continued.**

As a result Mr Smith was denied his right to a fair trial. This constituted a breach of Article 6 of the European Convention on Human Rights.[26]

162. The information listed above was available at trial and is therefore not new. In all but the very first interview Mr Smith was accompanied by a legal representative. The Commission's opinion is that none of the points raised, individually or jointly, would have been sufficient to persuade the trial judge to exclude any of Mr Smith's interviews. In the Commission's view the matters referred to by Mr Smith's representative do not amount to a breach of Article 6, or to oppression.

Issue 26

Mr Smith believes he was under surveillance for some time prior to his arrest. The Crown denied that this was the case. This Commission is invited to ascertain whether Mr Smith had been under observation prior to the date of his arrest, and to ensure that all unused material, which should have been disclosed, has been so disclosed.[27]

163. This matter has already been addressed at Issue 21 of this statement of reasons.

Issue 27

The Commission is invited to review the formal non-disclosure of material pursuant to the Public Interest Immunity Certificate issued by the Secretary of State and ratified by the Trial Judge, and to

[26] Submission paras 14-17
[27] Submission para 18

ensure that all material, which should have been disclosed, was in fact disclosed.[28]

164. The Commission has examined all the material in this case, as listed earlier in this statement of reasons. The Commission is satisfied that there has been no failure to disclose relevant material on the part of any of the public bodies involved in the arrest and prosecution of Mr Smith.

Issue 28

Of all the documents relied upon by the Crown to show that Mr Smith had been passing sensitive material to the Russians, there was only one restricted document dating from 1982. At trial the Crown adduced evidence from Dr Lewis that this document related to the ALARM missile system. This was unsatisfactory for the following reasons:

(a) **The link was not made in advance of the trial and was not disclosed in advance of the trial, so the defence was unable to address the issue or obtain evidence to rebut the link.**
(b) **Dr Lewis said he made the link after speaking with the technical director at Marconi, who told him that the document related to the ALARM missile system. This was hearsay evidence and therefore inadmissible.**
(c) **Dr Lewis admitted in evidence that he was not an expert in the relevant field.**
(d) **The trial judge stopped cross-examination of Dr Lewis on the subject, therefore the defence were denied the opportunity to meet the case against Mr Smith properly.**

165. These matters have already been addressed earlier in this statement of reasons.

Issue 29

The Commission is requested to contact Marconi and in particular the technical director to whom Dr Lewis spoke, and to ascertain precisely what the restricted document related to.[29]

166. The Commission does not propose to contact the Marconi Company in respect of this matter.

[28] Submission para 19
[29] Submission paras 20-23

Issue 30

In relation to sentence, it is submitted that the sentence of 20 years remains excessive despite the reduction made by the Court of Appeal in June 1996.[30] The following reasons are cited:

a) **The sentence on Count 1 appears to be excessive as compared to the sentence imposed on Count 2.**

b) **In 1992 when Mr Smith was arrested there had been a considerable thawing of relations between the West and the former Soviet Union and this was reflected in the evidence given at trial. The need for a deterrent sentence was no longer in existence and certainly no longer applies today.**

c) **The overall sentence of 20 years remains excessive in all the circumstances given that there was only one document marked restricted in all the documents found in Mr Smith's car. He did not have access to any documents marked secret or top secret, and there was nothing to prove the nature of any documents or material that had been passed on previous occasions.**

d) **The Court of Appeal noted that between 1950 and 1955 there had been only two cases where sentences greater than 25 years had been imposed for treachery and spying and that those cases involved the loss or possible loss of life of agents acting on behalf of the United Kingdom. This case was in a wholly different and less serious bracket and the total sentence of 20 years was therefore too long.**

e) **The length of sentence is unfair and disproportionate in view of the fact the Government and the Crown Prosecution Service have decided not to prosecute two disclosed spies, Melita Norwood and John Symonds. These decisions leave the length of the sentence imposed upon Mr Smith grossly disproportionate.**

167. Section 13 Criminal Appeal Act 1995 provides that the Commission may refer a sentence to the Court of Appeal only if there is a real possibility it would not be upheld, and only if there is an argument on a point of law or information not previously raised.

168. In respect of (a) the overall point of importance to Mr Smith is that of totality, a question already considered by the Court of Appeal. Items (b) and (d) have already been addressed by the Court of Appeal.

169. In relation to (c) the reasons for the non-prosecution of Ms Norwood and Mr Symonds are documented in the Report of the Intelligence and Security Committee, June 2000, Cm 4764. The Commission does not consider that the decision not to prosecute other alleged

[30] Submission paras 24-22

spies can have any effect upon the sentence imposed upon Mr Smith.

170. Since Mr Smith's appeal in 1995 the Criminal Cases Review Commission was established and a number of sentence cases resulting from the Commission's referrals have been heard. In *R v Graham* (1999) 2 Cr App R (S) 312 the Court of Appeal stated:

> "the Commission was established, primarily, so that cases where there had been a possible miscarriage of justice could be referred to this Court. A defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as the victim of such a miscarriage."

171. The Court of Appeal also recognised:

> " ...the level of sentencing, both generally and in relation to particular offences, can and does rise and fall over a period of years, in response to changes in climate of public opinion, particularly as expressed in Parliament."

172. The Commission does not consider that there is any basis upon which it could be argued that the Court of Appeal would not uphold Mr Smith's sentence were a referral to be made.

Further Submissions

173. On 9 April 2003 the Commission informed Mr Smith that it was not minded to refer his conviction. A provisional statement of reasons was forwarded to Mr Smith and his legal representatives. Mr Smith was offered the opportunity to make further representations, which were received on 17 October 2003.

174. The further representations received from Mr Smith and his legal representatives are extremely lengthy. They comprise a 7-page outline submission, a 49-page document summarising arguments in relation to the evidence of Dr Meirion Francis Lewis, and 2 further ring binders of material in support of Mr Smith's application.

175. The Commission has summarised Mr Smith's further representations. The grounds and each issue raised are set out, and the Commission's response is set out below each issue.

Further Analysis and Reasons

Ground 1: undisclosed evidence relating to Richard Tomlinson

Issue 31:
The Commission has failed to consider Issue 2 in sufficient detail. In particular it has not tried to find the report to which Mr Tomlinson refers, nor has it sought to interview Mr Tomlinson.

176. The Commission has examined all the material in the possession of the Security Services (MI5 and MI6). No report such as the one Mr Tomlinson describes has been found.

177. In the absence of such a report the Court of Appeal would not find evidence from Mr Tomlinson in relation to this matter to be credible, for the reasons already stated at paragraph 101.

178. The Commission has found no evidence to support Mr Smith's contention that the Security Services "deliberately distorted" the damaging nature of the information found in his possession at the time of his arrest. The Commission notes that the information was interpreted by experts, whose reports were disclosed to the defence prior to trial, all of whom were available for cross-examination at trial.

179. Mr Smith further asserts that "Mr Tomlinson (or the MI5 report to which he refers) has made a mistake regarding Oschenko, because he could not have been involved in any of the 4 counts for which Smith was charged". He goes on to that it is "factually incorrect for the CCRC to state that Oschenko would have had any knowledge of the information involved in Counts 1 and 2; if the CCRC were told this in the course of their investigations then there has been a concerted attempt to mislead the CCRC".

180. The Commission's response to Mr Smith's representations in relation to Mr Tomlinson is based upon Mr Smith's assertion as to what Mr Tomlinson said, and not on any information provided by any other party. Mr Smith now appears to be suggesting that Mr Tomlinson must have been mistaken in relation to Oschenko. The Commission can only reiterate what it has said in relation Mr Tomlinson as set out in paragraph 94 above: Mr Tomlinson refers to a report allegedly deriving from the debriefing of Oschenko following his defection to the West. In its examination of all the material held by the Security Services the Commission has found no such report.

Ground 2: Dr Meirion Francis Lewis

Issue 32

In relation to Issue 4 Mr Smith submits that Dr Lewis provided false testimony, which gave the jury a distorted view of the true significance of document 51-59, and the Commission failed to investigate the truth of his evidence.

181. The Commission decided that in order to address the issues now raised by Mr Smith it was necessary and appropriate to trace and interview Dr Meirion Francis Lewis.

182. Dr Lewis is retired, but agreed to be interviewed by the Commission. Dr Lewis was interviewed on 8 February 2005. The statement he provided to the Commission, dated 22 February 2005, is disclosed with this statement of reasons.

183. During the course of his evidence at trial, Dr Lewis was asked to comment upon the sensitivity of certain documents found in Mr Smith's possession, and whether the information contained in those documents might have been useful to an enemy of the UK.

184. Document 51-59 was sent by Marconi Space and Defence Systems (MSDS) to the Hirst Research Centre at GEC. The Commission has obtained a copy of the document from papers retained by the Ministry of Defence. The document is headed 'Demonstrator Programme Requirement Specification Bandpass Filter Assembly'.

185. Dr Lewis gave evidence-in-chief that this document related to a programme to build surface acoustic wave filters for use in a receiver in an airborne guided weapon system. [31] Dr Lewis said that he did not know exactly what the missile system was. [32]

186. In cross-examination on Thursday 7 October 1993 Dr Lewis was asked about his evidence in relation to several documents, including document 51-59, and a document relating to sensors. Defence counsel referred to an abstract of a published scientific paper by *Caliendo et al.* Neither Dr Lewis nor defence counsel had read this paper in full, so the trial judge directed that they should both acquire and read the paper before proceeding any further. The trial was adjourned until the following Monday, 11 October 1993, for this to be done.

[31] Trial transcript: 13D-H
[32] Trial transcript: 19C and 25D-E

187. Over the course of the following days, Dr Lewis acquired and read the relevant paper. He also re-read several of the documents in relation to which he had given evidence, including document 51-59. On re-reading that document, he noticed a number of pointers that led him to conclude that it may relate to the ALARM missile system. He was, at that time, aware of the development of the ALARM missile through contact he had with personnel at MSDS.

188. Dr Lewis decided to telephone MSDS to see if he could speak to the then Technical Director, Dr Reginald Humphryes, in order to discuss the matter with him, but Dr Humphryes was not available over the weekend. Dr Lewis called into MSDS on his way back to London on Sunday evening, and left a sealed letter addressed to Dr Humphryes with the Security Guard at MSDS. In that letter, Dr Lewis described document 51-59 and asked whether it related to the ALARM missile system. He indicated in the letter that he would telephone to speak to Mr Humphryes on Monday morning.

189. When Dr Lewis arrived at Court on the Monday 11 October 1993, he spoke to counsel for the prosecution (Mr Nutting) and told him that he thought he could now identify the missile system in document 51-59. Dr Lewis explained the steps he had taken over the weekend. Mr Nutting agreed that Dr Lewis should telephone Dr Humphryes.

190. Dr Lewis has told the Commission that Dr Humphryes confirmed, during this telephone call, that document 51-59 related to the ALARM missile system. Dr Lewis informed Mr Nutting, as a result of which he made two further witness statements giving details of what had occurred.

191. Dr Lewis resumed giving evidence, and in response to questions from Mr Nutting told the court he had discovered that the filters referred to in document 51-59 were used in the ALARM missile system, currently in service with UK armed forces.

192. The Commission has re-examined the files held by the Crown Prosecution Service in relation to Mr Smith's trial. It is clear that Dr Lewis made two separate statements about this matter on 11 October 1993. Those statements were formally served on the defence by way of a Notice of Additional Evidence dated 11 October 1993. The two statements and the Notice of Additional Evidence are disclosed with this statement of reasons.

193. The first statement relates to the matters raised by defence counsel in relation to the paper written by *Caliendo et al.* The second statement relates to the contents of document 51-59:

> "...a restricted document entitled 'Demonstrator Programme Requirement Specification Bandpass Filter Assembly' which was contained in the prosecution exhibit bundle at pages 51-59 inclusive. The contents of this document concern sensitive equipment currently in service and should be treated in extreme confidence. I made a number of deductions from this document. These concern the fact that the knowledge of the IF frequency and bandwidth could be useful to a potential enemy which wished to jam the airborne guided weapon concerned. In addition, I noted that the specification on the group delay matching of the IF filters was significant in suggesting the mode of operation on the weapon. From this I deduced that the missile was likely to be an 'ARM', i.e. an anti-radar missile. In the intervening period I have therefore contacted the Marconi Company who have confirmed my suspicions. They confirm that the receiver is used in a missile called 'ALARM' which is currently in service with the R.A.F."

194. Dr Lewis proceeded to give evidence-in-chief along the lines of the information contained in his statements.[33] He was then cross-examined at some length by defence counsel. [34]

195. Dr Lewis accepted in cross-examination that document 51-59 itself did not directly identify the ALARM missile.[35] He went on to explain why he thought document 51-59 related to the ALARM missile, and explained the way in which this had been confirmed to him by MSDS that morning.

196. It was open to the defence to seek an adjournment to make enquiries as to whether or not document 51-59 related to the ALARM missile. The information provided by Dr Lewis in his statement was very specific, and MSDS was the manufacturer of the ALARM missile. It seems that the defence team concluded that the more it probed this matter the more damage it was likely to do to the defence case. Defence counsel gained a concession from Dr Lewis in cross-examination that document 51-59 did not identify ALARM directly. The alternative strategy would have been to object to the admission of the hearsay statement, to secure an adjournment, and to interview personnel at MSDS, who would have been bound to identify the relevant ARM as ALARM.

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[33] Trial Transcript: 60A-63A
[34] Trial Transcript: 63A-83
[35] Trial Transcript: 81G

197. The Commission has traced and interviewed Dr Reginald Humphryes, the Technical Director of MSDS referred to by Dr Lewis in his statement. The interview took place on 20 July 2005, although the statement was not signed until 13 October 2005. Dr Humphryes' statement is attached to this statement of reasons.

198. Dr Humphryes is currently employed by THALES, West Sussex. Dr Humphryes was shown a copy of document 51-59 and a copy of Dr Lewis's statement to the Commission. However, Dr Humphryes had no recollection of speaking to Dr Lewis about this matter, and was unable to confirm whether or not Dr Lewis' recollection was correct.

199. As Mr Humphryes was unable to confirm that he told Dr Lewis that document 51-59 related to ALARM, the Commission took the view that the only way to resolve the issue would be to obtain a report from an expert in ARMs.

200. Mr Smith's legal representatives wrote to the Commission on 14 July 2005 to express Mr Smith's concern that any expert instructed by the Commission should be independent from the Ministry of Defence. The Commission wrote to Mr Smith's legal representatives on 18 July 2005 to confirm that any expert instructed would be instructed on the basis of his/her qualifications, areas of expertise and experience.

201. Document 51-59, when considered in isolation, is protectively marked "Restricted" and continues to retain this classification. When coupled with the information that it relates to ALARM, however, document 51-59 attracts a protective marking of "UK Secret". As a result, before seeking the opinion of any expert the Commission was obliged to notify the Ministry of Defence of its intention to provide the document to an expert in ARMs in order to obtain an independent report in relation to the contents of document 51-59.

202. After notifying the Ministry of Defence of its intention, the Commission consulted the ALARM Port Authority at RAF Wyton in order to identify potential experts who would be in a position to provide a report about ARMs. The Commission decided to instruct Mr Martin Winstone, currently employed by MBDA Missile Systems, Stevenage. Mr Winstone was selected by the Commission as he has had no previous involvement in the case of Mr Smith; his name appears on document 51-59 as the person who approved it, so he evidently had first hand knowledge of its contents; and his curriculum vitae made it clear that he has had many years' experience in the field of ARMs, including ALARM.

203. Mr Winstone was interviewed by the Commission on 29 September 2005 in order to ascertain whether he would be prepared to accept instructions to provide an expert report on the contents of document 51-59. Subsequently, Mr Winstone was provided with a formal letter of instruction dated 3 October 2005. A copy of the Commission's letter of instruction is disclosed with this statement of reasons.

204. Mr Winstone has confirmed that document 51-59 (which he refers to by the reference number on the document itself, namely 79481/PBH/BB/S08) provides "clear and unambiguous indicators that the contents relate to an Anti-Radar Missile". [36] Further, Mr Winstone states he is "certain that that document relates to a component within the ALARM seeker".[37] He goes on to comment that the information in document 51-59 "could have been used to design systems that would reduce the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time."[38]

205. The Commission takes the view that the report of Mr Winstone provides certain proof that document 51-59 relates to ALARM, and that the information could have been useful to an enemy of the UK.

Issue 33

Mr Smith submits that Dr Lewis was not sufficiently qualified or expert in the fields of missile and jamming techniques and, consequently, the evidence he gave at trial concerning the ALARM missile system was technically incorrect. He urges the Commission to investigate the veracity of his evidence. He also asserts that the trial judge failed to warn the jury about Dr Lewis' lack of expertise.

206. At the time of Mr Smith's trial, expert witnesses such as Dr Lewis were required, by the Crown Court (Advance Notice of Expert Evidence) Rules 1987, to set out the evidence they will give in the form of a report. The report is served on the court, and all parties involved in the case, in advance of the hearing.

207. It is entirely a matter for the trial judge to decide whether a witness has sufficient credentials and expertise to give evidence as an expert. It is then a matter for the jury, having heard the witness give evidence and be cross-examined, whether they accept the evidence or not.

[36] Report of M Winstone: para 4
[37] Report of M Winstone: para 5
[38] Report of M Winstone: para 6

208. Dr Lewis' report was served on the defence in advance of the trial, in order that any weaknesses or defects in his evidence could be analysed, with a view to making appropriate challenges in cross-examination. Dr Lewis related his qualifications and professional experience in his report, and to the Court. He stated that his particular area of expertise was ultrasonics, including bulk and surface acoustic wave devices. No objection was made by the trial judge or the defence about his status as an expert witness, or the evidence he indicated that he would give.

209. In any event, the defence called expert evidence from Dr Maher, who had already had the opportunity to consider the contents of Dr Lewis' reports in advance of the trial.

210. Mr Smith's complaint about the way in which Dr Lewis came to identify the ALARM missile has already been addressed. What Dr Lewis did was to obtain confirmation of a suspicion and give evidence identifying one particular ARM. He provided basic information about the nature and purpose of ARMs. He did not seek to identify the ARM himself, but took expert advice. Nor did he attempt to go into any technical detail about the issue that would have taken him outside his area of expertise.

Issue 34

Mr Smith submits that the testimony of Dr Maher was severely impeded by interruptions from the trial judge, which were biased and unfair to the defence.

211. The Commission has already addressed this issue fully at paragraphs 124-125, and does not consider that there was any prejudice to Mr Smith as a result of the restrictions imposed upon the publicity of certain aspects of the evidence in the trial, or the interruptions of the trial judge during the course of Dr Maher's evidence.

Issue 35

Mr Smith submits that the defence was prevented from properly cross-examining Dr Lewis due to the interruptions of the trial judge. He claims there is a sinister reason for restricting the defence cross-examination. From the answers given by Dr Lewis shortly prior to this interruption, he was talking about a subject that went beyond his knowledge, namely the ALARM missile system. Dr Weatherley, the MoD observer, was anxious to prevent Dr Lewis from making mistakes and that is the true reason why the cross-examination was halted. It is submitted that this act by Dr Weatherley was an act to pervert the course of justice.

212. The Commission has re-examined the transcript of Dr Lewis' cross-examination. Defence counsel asked the following question, relating to the ALARM missile:

> "How do you attack then the missile? How do you attack it; how do you destroy it?"[39]

213. This led prosecution counsel to request that the jury should withdraw for a moment. Prosecution counsel explained to the judge that a prosecution expert present in court, Mr Weatherley, had indicated a concern to him that the questioning was "going into some very secret areas". [40]

214. Defence counsel explained that the point he was trying to make was that there was no documentary evidence to identify specifically the ALARM missile, and the judge acknowledged that that question was not particularly sensitive.[41]

215. The judge went on to say:

> "I propose to tell the jury that it seems inadvertently we may be now going with Dr Lewis onto matters that are extremely sensitive ...I think in fact probably what Dr Weatherley is concerned about, and the Solicitor General is concerned about, is that we do not really want to get involved in how in fact actually you would shoot down the ALARM system. It is something we would prefer potential enemies not to know about. I see Dr Weatherley nodding at the back of the court. I think, if you can keep away from that – probably your last few questions and mine when I interrupted."

216. Defence counsel then went on to conclude his cross-examination, during the course of which Dr Lewis conceded that document 51-59 did not directly identify the ALARM missile. It is apparent, on reading the whole of defence counsel's cross-examination of Dr Lewis, that this was one of the main points defence counsel was trying to establish.

217. Mr Smith's contention is that Dr Weatherley was trying to undermine effective cross-examination of Dr Lewis. The reasons for the interruptions made by Dr Weatherly were explained to the trial judge, in the absence of the jury, so that the trial judge could determine, as he did (see para 215), whether or not the questioning

[39] Trial Transcript: 79A
[40] Trial Transcript: 79A-C
[41] Trial Transcript: 80:D-E

of Dr Lewis had strayed into areas that were irrelevant, inadmissible or sensitive.

Issue 36:

Mr Smith asserts that it is "technically incorrect" for the Commission to state Dr Maher conceded some part of the information was capable of damaging UK security interests. Dr Maher's testimony makes it clear that he does not regard himself as an expert in the two fields where he conceded there may be some potential damage. Dr Maher was agreeing that if the documents were as sensitive as Crown witnesses claimed, then he would have to concede that point. In addition, Mr Smith states that the Commission has overlooked the fact that Dr Maher was critical of Dr Lewis and Squadron Leader Bagley.

218. The Commission has re-read the evidence of Dr Maher, during which he clearly conceded that some of the material found in the boot of Mr Smith's car was potentially useful to an enemy of the UK.

219. Dr Maher also conceded that he was not an expert in the RAPIER and ALARM missile systems, although he was an expert in associated areas relating to protection against weapons systems, e.g. thermal imaging.

220. In particular, Dr Maher accepted that if the Russians made an association with ALARM, then document 51-59 would be useful to enable the Russians to take counter-measures to disable that weapon system.[42]

221. The evidence of Dr Maher in relation to what was said by Dr Lewis and Squadron Leader Bagley was before the jury at trial.

Issue 37:

Mr Smith asserts that the reason why counsel for the defence at the appeal accepted that the issue of potential damage caused by the material could not be re-argued on appeal was not because of any concession made by Dr Maher but was, instead, due to the fact that at that time (a) no expert was prepared to jeopardise their relationship with the MoD by giving evidence for the defence and (b) there was in any event limited information available in the public domain concerning the ALARM missile system. Mr Smith submits that information in relation to the ALARM missile is more readily available now.

[42] Transcript of Dr Maher's evidence: page 39D-G

222. This submission, in effect, invites the Commission to obtain fresh expert evidence relating to the ALARM missile system in order to challenge Dr Lewis' interpretation of document 51-59. This work has been undertaken, as outlined above.

Issue 38

In relation to Issue 14 Mr Smith repeats his criticism, made at issue 36 above, of the Commission's conclusion that Dr Maher conceded in evidence that some part of the information was capable of damaging UK security interests. Mr Smith submits that there is now fresh evidence to show that the information contained in the restricted documents was at the time of his arrest and at trial available in published material which was in the public domain.

223. What was said by Dr Maher is a matter of record, shown by the transcript of his evidence during the trial. The Commission has already reviewed Dr Maher's evidence, from which it is clear that the concession was made. There is no evidence to suggest that the information contained in document 51-59 has ever been in the public domain.

224. Some technical material relating to ALARM is available in the public domain. It is clear from the material submitted by Mr Smith in his further representations that, in more recent times, particularly with internet and modern library resources, there is a great deal more information available than there was at the time of Mr Smith's trial. What is not available, however, is the restricted information contained in document 51-59 which, when coupled with the fact that it relates to ALARM, remains classified as "UK Secret".

Issue 39:

Mr Smith complains that the Commission has not investigated Issue 19 properly. He submits that the introduction of hearsay evidence by Dr Lewis meant that he did not have a fair trial.

He also claims that the Commission has failed to investigate whether there is any evidence to support Dr Lewis' account of his conversation with Dr Humphryes (at MSDS) and the fact that he had confirmed that the restricted document related to ALARM.

He submits that that the Commission was wrong to conclude that the issue of which type of anti-radar missile system the restricted document related to was not of crucial importance to the prosecution case.

He claims that the same type of receiver used in the ALARM missile system is also used in two other types of radar system (the active radar and the semi-active radar) and therefore it was impossible for Dr Lewis to identify the restricted document as relating to ALARM. He submits that the Commission should investigate this issue further.

225. The Commission has conducted further enquiries into these matters, confirming that the ARM to which document 51-59 refers is in fact ALARM, as Professor Lewis identified at the time of trial.

226. In relation to the issue of which ARM was referred to in document 51-59, it is now clear that it was ALARM. It is axiomatic, however, that information capable of disabling any ARM (whether active or semi-active, assuming Mr Smith's assertion is correct), or enabling the development of countermeasures to any ARM, would be equally detrimental to the interests of national security.

Issue 40:
In relation to Issue 20 Mr Smith submits that it is inconceivable, and therefore suspicious, that the police did not interview any personnel at MSDS about the restricted document. He submits that someone from MSDS should have called to give evidence and that it was unfair that the prosecution was allowed to adduce hearsay evidence through Dr Lewis.

227. This issue has been addressed.

Issue 41:
In relation to Issue 29 Mr Smith submits that the Commission is wrong to conclude that there is no reason to interview anyone at MSDS in order to verify Dr Lewis's account of his conversation with the technical director about the missile system to which the restricted document related. He further submits that the Commission has acted unreasonably in refusing to seek independent expert evidence on the nature of the restricted document.

228. These issues have been addressed.

Issue 42:
In relation to Issue 16 (relating to the sentence imposed on Leslie Morris) Mr Smith refers the Commission to two further espionage cases (Rafael Bravo and Ian Parr) where he claims the Crown willingly publicised details of the projects to which the sensitive material in question related. He submits that the persistent refusal of the Crown in his case, post trial, to acknowledge that the project in

question was the ALARM missile system proves that the restricted document did not in fact relate to ALARM.

229. The cases of Ian Parr and Rafael Bravo, who were both convicted of offences contrary to the Official Secrets Act 1911, have no relevance to the safety of Mr Smith's convictions. Broad details of the type of information involved in each case were reported in the press.

230. The issue of whether document 51-59 did in fact relate to ALARM has now been resolved.

Issue 43:
Mr Smith complains that the Commission has not properly investigated Issue 28. He submits that the Commission should obtain an independent report from an ALARM expert.

231. This issue has been addressed.

Ground 3: Inequality of arms in relation to experts available to the defence

Issue 44:
Mr Smith states that he does not accept the Commission's conclusion that Dr Maher was able to "comment authoritatively on the Crown expert evidence". He submits that Dr Maher's expertise was inadequate because he was not sufficiently knowledgeable about the RAPIER and the ALARM missile systems.

232. Dr Maher was the expert selected by the defence to give evidence for the defence. When accepting instructions to appear as an expert witness, Dr Maher must have indicated that he was confident to comment authoritatively on the areas of evidence outlined in the reports that would have been served on the defence in advance of the trial.

233. None of the experts at trial anticipated that there would be a need to explore issues relating to ARMs, as this arose as a result of Dr Lewis raising the issue during the course of his evidence. As explained above, the evidence Dr Lewis intended to give was served on the defence by way of a Notice of Additional Evidence, affording the defence team the opportunity to decide whether to challenge the evidence. It is clear that a pragmatic decision was taken. The tactical good sense of that decision is now clear, as further enquiries have identified the ARM in question as ALARM.

Ground 4: Confusion over what material was in the public domain

Issue 45:
In relation to Issue 8 Mr Smith submits that the trial judge's direction to the jury was incorrect and therefore it misled the jury on a crucial issue. He claims that the information in question was already in the public domain and that the Russians (just like UK scientists) would have had the capability to access it.

234. The Commission has already addressed this issue. The jury heard evidence from Dr Maher that some of the information was already in the public domain.

235. In the Commission's view, the trial judge's direction to the jury, as set out at paragraph 114 above, was entirely correct.

Ground 5: Surveillance prior to arrest

Issue 46:
Mr Smith claims that the fact that he was under surveillance prior to 8 August 1992 was not disclosed to his defence at the time of trial. He submits that the Commission should make enquiries to establish whether appropriate PII procedures were followed in relation to this evidence as it is directly relevant to the issue of the admissibility of the George telephone call and the entrapment argument which was rejected at trial and by the Court of Appeal.

236. Mr Smith would have been well aware of the fact that he was under surveillance for some days prior to his arrest. It was the Crown case that (a) Oschenko defected to the West on 25 July 1992; (b) as a result, the Security Services were made aware of Mr Smith's activities; (c) Mr Smith was under surveillance for a short period of time prior to his arrest, as illustrated by the fact that he was observed at Harrow on the Hill on 6 August 1992. The fact that Mr Smith was under surveillance during this period of time was known to the defence prior to trial.

237. From the papers examined by the Commission during the course of its review, it is clear that there were no additional surveillance logs other than those disclosed to the defence. No further information was withheld from the defence as a result of public interest immunity proceedings.

Issue 47:
Mr Smith alleges that the money recovered from his home address came from (i.e. was planted by) MI5 or Special Branch. He alleges that this is the reason the Crown did not attempt to trace its source or adduce any evidence in relation to that issue.

238. The Commission has seen no evidence capable of supporting this allegation. The evidence relating to the money found in Mr Smith's possession was, in any event, before the jury.

Appendix A: arguments against the evidence of Dr Lewis

Issue 48:
Mr Smith submits that in the light of the arguments raised in the 49-page document entitled "arguments against the evidence of Dr Meirion Francis Lewis" the Commission should instruct an independent expert to evaluate document 51-59.

239. This has now been done.

Further Submissions

240. On 9 April 2003 Mr Smith was informed that the Commission had reached a provisional view that there was no real possibility that his conviction would be overturned if it were referred to the Court of Appeal.

241. Mr Smith was offered the opportunity to make further submissions in response and his further submissions were received at the commission on 17 October 2003. As a result of these further submissions, additional work was undertaken by the Commission and additional material was disclosed to Mr Smith.

242. Mr Smith was afforded the opportunity to make any response to the Commission's second provisional Statement of Reasons by 18 August 2006, and this time limit was extended by agreement until 12 February 2007.

243. Mr Smith has made a number of further representations to the Commission in the form of letters, submissions, documents and emails between 18 September 2006 and 12 February 2007. These include some lengthy documents, as a result of which it has been necessary to summarise the points they raise. His main submissions, however, are dated 12 February 2007 and the issues raised in that submission have been addressed first. Other submissions are dealt with under a reference to their source.

Subsequent Analysis and Reasons

Letter dated 12 February 2007

Issue 49
The contents of Mr Smith's desk at HRC

244. Mr Smith takes issue with the Commission's statement in paragraph 120, namely: "It was not possible to identify which of the documents in Mr Smith's possession might have originated from the desk" of Dowie Lewis. He states "This is simply not true, as the documents are all written in English, and it is possible to read them and interpret the information they contain." He suggests that his interpretation of the exhibits at trial confirms that certain of the trial exhibits were in fact documents that Dowie Lewis left in his desk.

245. As indicated at paragraph 118 in this statement of reasons, Mr Smith gave evidence to the jury about this matter at trial, and contended that some of the documents in his possession on arrest had originated from Dowie Lewis' desk. The jury were in a position to assess Mr Smith's account of how he came to be in possession of the documents. As previously stated, the key issue for the jury to decide in relation to count 4 was whether Mr Smith had possession of the documents for the purpose of damaging the safety or interests of the state. Mr Smith's case was that he had possession of the documents but only for the purpose of handing them over to a commercial competitor and not the Russians. Therefore, the question of where the documents came from was of much lesser significance, compared with the other evidence presented to the jury (concerning Mr Smith's background of involvement with the KGB, the circumstances of his arrest, the nature of the material found in his possession and evidence relating to his finances), in determining the issue of intention.

Issue 50
Collaboration between Mr D T Lewis and Mr F S McClemont

246. Under this heading, Mr Smith makes the following points:

(i) Before trial he gave his solicitor information to show how the various documentary exhibits related to each other and to the personnel involved. He maintains that this proves that the documents were at one stage all together in one file.
(ii) He asserts that Dowie Lewis was gathering documents for "a BS9450 project, a capability approval exercise". He suggests

that as this document was "chosen for a BS9450 Exercise from 1983 to 1984" this contradicts the claim that its contents were "sensitive".

(iii) He suggests that the Commission should investigate the working relationship between Mr McClemont and Dowie Lewis to confirm they were working together on this particular project.

(iv) He complains that the Commission has given no explanation as to why Mr McClemont was issued with the 'restricted' document in 1982, and whether he knew anything about its intended use.

(v) He claims that no evidence has been produced to show whether the information in the 'restricted' document became "secret" before or after December 1985, when Mr Smith arrived at HRC and took control of the material left in Dowie Lewis' desk.

(vi) The documents in the BS9450 file all relate to one period in time, but they do not indicate any later developments in the technical specifications after the exercise was complete. This is why the SAW documentation was already old when Mr Smith took possession of it.

(vii) He states that the Commission will be able to refer his case on the basis of this point alone, as it was an essential part of the Crown's case that he stole these "sensitive" documents from a number of sources within HRC.

(viii) He asserts that his solicitor and barrister either did not understand the significance of this point, or they negligently decided it was not an important issue in the case.

247. Essentially, Mr Smith argues that:

- the Commission should make further enquiries in relation to Mr McClemont's involvement with the restricted document;
- the documents all originated from Dowie Lewis' desk. He contends that this undermines a key part of the prosecution case against him, namely the assertion that he stole the documents from various sources at HRC over a period of time;
- the fact that the restricted document was later selected as part of a BS9450 capability approval exercise for SAW filters run by Dowie Lewis is evidence that the contents were not at that time regarded as being sensitive;
- by the time he commenced work at HRC in December 1985 the contents of the restricted document were no longer regarded as being sensitive;
- his legal team failed to recognise the significance of this point and therefore his defence was prejudiced.

248. As previously indicated, in deciding whether or not to receive fresh evidence, the Court of Appeal will consider the criteria set out in section 23 of the Criminal Appeal Act 1968, namely:

(a) whether the evidence appears to the Court to be capable of belief;
(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

249. The Commission concludes that the Court of Appeal would find that there is no reasonable explanation as to why Mr Smith's current account as to how he came to be in possession of the restricted document could not have been deployed at trial: section 23 (2)(d). Clearly, his current interpretation is based on documentation available to him at the time of trial.

250. In the Commission's view, there is no evidence to suggest that the defence team failed to understand the point being made by Mr Smith, or that the matter was not pursued in a way that might render the defence team negligent or incompetent to the extent that it could affect the fairness of Mr Smith's trial. It is clear that the point was made to the jury at trial, as confirmed in the summing-up:

> "When he [Mr Smith] arrived at his desk [at HRC], that is in 1985, his desk was full of papers left by the last occupant, that is Mr Dowie Lewis. In the course of his seven years at HRC he never succeeded actually in clearing out the desk completely. He cleared out some papers, but there was still a nearly full bottom drawer by the time he came to leave ..."[43]

251. Both Mr Rock Tansey QC and Mr Gary Summers were very experienced counsel, specialising in serious and complex criminal charges. They would, in the Commission's view, have been bound to have appreciated fully the point being made by Mr Smith. They were in possession of all the material facts and documentation and they would have been in a position to advise him as to the nature and extent of the information that should be presented to the jury in support of this point.

[43] Summing-up: 16/11/93 page 40:C-E

252. The jury was aware that Mr Smith commenced work at HRC in 1985 and that he left GEC in 1992, at which point the incriminating papers were found in his possession. The jury was in a position to assess the likelihood of Dowie Lewis having left any of this information in his desk before departing from HRC, and the likelihood of Mr Smith not having cleared out the final batch of papers in the desk until shortly prior to leaving GEC.

253. The Commission further concludes that the Court of Appeal would find that Mr Smith's arguments on this issue, as currently expressed, would not afford a ground of appeal: section 23 (2)(b) Criminal Appeal Act 1995. Essentially, this is an old argument which was rejected by the jury at trial, but which has been re-stated by Mr Smith in a different way. The essential proposition for the jury's assessment was a simple one, as set out in the above paragraphs.

254. As to whether there is "evidence" that document 51-59 became "secret" before or after December 1985 or became less sensitive at any particular time, the views of those who owned the document were made clear at trial and appeal, and there is no evidence to suggest that those views have changed. An essential issue for the jury was whether Mr Smith's possession of the document in 1992 was with the intention of supplying it to the Russians for a purpose that was prejudicial to the interests of the state. As the trial judge said in his directions to the jury:

> "No defendant charged under this Act is entitled to be acquitted because the safety or interests of the state in fact were not actually prejudiced, that is harmed or damaged. The point that you have to concentrate on is whether this defendant had any of these items for a purpose prejudicial to the safety or interests of the state".[44] [emphasis added]

255. As to classification, the incorrect classification of the document is outlined in the Security Commission report: essentially the document should have received a higher classification from the outset. This matter is dealt with more fully at paragraph 273 below.

256. As regards Mr Smith's other submissions in relation to Mr McClemont and the alleged significance of the BS9450 project, the Commission has contacted Mr McClemont to seek his comments. The Commission spoke to Mr McClemont on the telephone on 26 February 2008. On 27 February 2008 the Commission sent Mr

[44] Summing up: 7B-D

McClemont a letter to request his assistance, which is disclosed with this statement of reasons.

257. In a telephone conversation with the Commission on 28 February 2008, Mr McClemont confirmed that in October 2007, with the agreement of his employer and the MOD, he provided Mr Smith with a written statement in which he commented on the restricted document 51-59 and other associated matters. The Commission has obtained and considered a copy of Mr McClemont's statement which is signed and dated 11 October 2007, and which for completeness is also disclosed with this statement of reasons.

258. The question of whether Mr McClemont's statement might create a ground for referral is considered separately, at paragraphs 331-352 below, to enable all the points made in Mr Smith's subsequent submissions as regards the sensitivity or otherwise of the contents of the restricted document to be considered together.

Issue 51
New evidence about the delay line documents

259. Mr Smith raises the issue that certain documents within the material at trial contain the name of "Lewis" which shows that Dowie Lewis had some involvement in the project which ultimately led to the production of document 51-59.

260. This is another extension to Mr Smith's argument, raised at trial, that papers found in his possession at the time of his arrest originated from the desk of Dowie Lewis. Again, his argument is based on papers that were available at the time of the trial and, for the reasons already stated above, those arguments are not capable of affecting the safety of his conviction.

Issue 52
The evidence of Professor Meirion Lewis has been accepted as hearsay

261. Under this heading, Mr Smith makes the following points:

(i) Meirion Lewis misled the Court when he testified that he had been in contact with the Technical Director of Marconi, who confirmed that document 51-59 related to the ALARM missile.

(ii) The Technical Director who Professor Lewis contacted was Dr Reginald Humphryes, who admits he was not the Technical Director of Marconi Dynamics at the time.

(iii) Dr Humphryes admitted to Mr Smith in a telephone conversation of 4 January 2007 that he had no more knowledge about ALARM than any ordinary engineer might learn from the public domain. Dr Humphryes was not an expert on the design or operation of ALARM.

(iv) In the same conversation Dr Humphryes admitted that the reason Professor Lewis contacted him was because they knew each other. They had known each other from university days.

(v) It is apparent that Professor Lewis was contacting the wrong person to obtain confirmation that the document was connected with ALARM, because Dr Humphryes was not involved in any aspect of the ALARM project at Marconi. It is also unlikely that Dr Humphryes would have had the authority to discuss classified information about ALARM with either Professor Lewis, or with Marconi Dynamics.

(vi) Dr Humphryes' responsibilities and relationship with Professor Lewis were never presented to the court, or disclosed to the Defence team. Professor Lewis' evidence implied that Dr Humphryes was an authority on ALARM.

(vii) The Commission's provisional statement of reasons concedes that Professor Lewis gave hearsay evidence that the SAW filter specified in document 51-59 was used in ALARM.

(viii) It is quite clear that Professor Lewis misled the Court as to the SAW filter being in a missile called the ALARM, and if this fact alone was properly given to a jury they would not have convicted Mr Smith.

262. The results of the Commission's enquiries of Meirion Lewis and Reginald Humphryes are set out at paragraphs 181-199 in this statement of reasons and will not be repeated here. It is clear that Mr Smith has now made his own approach to Mr Humphryes. Mr Humphryes has said nothing that could realistically be regarded as inconsistent with the statement he has already provided to the Commission. He was utterly frank in accepting that he had no recollection of the incident to which Professor Lewis referred. Many years have passed since the time of the trial and it is perhaps unsurprising that the recollections of these two men are not as clear as they once were.

263. The fact remains that Professor Lewis made a statement at the time of trial to confirm that he had contacted Marconi. This statement was disclosed to the defence team, who chose – for obvious and understandable reasons - not to pursue the matter at that time. The subsequent enquiries on this matter made by the Commission have not raised any new information that might be capable of affording a ground for appeal. On the contrary, the subsequent evidence of Martin Winstone clarifies any ambiguity that may have existed at trial, and confirms that document 51-59 did in fact relate to ALARM.

Issue 53
Further matters relating to ALARM

264. At paragraphs 5 – 9 in his submissions, Mr Smith makes a number of technical points relating to the ALARM missile. The Commission took the view that these points required the further assistance of Martin Winstone. Accordingly, the relevant paragraphs were extracted from Mr Smith's submissions and sent to Mr Winstone with a further letter of instruction dated 22 March 2007. Mr Winstone's second report was received on 17 October 2007. Both documents are disclosed with this statement of reasons. Each of Mr Smith's submissions on the point is addressed in turn below.

265. At paragraph 5 of his submissions, Mr Smith asserts that it is impossible to identify ALARM from document 51-59 as Professor Lewis did at trial. The specific points raised by Mr Smith are as follows:

(i) Mr Winstone states (in his second report, paragraph 4) that:

> '...in particular the General Description and Electrical Parameters sections, provide clear and unambiguous indicators that the contents relate to an Anti-Radar Missile'.

(ii) The information in the section headed "General Description" in document 51-59 is too general to connect it with an ARM, as any IF filter will determine a system's bandwidth response. Typically, missiles such as ALARM will contain more than one Intermediate Frequency stage (dual or triple conversion is common), and so somebody unfamiliar with the design of the receiver would find it difficult to identify which stage this document related to. Mr Winstone has omitted important technical details from his report.

(iii) There is nothing unusual in the section headed "Electrical Parameters" to indicate how Mr Winstone arrived at his opinion. If Mr Winstone claims that 2.5 nS group delay matching is the key parameter, as Professor Lewis did at trial, then the Commission has failed to demonstrate how this requirement differs from any other missile designed to home in on a target, as the guidance systems are similar in all guided missiles. Mr Winstone has not shown what details in the document can be used to identify ALARM.

(iv) When challenged in a telephone conversation with Mr Smith on 3 January 2007, Mr Winstone admitted he was not familiar with the information that would identify ALARM from the sections he has indicated, and so it is difficult to believe that Mr Winstone can justify his claims. In answering the Commission's questions he appears to be relying on hearsay evidence.

(v) A key issue at the trial was Professor Lewis' claim that he could identify ALARM from some information in the document, which he could not actually describe to the Court. The Commission's report is also unable to identify what information in the document could identify its use in ALARM.

(vi) Professor Lewis's testimony did not reveal any detail that would prove he could identify ALARM from the document. In fact, Mr. Winstone's testimony is that the SAW was from a Demonstrator ARM, not ALARM.

266. Mr Winstone's report has considered the points made by Mr Smith in support of this submission. He agrees that ALARM is not specifically mentioned in document 51-59. However, in his judgment, it is "clear that the document does relate to ALARM when the document as a whole is reviewed, rather than individual paragraphs, and that this could be deduced by any competent analysis". In particular, he comments as follows:

- "On the cover of the document, the generating company is identified as Marconi Space and Defence Systems Ltd. As a company, our commercial remit at that time would have been easy to establish.
- On page 2, the document states 'The filter is to form part of an IF receiver incorporated in an airborne guided weapon'.
- On page 3, the document identifies that the demonstrator is an immediate activity followed by a 'Full Scale Project Definition and Development Programme'

- In July 1983, the award of the ALARM contract was announced in the House of Commons and shortly thereafter entered Full Scale Development.
- Information on which missile systems were in the process of development and/or production at Marconi Space and Defence Systems (or its successor companies) would be readily available in the public domain from such events as Farnborough."

267. Mr Winstone has addressed the specific points raised by Mr Smith as follows:

- "I am not aware that any important details were left out of my original report that were needed to respond to the questions asked.
- I agree there is nothing unusual in the bandwidth and centre frequency parameters as such, but they do become significant when related to 'an airborne guided weapon.' I would also dispute from the attachment that 'the guidance systems are similar in guided missiles'. There are many different types of guidance that can be applied in a system and information on group delay is a very strong indicator of the approach adopted.
- I recall the phone call but not the content. However, my response to the Commission is not based upon hearsay. In any conversation, I would not have had the documentation in front of me and as such would not be able to respond definitively to an ad hoc approach.
- I cannot comment on rationale used by Professor Lewis since I am unaware of it. With regard to my report identifying the device as for a demonstrator, the document identifies that the demonstrator is an immediate activity followed by a 'Full Scale Project Definition and Development Programme'."

268. In the Commission's view Mr Winstone's second report addresses each of the matters raised by Mr Smith and reaffirms the fact that document 51-59 did in fact relate to ALARM. As set out earlier in this statement of reasons, Professor Lewis, who was not an expert in anti-radar missiles, even before he spoke to Dr Humphryes, was able to identify the fact that document 51-59 was probably associated with ALARM. The Commission remains satisfied that Mr Winstone's expertise in the matter of ALARM is beyond doubt.

269. In section 6 of his submissions Mr Smith raises points relating to the SAW filter specification used in ALARM. The points he has made are as follows:

(i) The Crown case is only valid if the SAW filter used in ALARM is the same as the 'restricted' document dated 8 January 1982.

(ii) Mr Winstone has made an ambiguous statement in his report para 6. He has not made it clear that the 'restricted' document related to ALARM in 1992. He says:

> 'the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time.'

(iii) Mr Winstone has not confirmed whether the component specified in the document 51-59 was in fact identical to the component used in ALARM in 1992.

(iv) The Security Commission's report (Cm 2930) states the obvious about the 'restricted' document, that 'at the time the document was created it was not specifically linked to a particular weapons system' (Annex A.5). The SAW filter was in fact used in a prototype ARM demonstrator in 1982. This is the reason the document was not marked "secret". The Commission has failed to show that the SAW in the ARM went on to become the SAW in the ALARM after 1982.

270. Mr Smith points to the Security Commission's report (Cm 2930) which indicates that at the time document 51-59 was created it was not linked to a particular weapons system. Briefly stated, the Commission understands the status of document 51-59 was as follows. At the time of its creation it was nothing more than "a component within the engineering solution to the system requirement" but it provides "clear and unambiguous indicators that the contents relate to an anti-radar missile".[45] It was originally marked "Restricted - Commercial in Confidence". Subsequently, and in particular as a result of the explanation given to the Security Commission by the Ministry of Defence, it is now clear that this document should originally have been classified as "Secret". It was not necessary for the document to have been specifically linked to ALARM at the time of its creation. The full scale development phase of ALARM did not commence until after July 1983, as confirmed in Mr Winstone's second report.[46]

271. Furthermore, one of the key features in the Commission's review is that Mr Winstone confirms in his report:

[45] Martin Winstone's first report, paras 3 and 4
[46] Martin Winstone's second report, page 1 at 5.

> "I am certain that the document related to a component within the ALARM seeker.
>
> It is my opinion that the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at the time." (Commission's emphasis)

272. The Commission reiterates that Mr Smith was prosecuted on the basis that he was obtaining/collecting/communicating material for a purpose prejudicial to the interests of the state. It was not in fact necessary for the Crown to prove that the SAW filter outlined in document 51-59 went on to be installed within ALARM. One of the main purposes of instructing Mr Winstone was to confirm the way in which the document related to ALARM. He was not only certain that it did relate to ALARM but he also explained:

> 'In 1981, MSDS committed to develop a demonstrator of the ALARM seeker to reduce the development risk to MSDS and to convince the MOD that any remaining risk was low and manageable. A key element in this was the design of the receiver system of which the bandpass filter was a key component".[47]

273. Further in relation to when the SAW filter became "Secret" Mr Smith has raised the following points:

(i) "It is necessary to identify when, precisely, the SAW filter specification in the 'restricted' document developed from a prototype Anti Radar Missile (ARM) in 1982 to become part of the ALARM missile in service with armed forces. This date has been ignored throughout the legal process."

(ii) "After the document was created on 8 January 1982, it was then used at Hirst Research Centre in 1983 and 1984 as part of the British Standards BS9450 Capability Approval Exercise. During this period Copy No.14 of the 'restricted' document was passed from Mr F.S. McClemont to Mr D.T. Lewis, and it ended up in the desk which I inherited in December 1985."

(iii) "The Commission has not identified when the document became part of the ALARM missile, and therefore became potentially secret information. Mr Winstone has not made this point clear in his statement at paras 5 and 6, and he leaves us

[47] Martin Winstone's first report, para 5

to guess that this transition may have occurred anytime between 1982 and 1992."

(iv) "When the document became a secret is relevant to its status in December 1985, when I joined HRC. I had no knowledge of what the documents left in the desk of Dowie Lewis related to, and nobody advised me that I should take any special precautions regarding these documents."

(v) "It is mandatory in all military projects that the contractor maintains a configuration management system for documentation. ALARM will have a documentation system identifying the development of the ALARM build standard."

(vi) "It is therefore possible to identify what components were used in ALARM at August 1992, by looking at the Parts List for the build standard at that time. Mr Winstone should be asked to show the CCRC the relevant Parts List page from ALARM (in confidence), to prove document 51-59 was used on the build standard of 1992."

(vii) "If a later issue of the document was used, or the document was not listed on the Parts List, then Mr Winstone should be asked to explain the effect this will have on the answers he provided to the Commission in its second provisional statement of reasons. At this stage it is clear that the SAW filter in ARM is not the same SAW filter in ALARM circa 1992."

274. The Commission has already explained why it does not consider that it was or is necessary to identify when the SAW filter specification in document 51-59 developed from being a prototype to being incorporated in the ALARM missile in service with the Armed Forces.

275. As to when the document became secret, as stated above the incorrect classification of the document is outlined in the Security Commission report: essentially the view of the Ministry of Defence is that the document should have received a higher classification from the outset. Nonetheless, and although the Commission does not consider this information to be directly relevant to the safety of the conviction, Mr Winstone was asked to comment on when the document was likely to have become "Secret".

276. Mr Winstone states that he is unable to provide definitive information, but he would expect that a status of "Secret" would have attached to document 51-59 "early during the Full Scale

Development phase, since each Ministry of Defence Contract is issued with a set of appropriate classifications for each aspect of the system". On page 1 of his second report, Mr Winstone confirms that the Full Scale Development phase would have commenced "shortly after the announcement of the award of the ALARM contract in the House Of Commons in July 1983".

277. As to whether it is possible to show whether document 51-59 was used on the build standard in 1992, as indicated earlier it was not necessary for this to be shown previously and it is not necessary for it to be shown now. However, Mr Winstone has been asked to comment on the matter. Mr Winstone confirms Mr Smith's assertion that ALARM will have a configuration management system and, in particular, "a Master Records Index that identifies the build standard". He confirms that

> "'I have checked the parts list relevant to the ALARM system when it entered service with the RAF and throughout the period of the trial and it called up part number DA9210 (cf commercial part number DW9210 quoted in questions). Conventionally, the numbers define the device and the associated letters would be associated with the packaging or it being military or commercial specification. The reason for the difference in the letters would need to be confirmed through other routes.
>
> "The document 79481/PBH/BB/S08 is not referenced on the parts list and it should not be. The parts list is used for the mustering of components for assembly and does not include reference to any performance. Following design, development and qualification of the component, all further references would be against a component number only for manufacturing at component level and then for build into higher level assemblies. Mass production of the component for the programme was against a separate document, for use by assembly personnel referenced 1BK-511052. This 1BK-511052 document specifically includes the manufacturer's part number (DA9210)."[48]

278. In section 8 of his submissions, Mr Smith comments on the susceptibility of ALARM to jamming. The points he has made are as follows:

[48] Martin Winstone's second report

(i) Even if it can be shown that the component specified in document 51-59 was used on the ALARM missile in service in 1992, this does not mean the information in the document would enable a potential enemy to jam that missile.

(ii) Mr Smith states that he was denied the opportunity to examine an expert on ALARM at trial - no such expert was called by the Crown - and therefore the safety of his conviction relies on proof that the information in the document would be useful to an enemy to develop counter-measures. No expert at the trial was able to give that proof.

(iii) Mr Winstone's background as a physicist and administrator limits his capability to conduct a detailed analysis of the engineering issues involved. Therefore it is important to discover if there are test results from the commissioning process for ALARM, showing that jamming at the Intermediate Frequency of 120 MHZ had been considered a risk.

(iv) It is submitted that the Commission should investigate the real possibilities of jamming ALARM by using the IF frequency. This point has never been properly tested in the legal process, and of course it is now widely known that the ALARM cannot be jammed. So once again the Commission appears to have been misled by both Mr Winstone and Professor Lewis.

279. What Mr Smith is suggesting here is that the Commission should refer his conviction to the Court of Appeal so that he can seek to establish that disclosure of document 51-59 could not have led to the development of a successful jamming of an ALARM missile.

280. It was made clear at trial that Professor Lewis had no particular expertise in relation to anti-radar missiles. Nonetheless, he was able to identify the possibility that document 51-59 related to an anti-radar missile, which prompted his subsequent enquiry of Marconi. It was open to the defence to seek an adjournment in order to obtain further information, either from Marconi or from an expert in the field, but a clear tactical decision not to do so was taken by the defence team, clearly in consultation with Mr Smith. As Lord Justice Judge said in *R v Hakala* [2002] EWCA Crim 730:

> "The trial process is not a tactical game. Under the rules which govern every trial at any given stage in the evolution of the criminal justice process, forensic steps taken by one side, or the other, carry forensic consequences."

281. Despite this general principle, the Court of Appeal will generally agree to receive fresh evidence when it is necessary and expedient in the interests of justice to do so. The criteria in section 23 of the Criminal Appeal Act 1968 have already been set out elsewhere in this statement of reasons. If fresh evidence would be likely to afford a ground of appeal, and would have been admissible in the original proceedings (or a subsequent appeal) and if there is a good reason why it was not available, then it is likely to be admitted.

282. In his second report, Mr Winstone has made no comment about the susceptibility of ALARM to jamming, and the reasons for this are clear from what is set out in paragraphs 212-217 of this statement of reasons: one would not expect to secure a description of whether, and if so how, countermeasures to the United Kingdom's defence capability could be developed. In his first report, however, Mr Winstone states clearly that the information contained in document 51-59 could in 1992 "have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time". [Emphasis added]

283. The Commission has accepted Mr Winstone's expert opinion. Other than Mr Smith's comments on the matter – and he is not an expert in this area - there is nothing to suggest that it is not accurate. It is important to keep in mind the test the jury was required to apply when considering the evidence about the documentation in Mr Smith's possession: was it collected or communicated for a purpose prejudicial to the interest of the state? The issue of whether the ALARM missile could or could not be jammed was to an extent rendered academic in the context of that test. It is the purpose which is important, not whether or not a method to jam ALARM could in actual fact have been developed following the unauthorised disclosure of document 51-59.

284. Moreover, the defence team was made aware of the evidence Professor Lewis was going to give on this point, and as indicated above chose not to seek a second opinion on the matter before allowing it to proceed. In all the circumstances, the Commission does not consider that it is necessary or indeed appropriate to conduct any further investigations into this matter.

285. Turning to Mr Smith's doubt about the expertise of Mr Winstone, the Commission considered carefully which expert should be instructed in relation to this matter, and for the reasons set out earlier in this statement of reasons decided to instruct Mr Winstone, who

appeared to the Commission to be the most appropriately qualified expert in the field. The Commission notes Mr Winstone's particular qualifications and experience as set out in paragraphs 1- 5 of his first report, under the heading 'personal résumé'. In his second report he goes on to confirm that

> "...throughout the 1980s I was an expert in the field of anti-radar seekers and their susceptibilities ... [and] for much of the past historical activity related to the seeker, I was not only the manager of the talent team but an integral member of the team. Systems Manager within MSDS is a technical role, not administration."

286. So far as the Commission is concerned, there is no doubt that Mr Winstone is appropriately qualified and experienced to comment authoritatively on the evidence relating to ALARM.

287. In section 9 of his submissions, Mr Smith raises the issue of whether it is in fact possible to design countermeasures from the content of document 51-59. He has raised the following points:

(i) Mr Martin Winstone claims that information within the document "could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time."

(ii) Document 51-59 was so important to the outcome of the trial that it should have been dealt with by experts in the field. The Commission now acknowledges that Professor Lewis was not such an expert.

(iii) The Commission should also be aware that Mr Winstone is not an expert in missile design, or jamming technology. He is merely the manager of the talent team who did and still do such important work, and Mr Winstone would therefore need to ask the relevant person the specific details.

(iv) It is widely known that ALARM cannot be jammed; in fact it is designed to home in and destroy any attempt to jam it. Both Mr Winstone and Professor Lewis have been allowed to present a totally negative opinion, without their claims facing any engineering challenge whatsoever.

288. The Commission takes the view that, in effect, these points merely repeat what is said in section 8 of Mr Smith's submissions, and the

Commission does not consider that there is anything it can usefully add to what has already been said on the subject.

289. In section 10 of his submissions, Mr Smith questions which expert could resolve the ALARM issue. He has made the follows points:

(i) The defence expert Dr Eamonn Maher was not an expert in missile technology or ALARM. Natural justice would require that the Crown and defence use knowledgeable experts in order to give the jury correct facts on which to consider their verdict. Clearly Professor Lewis was not qualified to give evidence on ALARM.

(ii) A fair trial provides the accused with the opportunity to test the evidence of witnesses, but in the circumstances of Mr Smith's trial this principle became impossible. Article 6 of the ECHR was violated, because there was no equality of arms between Crown and defence. The defence did not have the opportunity to challenge the evidence on ALARM, and its accuracy was never confirmed. In fact, the merits of this case have never been tested before the courts.

(iii) Mr Martin Winstone is not sufficiently expert to be able to answer the questions asked by the Commission. It is necessary to consult the person(s) who have advised Mr Winstone, and the conclusive proof will be an examination of the parts list showing which SAW filter was used in ALARM in 1992.

290. Essentially, this submission is repeating what has been raised by Mr Smith previously. The Commission has already provided detailed responses to each aspect of this submission, which can be summarised as follows. The issue of ALARM was only raised part way through the trial. It was open to the defence to seek an adjournment to consult a new expert, but they chose not to do so. The Commission has now instructed a reputable and appropriately qualified expert, Mr Martin Winstone, who has provided an authoritative opinion on document 51-59 and ALARM. This is precisely the type of information that the defence could have obtained had they chosen to instruct an independent expert about this issue at the time of trial, which illustrates the good sense of the defence team not to pursue the issue at that stage. This tactical decision did not create a breach of Article 6. .

Issue 54
No secrets were passed by Mr Smith to anyone

291. In section 11 of his submissions, Mr Smith makes the following points.

(i) Anyone knowledgeable in the technical exhibits and evidence given at the trial will be aware that there was no evidence that any secrets had been passed by Mr Smith to anyone, and certainly not to a Russian. The Commission has overlooked this important fact, as all the exhibits produced at the trial were still in my possession.

(ii) The Prosecution's case was that Mr Smith reacted to the telephone call on 8 August 1992 like a Russian agent. This was a wrong assumption, because he took no technical papers with him to the telephone kiosk. The Crown mis-read his intentions and incorrectly claimed he was desperate to get rid of the documents.

(iii) Mrs Rimington (Mrs C) confirmed in cross-examination that Mr Smith had never been observed in the company of any KGB officers, contrary to what the Crown had alleged.

292. The trial judge's direction to the jury as to what they must find before they could convict Mr Smith has already been set out in full at paragraphs 87-92 in this statement of reasons. The Commission is satisfied that those directions are correct and appropriate as a matter of law.

293. Mr Smith's assertion about his reaction to the telephone call was a central argument for the defence at the time of trial. As a result of section 13 Criminal Appeal Act 1995, the Commission cannot refer a conviction to the Court of Appeal purely on the basis of a material that has already been considered at trial or on appeal, and in respect of which there is no new evidence or argument.

294. The evidence of Mrs C was before the jury. This is not a new point. The trial judge agreed that the Crown witnesses should retain anonymity, and the identity of Mrs C is irrelevant to the evidence she gave.

Issue 55
New evidence about surveillance prior to arrest

295. In section 12 of his submissions, Mr Smith makes the following points.

(i) The second provisional statement of reasons (at paragraph 236) indicates that he was "under surveillance for a short period of time prior to his arrest, as illustrated by the fact that he was observed at Harrow-on-the-Hill on 6 August 1992. The fact that Mr Smith was under surveillance during this period of time was known to the defence prior to trial".

(ii) This evidence was never disclosed to the Defence. The Crown was asked to disclose all surveillance prior to arrest, but only the surveillance operation on the morning of 8 August 1992 was disclosed.

(iii) Knowledge that there was surveillance at Harrow-on-the-Hill on 6 August 1992 is important new evidence, which would have assisted the defence case that Mr Smith was not there to meet a Russian. Events at Harrow were important to the Crown case, and it would have helped the defence to have examined that surveillance evidence before the jury.

(iv) It is important to identify when the MI5 surveillance began, and when the operation was handed over to Special Branch to execute the arrest. The Commission should understand why Mr Smith became of interest to MI5, either as a result of information received from Oschenko, or from information that we now understand had come from Mitrokhin. The obvious conclusion is that MI5 used Oschenko's defection as a cover for Mitrokhin, who remained hidden from public view for a further 7 years until 1999.

296. The Court of Appeal judgment, dated Thursday 8 June 1995, summarises the basis on which the Crown presented its case at trial as follows:

> "On 6 August the applicant went by car to Harrow-on-the-Hill. The documents which were the subject matter of count 4 were in the boot of his car. It appeared that the applicant was expecting to meet somebody but no-one appeared. On Saturday 8 August, an officer in the British Security Services ..."[49] [emphasis added]

[49] Court of Appeal judgment: 3:C

297. It is therefore apparent, based upon what the Court of Appeal said when delivering its judgment, that at the time of trial the defence were aware that there had been some degree of observation of Mr Smith prior to his arrest. As previously indicated at paragraph 148 above, the Commission has examined all the material held by the Security Services and the Metropolitan Police Special Branch and has found no evidence which assists Mr Smith's defence case.

298. The Commission is satisfied that all relevant material which was generated as a result of the operation to arrest Mr Smith on 8 August 1992 was disclosed in full at the time of trial.

Issue 56
Misrepresentation of a link to Victor Oschenko at Mr Smith's appeal

299. In section 13 of his submissions, Mr Smith makes the following points.

(i) "Although no evidence could be produced at trial that I had ever met Victor Oschenko, the Prosecution asserted that I had been recruited as an agent by him and that he had trained me as a spy."

(ii) "At the end of the cross-examination of Stella Rimington, who by this time was the Head of MI5, she revealed on oath that MI5 had no evidence that I had ever met Victor Oshchenko, who had been under constant observation during his time in London. This was an important admission, because it was the only concrete testimony in the trial as to whether I had met Oshchenko."

(iii) "At the Appeal in 1995 the third ground of Appeal - "Wrongful Admission of Evidence Relating to Victor Oshchenko" states:

> 'There were no sightings of the appellant with Oshchenko nor any evidence that they knew or had dealings with each other.'

(iv) The critical evidence of Stella Rimington should have carried great weight, because she had previously been the Head of the counter espionage unit of MI5. However, at the time of my trial and Appeal she had not been identified as the Head of MI5; she was only referred to as Mrs C."

(v) "Stella Rimington's evidence was relevant to the defence case, because she supported my own evidence that I had never met the Russian agent named Oshchenko."

(vi) "MI5 reports, apparently based on debriefings with Oshchenko, reveal that he had never recruited me as an agent, nor had he trained me in spy craft, or provided me with any spying equipment. These reports are all in the third person, and so it is impossible to be certain what Oshchenko actually said. Nevertheless, despite his availability in the UK, Oshchenko was not called as a witness at the trial, and this must be connected to the inaccurate and contradictory nature of the claims he is reported to have made."

(vii) "Unfortunately Mr Michael Mansfield QC, either due to a mistake or laziness in researching the facts, failed to present the best defence case at Appeal, and so the judges' ruling was allowed to wrongfully conclude that Oshchenko did know me and did recruit me as a Russian agent."

(viii) "This failure of Mr Mansfield has resulted in their Lordships basing their judgement on a mistake of fact, as can be observed from the numerous wrongful references to Oshchenko within the published ruling."

(ix) "It is submitted that the Commission's provisional statement of reasons fails to identify the simple fact that the head of MI5, Stella Remington, was the person identified in her statement as Mrs. C, and at my trial she confirmed on oath that I had never been seen in the company of either Oshchenko or any other Russian KGB officer."

(x) "The Commission has the statements of Mrs. C, and the Commission recognize her position within MI5. The Commission has the trial transcript and the notes of the debriefing by Mrs C of Oshchenko, the Russian spy who supposedly trained me. It appears that the Commission either has not read these documents or has failed to comprehend the important details contained within them."

300. The Commission confirms that it has examined each of the documents referred to by Mr Smith at (x) above. It was the Crown's case against Mr Smith that he was recruited and controlled by Victor Oschenko. That has never altered.

301. For the avoidance of any doubt, the Commission does not accept the assertion made by Mr Smith, also at (x) above, that it "recognises" that Mrs C is Stella Rimington. The Commission has not made any enquiry of MI5 as to the identity of Mrs C and does not comment upon whether or not she is in fact Stella Rimington. For the purposes of addressing Mr Smith's submissions, it is not necessary for the Commission to undertake any such enquiry.

302. Mrs C was afforded anonymity at trial as a result of the nature of the work she undertook and the evidence she was to give. She readily accepted in cross-examination that "there were no sightings of Mr Smith and Oschenko together". [50] This was the last piece of evidence she gave. It was before the jury, it was fresh in their minds at the end of her evidence, and it was not disputed.

303. It is the role of the jury in a criminal trial to decide the facts. The jury heard clear, undisputed evidence from Mrs C, which they had no reason to reject as it was never in issue. Even if Mrs C did go on to become a much more important person within MI5 – and the Commission reiterates that it does not need to know or to confirm whether or not that was the case – her evidence would have carried precisely the same weight and it would have had precisely the same effect on the jury.

304. Mr Smith alleges that his counsel at appeal, Michael Mansfield, QC failed to present the defence best case since he allowed the Court of Appeal to proceed from an erroneous premise: namely that Oshchenko knew and recruited Mr Smith as a Russian agent. The Commission has re-read the Court of Appeal's judgment, the relevant parts of which are as follows:

> "The second ground is that the judge erred in law in admitting evidence of the telephone conversation between the applicant and Mr B on 8 August 1992 and that this error constituted a material irregularity in the course of the trial. It was submitted by Mr Mansfield QC that the question and answer at the outset of the conversation in which Mr B said "I am a colleague of your old friend Victor. Do you remember him?" to which he received the answer "Yes" constituted a crucial admission by the applicant which it was said went to the heart of the case.
>
> It was submitted that, without that admission by the applicant, the Crown was unable to link the applicant to

[50] Transcript of evidence of Mrs C: 35H-36:B

> Victor Oschenko because there was no other evidence to connect them. It was further submitted that once the Crown was able to link the applicant to Oschenko this had a "domino effect" to use Mr Mansfield's words. In particular it enabled the Crown to submit successfully that evidence should be admitted about Oschenko's activities both as a KGB officer in London from 1972 to 1979 and in respect of his defection to the United Kingdom at the end of July 1992, even though Oschenko was not called to give evidence personally.
>
> Mr Mansfield then contended that it was the apparent link to Oschenko which then enabled the Crown to call evidence about such matters as the applicant's communist past in the 1970s, his employment with EMI, his concealment of his communist past, his trip to Portugal in 1977, the fact that Portugal was then used by the KGB for training agents and the applicant's efforts to obtain restoration of his security clearance. Furthermore, it was said, the link with Oschenko enabled the Crown to suggest that the events of, and the applicant's behaviour on 6 and 8 August were directly influenced by the defection of Oschenko at the end of July. Mr Mansfield submitted therefore that, on any view, the telephone call was very important because it achieved its purpose, namely to provide the Crown with the vital and missing evidence of a link between Oschenko and the applicant, a link which was an essential aspect of the Crown's case in connecting the applicant to the Russian Intelligence services. Mr Mansfield contended that the judge should have exclude the telephone conversation in the proper exercise of his discretion ...."[51]

305. From this, it is clear to the Commission that Mr Mansfield was well acquainted with the essential facts of Mr Smith's case, and the lack of any possible evidential link to Oschenko other than the telephone call. It is also clear that their Lordships were under no misunderstanding about the basis of Mr Smith's assertion that he did not know Oschenko. Their Lordships were also well aware of the evidence of Mrs C, as a transcript of her cross-examination was provided to them in advance at counsel's request.

[51] Court of Appeal judgment: 8:F-10:A

Issue 57
Misrepresentation of the Oporto map and the holiday of 1977

306. In section 14 of his submissions, Mr Smith has made the following points.

(i) "John Watson's witness statement (disclosed as unused material) corroborates what I said about the visit to Oporto: that it was a holiday, and that we were only sightseeing and acting as tourists. My defence team were negligent in not calling Mr Watson as a witness."

(ii) "There is no reference whatsoever to Portugal, Lisbon or Oporto in the Security Commission's report on my case (Cm 2930). Neither is there any reference to the evidence of Mr E, and the allegations that he had been sent on a training mission to Lisbon in 1979. These omissions from the records support the argument that it was judged unsafe to connect the Oporto map with any KGB operation. "

(iii) "Although not called as a witness at trial, Viktor Oshchenko was shown the Oporto map, and he was led into agreeing that Oporto was the destination of some sort of training mission. This shows bias on the part of the MI5 interrogators, because it is clear that Oshchenko never volunteered Oporto (see report 013) until the Oporto map was produced for him to consider (see report 034). "

(iv) "At the time of my arrest, I was informed that a Russian defector was supplying KGB archive information to the United Kingdom (Police interviews page 122). I later learned that this information was being supplied by Mitrokhin, and did not agree with the Prosecution case at my trial, and did not agree with Oschenko's acceptance that the Oporto map was part of a so-called "KGB training mission" to Portugal. It would appear that this information about Oporto was from an unknown intelligence source. It seems that my retaining an old holiday map was the real source of this information. "

(v) "In the Mitrokhin Archive book, published in 1999 by Professor Christopher Andrew, there are two references to the Iberian Peninsula. On page 551 Andrew states:

> 'The first test, which Smith seems to have passed, was to remove two packets of secret material from a dead letter-box in Spain.'

On page 552 Andrew goes on to refer to another "test" that I was allegedly subjected to:

> '... by instructing him to remove a container holding two rolls of film from a DLB in the Paris suburbs and to deliver it to a KGB officer in Lisbon,'

By the time of my trial, MI5 realised that the Mitrokhin version did not agree with the case put forward by the Prosecution. Nevertheless, Stella Rimington not only backed the Prosecution case, she even travelled to Oporto to study what she would say about the Oporto map in her evidence. Rimington continued to support Oporto as the destination of a "training mission", when the Mitrokhin material refers to destinations hundreds of miles away. "

(vi) "Oporto was a vital aspect in the trial, because the Prosecution convinced the jury that my case was "similar" to that of Mr E. The essential ingredient was the claim that Mr E and I were both sent to Portugal, and this allowed the Prosecution to falsely link me to Oshchenko. "

(vii) "These ambiguities in the evidence are disturbing, since the only reference to Portugal in Mitrokhin is the alleged trip to Lisbon. The chronology in the book places this journey in 1979, or later. I never travelled to Portugal in 1979, because I had a holiday to Ibiza in July with my fiancée, and the latter part of that year was taken up by arrangements for my marriage, and moving into our new flat. I have not been to Portugal at any time after 1979, and this detail from Mitrokhin is entirely false. "

(viii) "The Commission has dismissed as insignificant the photograph from this holiday discovered in an Oporto club. The Portuguese journalist, who found the photograph, Frederico Duarte Carvalho, has studied the espionage activities of Russians and others in Portugal, and he simply cannot believe the claims being made about the Oporto map. Mr Carvalho lived in Oporto and knows that city well, and he disagrees fundamentally with the evidence given at my trial. When considered in the light of the Mitrokhin Archive material and Mr John Watson's statement, it is obvious that the facts do not match with the Prosecution case presented to the jury."

(ix) "Allegations during my Police interviews, that Oporto was the location of a KGB training mission, were pure speculation based on pressure from MI5. However, these claims did not have any basis in the information that Mitrokhin had actually passed to MI5. The Prosecution evidence about the Oporto map was therefore flawed and should not have been presented to the jury at all. If the jury had heard all the information and allegations relating to my foreign trips, then they would undoubtedly have seen the obvious anomalies and dismissed this evidence as unreliable. "

(x) "As in the case of the SAW filter and ALARM, the fair way to resolve confusion about the truth is to go back to the original sources. In the case of the Oporto map, the allegations appear to originate from material supplied by Mitrokhin after his defection. The Commission needs to check whether Mitrokhin gave MI5 any evidence identifying Oporto as the destination for a KGB mission. As this material has been heavily summarised in Professor Christopher Andrew's book, the only satisfactory approach would be to examine those parts of the Mitrokhin archive in the original Russian, to ascertain the truth. "

307. In effect, these submissions invite the Commission to re-open and re-investigate the issue of whether Mr Smith's trip to Portugal in 1977 was to participate in training with the KGB, or whether it was an innocuous holiday with a friend, John Watson.

308. As indicated at paragraph 128 in this statement of reasons, the issues surrounding the purpose of Mr Smith's visit to Portugal in 1977 have already been raised and argued at trial. Mr Smith told the jury that he had been to Portugal with John Watson and provided considerable detail about the trip. The judge summarised his evidence on the point at length to the jury.[52]

309. As acknowledged by Mr Smith in his submissions, the witness statement of John Watson was disclosed to the defence prior to trial. It was therefore open to Mr Smith to seek to call him to give evidence about the Portugal situation. Mr Smith would realise the importance he now ascribes to John Watson's statement at the time of trial, and doubtless would have made that clear to his advisers. It may be, for example, that John Watson – having provided a statement to the police which the Crown did not subsequently use – was unwilling to come to Court to assist Mr Smith, who faced very serious charges. It may be that the defence team advised against it.

[52] Summing up: 39:A-40:A

They were certainly made aware of it, as it was disclosed by the Crown. In the absence of a good reason why this evidence was not called, the Court of Appeal would be most unlikely to agree to receive it given the statutory criteria in section 23 of the Criminal Appeal Act 1968 as outlined above. Mr Smith now alleges that Mr Watson was not called as a result of failings on the part of his defence team, but in the Commission's view there is no evidence to support this contention, just a bare assertion from Mr Smith to this effect.

310. The other investigations suggested by Mr Smith will not be undertaken by the Commission. The Commission has considered this matter from the hypothetical basis that the point made is capable of proof: i.e. that the Portugal trip was an innocuous one. The issue for consideration is then whether the Court of Appeal, in the event of a reference by the Commission, would find that this could afford any ground of appeal. There is some guidance in the case law as to how the court will approach this task. In *R v Pendleton* [2002] 1 All ER 524 Lord Bingham said

> "The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict."

311. The Commission is satisfied that the Court of Appeal would conclude that the Portugal issue was only one aspect of the evidence against Mr Smith. Even if the Court was prepared to accept that there was some new evidence that Mr Smith took an innocuous holiday in Portugal, there was still a great deal of other evidence in the case upon which a jury would be entitled to find that Mr Smith had a long-standing connection with the Russians: for example, his concealment of his communist past, his efforts to obtain restoration of his security clearance, the Williams letter of re-activation and, in particular, his reaction to and his actions flowing from his telephone conversation with Mr B.

312. At the conclusion of his submissions dated 12 February 2007, Mr Smith makes a number of comments as follows:

(i) "These then are just a few reasons why I believe your second provisional Statement of Reasons, as it stands, does not tell a true story. The report fails to give me a fair hearing, and I believe I have demonstrated this point conclusively from the examples I have set out above. "

(ii) "There was self-evident dishonesty concerning Professor Lewis's evidence about ALARM, and how it might be jammed (I have already proved key points about this in my submission of 2003), but it is now clear this dishonesty extended to the alleged conversation Lewis had about the ALARM missile with the Technical Director of Marconi. I would expect the Commission to explain how it is possible, in a major trial, to "get away with" such monstrous abuses of process as occurred in that section of the trial. Clearly, Professor Lewis was brought along to my trial to make guesses, and at this stage all we know is that he simply took an opportunity to fabricate a story that ALARM was involved, when in fact the SAW in question was in the ARM and not the ALARM. "

(iii) "Errors continued on into the Court of Appeal, where Mr Michael Mansfield was badly prepared or simply made mistakes in what he told the Court, allowing the Court to conclude that I was trained as a spy recruited by Victor Oshchenko. You would no doubt be aware of my efforts to raise these matters with the Bar Council and the Legal Services Ombudsman. "

(iv) "To date the Bar Council have replied that I am out of time to bring these matters up, and the Legal Services Ombudsman has refused to intervene, it seems no one is going to investigate the merit of what I am saying. In the attached documents I include the 4-page letter from the LSO. The LSO, however, does point out the obvious suggestion, that such a matter is the province of the Commission to investigate. "

(v) "I would ask you to re-visit Mr. Martin Winstone's evidence, to ask him specifically when the SAW in the ARM changed to "secret" and was used in the ALARM. I would expect him to provide you with conclusive proof that issue 2 of the 'restricted' document appears in the parts list for ALARM in 1992. "

(vi) "My trial was littered with mistakes and false evidence, these resulting from the blatant bias of Justice Blofeld both during

the trial and particularly during his summing up. I can identify all these instances of bias. "

313. So far as the Commission is concerned, all the issues identified in these comments have already been addressed previously in this statement of reasons.

Submissions dated 7 December 2007

314. On 7 December 2007 Mr Smith forwarded further submissions to the Commission, from which the following issues can be distilled.

Issue 58
Deficiency of the defence expert, Dr Eamonn Maher

315. At section 1 of this submission, Mr Smith has made the following points.

(i) "Since June 2007 I have had discussions with my trial solicitor, Mr Richard Jefferies, and I have learned that Dr. Eamonn Francis Maher was selected as my expert witness on the recommendation of staff at Bradford University. From my own experience, gained through years working in science and technology, I was very sceptical that one man could satisfactorily cover all the fields of technology associated with the exhibits at my trial. "

(ii) "Despite my doubts, Dr Maher gave assurances to my lawyers that he was capable of giving expert evidence in all of the required fields, and he repeated that assurance on oath whilst giving testimony [Dr Maher Testimony, 5 November 1993, p.46-49]. As a result the defence expert testimony relied totally on the evidence of Dr Maher. In contrast, the Prosecution used one or more experts in each of the fields connected with the exhibits, i.e. a ratio of Prosecution to Defence experts of 20:1. "

(iii) "Mr Jefferies has told me that there were serious doubts raised within the defence team, before my trial, about Dr Maher's competency as a defence technical expert. Mr. R. Senior, another expert consulted, was very critical of the evidence being prepared by Dr Maher, particularly in the area of Surface Acoustic Wave technology. It was thought that Dr. Maher was "out of his depth" in fields on which he ultimately gave evidence. For personal reasons Mr Senior declined to give testimony himself. "

(iv) "In two of the key areas - Rapier and ALARM missiles - Dr Maher was not and could not claim to be an expert. The trial transcript clearly demonstrates that Dr Maher did not have experience in those military projects. Mr. R. Senior produced the Surface Acoustic Wave section in the defence research bundle, which successfully proved that the SAW technical information in the exhibits was already in the public domain. Mr Senior had to contradict some of the material in Dr Maher's original report, and he amended it and added more material of his own. If Dr Maher was being criticised by his peers in this important part of the case, then this raises doubts about Dr Maher's competence in other areas of the case. "

(v) "The Commission should therefore confirm these criticisms of Dr Maher with Mr Senior. It is believed that Mr Senior's first name is Richard, and he worked at University College London - his details will be recorded in the Tuckers files from my case. Mr Senior's involvement in the case is acknowledged in Dr Maher's Defence report, "Analysis of Exhibited Material from a Technical Standpoint", which refers to him by name as assisting with the evidence regarding SAW devices. Dr Maher therefore relied on second hand (hearsay) evidence from Mr Senior. "

(vi) "Mr Jefferies also informed me that a second expert was used in the preparation of the Defence case, helping to bolster Dr Maher's evidence. I do not know the name of this expert, but he attended meetings at Rock Tansey's Chambers in 1993, together with Rock Tansey, Gary Summers, Richard Jefferies and Eamonn Maher. During these meetings the second expert added points for Dr Maher to use in his evidence - this means that Dr Maher's evidence included hearsay material from two other experts who were not called to support their assertions."

(vii) "I was not previously aware of these criticisms about Dr Maher's expertise in the fields on which he gave evidence, consequently I must submit that the Defence expert was deficient, and that this now forms an important part of my application to the Commission. The effect of Dr Maher's deficiencies was a gross imbalance in the equality of arms between the Prosecution and the Defence, and the Defence were not able to adequately controvert the evidence of the Prosecution experts, in other words my trial was not fair. "

316. Linked to this issue are the matters Mr Smith has raised in section 2 of his submissions, under the heading "Associated failure of the defence legal team". It is convenient to deal with both sections of this submission together. The points he has raised are as follows.

(i) "In my previous submissions I have questioned Dr Maher's reliability regarding his evidence about Rapier and ALARM, but I did so based on my own understanding of Dr Maher's inadequacy in those fields. I now know that my own legal team had questioned Dr Maher's competence, and I therefore submit that the defence team failed to properly represent me at the trial. "

(ii) "I am now certain that my lawyers were aware of Dr Maher's limitations before my trial started, and I have learned that these shortcomings seriously affected the preparation of the defence case. As my lawyers knew that Dr Maher was wholly inadequate as an expert in areas that he was being asked to give evidence on, it has to be asked why they persisted with Dr Maher, and attempted to "muddle through" the difficulties with him? "

(iii) "My lawyers failed me in not finding better experts to help me prepare my defence. The defence legal team moved towards the trial in the knowledge that Dr Maher could not adequately deal with all the areas of evidence that were required of him. The defence lawyers should have asked for an adjournment to resolve the problems over the expert evidence, but instead they continued in this unacceptable manner as it was considered too late in the day to make changes and find new experts."

317. The Commission has already addressed, to an extent, Mr Smith's complaint that Dr Maher was not sufficiently expert to give evidence for the defence at trial. Nonetheless, some of the comments now made by Mr Smith do require a response.

318. An expert witness does no more than provide an opinion, which is excluded from the general rule against opinion evidence because it is based on special knowledge and experience. The duty of an expert witness is to report his or her professional opinion to the court, and no partisan allegiance is owed to the Crown or to the defence.

319. It is sometimes the case that an expert consulted by the defence will take the same view as the experts who are to give evidence for the

Crown, and if so it would be pointless for the defence to adduce such evidence independently. This is not an unusual scenario, as experts in any particular field will have consulted similar works of reference and they will have developed knowledge and experience which is broadly similar. As a result, it may sometimes be difficult to find an expert who offers a view which opposes the views of the other experts in the case. Certain matters upon which an expert is asked to comment may be clear cut, or capable of only one reasonable interpretation, or the possible variations of that interpretation may be very limited.

320. It is understandable, therefore, that the defence may sometimes find it difficult in any trial to find an expert opinion to support its case. This does not operate as a bar to a fair trial, however, even if the defence are completely unable to identify an expert to proffer a view to oppose the case for the Crown. That simply reflects the fact that the Crown has a strong case, or that reputable expert opinion on a subject is generally quite settled. It is still open to defence counsel to challenge all aspect of an expert's evidence through the process of cross-examination. The judge will then sum up the factual issues in the case fairly, and direct the jury on how they should approach their assessment of any expert evidence they have heard.

321. In the Commission's view, it is unsurprising that Mr Smith's advisers may have found it difficult to find an expert who was prepared to put forward a view which expressly contradicted the individual and collective evidence of the many experts who provided the opinions on which the Crown relied. Nonetheless, Dr Maher was identified, consulted and selected by the defence as the best available person to do that.

322. It is clear from Mr Smith's submissions as set out above that at least two further experts were consulted by the defence. They may have been critical of Dr Maher, but experts are often critical of each other. The defence may well have had reservations about the ability of Dr Maher to match the knowledge and experience of the experts called by the Crown, or to oppose their opinions successfully. That, however, is explicable on the basis that the Crown had a strong case against Mr Smith.

323. Once an expert has been instructed, the admissibility of his evidence is a matter solely within the discretion of the trial judge. Two specified conditions should be satisfied: firstly that study or experience will give the expert's opinion an authority which the opinion of one not so qualified will lack; and secondly the expert must be so qualified to express the opinion. Dr Maher explained his

qualifications and experience to the trial judge, who decided that he was sufficiently qualified to act as an expert in the case.

324. Once admitted, the weight to be attached to an expert opinion is assessed by the jury. The jury heard Dr Maher's opinions and they were entitled to accept or reject them. This is reflected in the trial judge's directions to the jury on how they should approach the expert evidence:

> "You have heard in this case from a variety of experts ... the majority have dealt with scientific matters. In this country we do not have trial by experts but trial by jury. ...This means that you are entirely free to accept or reject expert evidence as you feel inclined. You will of course pay attention to the qualifications of the experts, and every one of the experts had excellent qualifications. You will not, of course decide the case on numbers, saying that, because the Crown have called far more experts than the defence, that is a good reason for accepting the Crown evidence and rejecting the defence evidence.
>
> You will consider in the case of each expert how they gave their evidence. You will have to decide for yourselves whether you found them to be doing their best to help you. You will have to decide whether you thought they were being objective. You will have to decide if you thought they were doing their best to make themselves clear to you.
>
> You have to reach a decision on the evidence you have heard. Do not let yourself be frightened by the technicalities of the evidence. You must not approach the expert and technical evidence on the basis of "well, I don't fully understand what was happening so I can't make up my mind about this." You may think that an expert who is really an expert will take great pains to make himself clear. Obviously, if you come to the conclusion that any expert in your view was deliberately trying to mislead you, you will reject his evidence out of hand. If you should do that, do not let the fact that you consider his evidence is tainted rub over and say that, because his evidence is tainted, any other evidence called by whichever side it is is also tainted; that would be wrong. You have to decide on all the evidence,

drawing such inferences from it as you think appropriate." [53]

325. So far as Dr Maher accepting "hearsay" evidence from two other experts is concerned, it is by no means unusual for defence experts to consult and to share ideas prior to a trial. If one expert agrees objectively with a point made by another expert, there is no reason why he should not go on to present that opinion in evidence, provided that he shares it.

326. So far as Mr Smith's allegation of defence "incompetence" is concerned, it is clear from what he says in his submissions that the defence team spent much time researching and consulting with potential experts. In the Commission's view, it was not as a result of any "fault" on the part of the defence team that they were only able to put forward one expert, Dr Maher, with any degree of confidence. For the reasons outlined above, this is unsurprising.

327. The Commission has read the transcripts of Dr Maher's evidence with care. He confirmed to the court that he did not regard himself as an expert in all the fields covered in the course of Mr Smith's case, but he did say that he was "sufficiently expert to be able to give very informed opinion after the appropriate research".[54] The transcripts show that Dr Maher was not cowed by the expertise of other experts. He framed his opinions authoritatively. The main thrust of his evidence was that much of the information found in Mr Smith's possession could also be found in the public domain.

328. Ultimately it was a matter for the jury, in accordance with the directions given to them by the trial judge, to decide which parts of Dr Maher's evidence they wished to accept and reject. It was open to the defence, if they had thought it appropriate, to seek an adjournment at any stage so that Dr Maher could conduct further research or further experts could be consulted. They did not. In relation to Professor Lewis' evidence about ALARM, it was also open to the defence team to seek an adjournment, but they chose not to do so. As explained earlier, this was a tactical approach on the part of the defence team, and not one with which the Court of Appeal would find any basis on which to criticise counsel's conduct.

329. In any event, it is notoriously difficult to establish on appeal that defence incompetence undermines the safety of a conviction. The instances where the Court of Appeal will be prepared to find that the failings of counsel were such that a conviction should be quashed

[53] Summing up: 18-19
[54] Dr Maher's evidence: 46:E

are few and far between. It is necessary to point to a specific act or acts of incompetence, and to demonstrate that such acts led to identifiable errors at trial. This approach is confirmed in the leading case of *R v Day* [2003] EWCA Crim 1060:

> "...the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."

330. In the Commission's view there was no identifiable error by the defence team, in relation to the selection and instruction of Dr Maher or in relation to any other aspect of the case, which might satisfy this requirement. The Commission notes that it was not asserted on appeal that Dr Maher was incompetent, nor did Mr Smith's fresh legal team at appeal make any such assertion about the defence team at trial. Mr Smith's complaints about his lawyers were submitted several years after his original conviction, and for that reason the professional bodies charged with regulating the legal profession have declined to undertake any investigation into Mr Smith's allegations in this regard. No adverse finding has been recorded by the Legal Services Ombudsman. The Commission is satisfied that there is no evidence that Mr Smith was not competently represented at trial by experienced lawyers who did their best to present his case to the jury in the best possible light.

Issue 59

New evidence from Mr F S McClemont is capable of affecting the safety of Mr Smith's conviction

331. In section 3 of this submission, Mr Smith puts forward the following contentions:

(i) "In August 2007 I made contact with Simon McClemont, and he agreed to send me a written statement of what he knew about document 51-59. Mr McClemont was the man who was issued with that document in 1982, and his evidence raises important new points. "

(ii) "The "restricted" document was known to be linked to ALARM in 1982. Within Mr McClemont's department document 51-59 was known to be linked with ALARM at the earliest stages of development, i.e. at the time the document was created in

January 1982. Mr McClemont challenges the MoD's evidence to the Security Commission, as reported in the Security Commission's report: '... at the time the document was created it was not specifically linked to a particular weapons system.' (Annex A.5) With reference to this statement, Mr McClemont says: 'I think it was known at HRC and at MEDL in 1982, from discussions with representatives of MSDS, that it was for ALARM.' "

(iii) "Document 51-59 was superseded by an "unclassified" document in 1984. On 27 March 1984, document 51-59 was superseded by another "unclassified" MSDS specification with the reference 1011-00435 issue 1. In isolation, Mr McClemont thinks that the filter parameters in the specification were not sensitive".

(iv) "How the "restricted" document came to be in my possession. Within 2 days of my arrest on 8 August 1992, Mr McClemont and his departmental Manager, Mr Arthur Dyer, had a meeting with HRC's Director, Mr Stephen Cundy. Mr McClemont was asked how his copy of the "restricted" document had found its way into my possession. Mr McClemont confirms that the filter specified in document 51-59 was selected as a test vehicle for HRC's BS9450 Capability Approval Programme for SAW filters, and that Dowie Lewis was the QA representative concerned with the Capability Approval Programme. Mr McClemont presumes that this was why he had lent Dowie Lewis his copy of the "restricted" document (the reason why the document ended up in Mr Lewis's desk which I later inherited). Mr McClemont says: 'I believe I must have lent it to Mr Dewi Lewis with a view to helping him with the documentation for, and planning of, a BS9450 Capability Approval Exercise for SAW filters using DEM125/CQC5 filters as the qualifying vehicle.' "

(v) "The Police never interviewed anyone issued with the "restricted" document. Mr McClemont is not aware that any recipients of document 51-59 at HRC were interviewed by the Police, but he thinks that the authors and nominated staff at MSDS would have been better qualified to confirm the document's purpose, sensitivity, etc, than anyone at Hirst Research Centre. "

(vi) "Mr McClemont confirms that Professor Meirion Lewis exaggerated his evidence. Mr McClemont corroborates that Professor Lewis exaggerated certain evidence at my trial, on

Radiation Hard Quartz, Dow Corning adhesive, and cross-hatching on the SAWs. Mr McClemont also clears up another unresolved point in Professor Lewis' evidence at my trial, when he indicated that there may have been some sensitivity regarding the use of silver, connected with the Electron Beam Coater instructions and the manufacture of SAW filters. [Dr Lewis Testimony, 7 October 1993, p.25G] Mr McClemont confirms that 'Ag [silver] metallization was <u>not</u> used in SAW filter manufacture at HRC'. "

(vii) "<u>I make the following submissions concerning Mr McClemont's evidence:</u>

i. At the time of my arrest, Mr McClemont, his manager Mr Arthur Dyer, and others on the circulation knew that the "restricted" document had been used in the early stages of the ALARM missile project.

ii. The police made a serious mistake in not interviewing any of the people listed on the circulation list of the "restricted" document, and their negligence made it impossible for there to be a fair trial due to this missing evidence.

iii. The Defence was given no warning that the "restricted" document was related to ALARM, or that this document would take on a heightened significance at trial as being the only Official Secrets Act document found in my possession. As a result, the Defence legal team did not seek an expert able to testify about ALARM, and I was denied the best defence.

iv. The "restricted" document became obsolete on 27 March 1984 and it was replaced by an unclassified document identified as 1011-00435 issue 1. This information was not put before the jury, but in contrast the Prosecution attached inappropriate significance to the "restricted" document. The jury were not told that the document used on ALARM was unclassified, and therefore officially judged to be <u>not sensitive</u>.

v. Mr McClemont's evidence does not identify which SAW filter specification was used on production standard ALARM missiles. Expert opinion will be required to establish whether any of Dr M.F. Lewis's testimony was correct, because he had assumed that the "restricted" document was the only specification used on the project.

vi. The new evidence demonstrates that Professor Francis Lewis was not a credible expert witness. Dr Lewis lied when he told the Court that the "restricted" document

was used on ALARM missiles in service during the 1991 Gulf War, because the "restricted" document became obsolete in 1984. Dr Lewis gave false and totally misleading evidence to the Court.

vii. The CCRC should contact Mr McClemont, to confirm the details of his evidence, and to discover what more information he can add to shed light on the facts of this matter. "

332. Mr Smith did not produce any written statement from Mr McClemont and he did not provide his contact details. The Commission took the view that it was necessary to contact Mr McClemont and, as stated above, spoke to Mr McClemont on the telephone on 26 February 2008. On 27 February 2008 the Commission sent Mr McClemont a letter to request his assistance.

333. In a telephone conversation with the Commission on 28 February 2008, Mr McClemont confirmed that, with the agreement of his employer and the MOD, he had provided Mr Smith with a written statement in which he commented on the restricted document 51-59 and other associated matters. The Commission has therefore obtained and considered a copy of Mr McClemont's statement. The statement is signed and dated 11 October 2007.

334. Mr McClemont states that he worked in the Device Applications Laboratory at HRC in 1982 and worked on the design team for the bandpass filter specified in the restricted document. He therefore had access to the restricted document for that purpose.

335. Mr Smith contends that Mr McClemont confirms that it was known within his department that the restricted document 51-59 was linked with ALARM at the earliest stages of development, i.e. at the time the document was created in January 1982. He contends that this totally undermines the MoD's evidence to the Security Commission, as reported in the Security Commission's report, that '... at the time the document was created it was not specifically linked to a particular weapons system.'

336. The Commission notes that on pages 7 and 8 of his statement, Mr McClemont says: 'I think it was known at HRC and at MEDL in 1982, from discussions with representatives of MSDS, that it was for ALARM.' " However, the Commission also notes that on page 3 of the statement, Mr McClemont says:

> "I believe that the filter was generally known to those in the Device Applications Laboratory who were associated with its

> design, as being for the ALARM missile. This would probably not have been through any document, but by mention at meetings with the immediate customer (representatives of MSDS). Also, I am not sure exactly when in the evolution of the filter design that this would have become known." [emphasis added]

337. It is apparent therefore that Mr McClemont's statement does not necessarily undermine the statement in the Security Commission's report. In any event, as stated at paragraphs 255 and 270 above, the essential issue for the jury to decide at trial was whether Mr Smith's possession of the restricted document in 1992 was with the intention of supplying it to the Russians for a purpose that was prejudicial to the interests of the state. Whether Mr McClemont and his colleagues at HRC were or were not aware of the association with ALARM at the time of the design phase of the SAW filter and whether the picture as presented in the Security Commission report was or was not completely accurate is not the real question. As explained in paragraph 270 above, there is now clear evidence that the restricted document should originally have been classified as "Secret". It was not necessary for the document to have been specifically linked to ALARM at the time of its creation.

338. Mr Smith contends that Mr McClemont is of the opinion that the filter parameters in the specification on the restricted document are not sensitive.

339. On page 5 of his statement, Mr McClemont clearly states that he cannot comment expertly on the likely usefulness of the contents of the restricted document as he is not an expert in RF electronics or the design or operation of radar and homing systems or how they might be jammed. Therefore, in the Commission's view, his subsequent comments (which are clearly couched in uncertain terms) cannot be relied upon. The Commission has obtained an expert opinion in relation to these matters and is satisfied that the expert instructed, Mr Martin Winstone, is appropriately qualified and experienced to comment authoritatively on the evidence relating to the restricted document and to ALARM.

340. Mr Smith contends that Mr McClemont states that the filter specification in the restricted document was superseded by another "unclassified" MSDS specification in March 1984. He also contends that filters with the same performance as those being made for MSDS were commercially available after March 1984. He contends that this shows that the contents of the restricted document could not be regarded as being sensitive. However, Mr Smith has misunderstood Mr McClemont. Mr McClemont stated that only some

70 models to another specification were made, at Wembley in 1984 and 1985. He said that all subsequent production was at MDML but that he did not know to what specification.

341. As previously stated, regardless of classification, one of the key issues for the jury to decide was whether they were satisfied that the content of the restricted document was calculated to be or might have been or was intended to be directly or indirectly useful to an enemy. Expert evidence was given at trial by Dr Lewis and Dr Maher to the effect that the information was capable of damaging the security interests of the UK. Dr Lewis, in particular, was of the view that knowledge of the IF frequencies and bandwidth could be useful in designing systems to jam an airborne guided weapon (which was specifically mentioned on the specification). In addition, the reference to group delay filters would suggest to an enemy that the weapon was likely to be an ARM.

342. Martin Winstone has also confirmed to the Commission that the specification provides key indicators which identify the system as an ARM and that it could have been used to design systems that would reduce the effectiveness of any ARM in which the bandpass filter as specified was deployed.

343. It is on the basis of this evidence (principally that the specification could be linked to an ARM) that the content of the restricted document was regarded as being sensitive (and which the MOD accepted subsequently should properly have been classified as 'Secret').

344. Mr Smith contends that Mr McClemont's statement provides new evidence to support his assertion that the restricted document was one of the documents left in Dowie Lewis' desk.

345. Mr McClemont says that some time between 1982 and 1984 he loaned his copy of the restricted document to Dowie Lewis to assist him in preparing documents for a BS9450 capability approval exercise for SAW filters. This does not, of course, prove that the restricted document was in fact in Dowie Lewis' desk at the relevant time. This issue has been addressed fully elsewhere in this statement of reasons (see in particular paragraphs 244-253 above). In the Commission's view, Mr McClemont's statement adds little to the arguments already advanced in relation to that issue, and is not capable of raising a real possibility that the Court of Appeal would overturn Mr Smith's conviction.

346. Mr Smith expresses concern that none of the people listed on the circulation list of the restricted document were interviewed by the police and, in his contention, they would have been best placed to comment on the sensitivity of the document. He contends that this made it impossible for him to have a fair trial.

347. It was open to Mr Smith's defence team to seek to adduce relevant expert evidence in support of his case at trial. The circulation list contained in the restricted document was clearly available to the defence at the time of trial. The Commission does not consider that Mr Smith's defence was in any way prejudiced by the failure of the police and/or his legal team to seek to interview or obtain expert evidence from those personnel at MSDS and HRC mentioned on the circulation list.

348. Martin Winstone was a key member of the personnel at MSDS involved in the preparation and approval of the filter specification document. As previously indicated, Mr Winstone has confirmed that in his opinion the document clearly indicates the use of an ARM (ALARM) and that it could have been used to design systems that would reduce the effectiveness of any ARM in which the bandpass filter as specified was deployed.

349. Mr Smith contends that Mr McClemont confirms that Professor Lewis exaggerated certain evidence at his trial.

350. At page 5 of his statement, Mr McClemont makes it clear that he is not an expert in the design of RF systems or electronic warfare, hence he is not well qualified to comment on the quality or correctness of Professor Lewis' evidence which relates to these aspects [Commission emphasis]. As previously indicated, the thrust of Dr Lewis' evidence, which related directly to the key question which the jury had to decide (which was whether Mr Smith's possession of the restricted document was with the intention of supplying it to the Russians for a purpose that was prejudicial to the interests of the state), was that knowledge of the IF frequencies and bandwidth could be useful in designing systems to jam an airborne guided weapon (which was specifically mentioned on the specification) and that, in addition, the reference to group delay filters would suggest to an enemy that the weapon was likely to be an ARM. The matters upon which Mr McClemont comments (at page 6 of his statement) are not, in the Commission's view, matters of such significance that they are capable of undermining these key aspects of Dr Lewis' evidence. As is made clear elsewhere in this statement of reasons, Dr Lewis' evidence on these issues is now fully endorsed by Martin Winstone.

351. The additional submissions made by Mr Smith in paragraph 331 (vii) have already been addressed by the Commission elsewhere in this statement of reasons.

352. In conclusion, in the Commission's view, Mr McClemont's statement does not, as Mr Smith contends, raise "important new points" nor does it disclose any new evidence or argument which would give rise to a real possibility that Mr Smith's conviction would be overturned by the Court of Appeal if a reference were made.

Issues raised in two letters dated 6 November 2006

353. Mr Smith makes the following points:

(i) "The first entrapment process concerns how MI5 took an interest in me, and the subsequent operation they mounted to test my loyalties and suitability for enhanced security clearance. The test was an offer of money in exchange for secret information. Had the Commission investigated this it would have learned that I offered no secrets to the MI5 officer, but I did accept money from him. This was explained at my trial as industrial espionage". Mr Smith asserts that the Commission has failed to investigate the matter properly. "

(ii) "The second entrapment concerns MI5's decision to end the above operation as the operation had yielded no willingness or desire by me to pass secret information, and was costing MI5 substantial amounts of money to continue the operation. The trigger to ending the operation was a Russian sounding voice inviting me to a meeting place near a telephone box to await a further telephone call. The intention of MI5 was to direct me to a second meeting place, and my arrest was planned to occur at this second meeting. Both telephone calls and destinations were to be filmed and recorded, to demonstrate to the jury that I had been trained in spy craft. However, the plan went seriously wrong, because I had not even left home at the prearranged time for the first meeting place, I acted in a completely different way to what was expected, and I was arrested as I arrived home rather than at the planned place of arrest, namely the second meeting place." Mr Smith asserts that the Commission has failed to investigate the matter properly. "

(iii) "The police interview on tape 33. Superintendent MacLeod said he would prove I was trained as a spy by Oshchenko,

and that I passed secret material to him. After my arrest, Special Branch took me into custody, and at the end of a four-day interrogation, Superintendent McLeod told me that I would be charged with spying. He told me that he would prove that a Colonel Oshchenko had trained me."

(iv) "Dame Stella Rimington, overseer of Special Branch, who said on oath at my trial that I was not trained by Col Oshchenko, nor did I ever pass any secrets to him (after Oschenko's defection he was in British custody at the time Rimington said this)".

(v) "Despite the absence of any evidence that I had been trained as a spy by Oshchenko or that I had passed any secrets to him, my barrister Mr Michael Mansfield QC allowed the Court of Appeal to conclude that I had been trained by Oshchenko, and had even passed secrets to him over a number of years."

(vi) The rest of this letter comprises complaints about the quality of Mr Smith's legal representation and the effect it had on the presentation of his appeal, and a complaint about the lack of quality and thoroughness of the Commission's review.

354. The Commission considers that it was open to Mr Smith to tell the jury about the "entrapment" matter he has mentioned at (i). He does not explain why he believes this matter should be investigated now. It does not appear to have any direct relevance to any of the issues under consideration at trial. The point raises nothing that shows a need for any investigation by the Commission.

355. The second "entrapment" matter outlined at (ii) comprises a commentary on the matter of the telephone call which led Mr Smith to leave his home on the morning of his arrest. This raises nothing that requires investigation by the Commission.

356. In respect of (iii), Mr Smith does not explain what he believes the Commission can usefully investigate in relation to this point. The tape recorded interview of what was said by Superintendent McLeod was a matter of record. All the tapes and transcripts were supplied to the defence team. It was open to the defence team to put any questions they wished to Superintendent McLeod at the time of trial. So far as the Commission is concerned there is no point here to investigate.

357. In relation to item (iv) the Commission has already explained its view as to why it is irrelevant whether or not Mrs C was in fact Stella

Rimington. Mrs C's identity was not an issue the jury were required to consider. It would not have affected the factual basis of what she said at trial and it would not have affected the Lordships consideration of her evidence when the matter was reviewed on appeal.

358. In relation to (v) the Commission has already provided a detailed response to Mr Smith's allegation that his defence team was incompetent at an earlier stage in this statement of reasons. The Bar Council has declined to consider the complaint about Mr Mansfield, given the length of time that has elapsed since the appeal. The Legal Services Ombudsman did agree to look into the matter, but no adverse finding has been made against Mr Mansfield. The Commission has not noted any evidence of inadequacy during its review and is of the opinion that there is no evidence to support Mr Smith's allegations that his defence team at trial was inadequate, or that the Court of Appeal was misled by Mr Mansfield.

359. So far as Mr Smith's complaints about the thoroughness of this investigation is concerned, the position is this. The Commission will investigate matters which it decides are relevant to its review. The Commission does not act under the direction of an applicant, and it is not required to investigate automatically every point raised by an applicant. It is open to Mr Smith to contact the Commission's complaints manager if he considers that the review has been defective, or to apply for judicial review to challenge any interim or final decision taken on his case.

Second letter dated 18 December 2006

360. Within this letter Mr Smith makes the following remarks:

(i) "I am not sure whether you have noted an important fact concerning the significance of the component to which the Marconi "restricted" document (Exhibit pages 51-59) refers. The details within this specification are relevant and are the reason why I have been so perseverant in pursuing the technical value of that "restricted" document. The Defence Technical expert, Dr Eamonn Maher, thoroughly researched the SAW devices being manufactured by GEC at the time of my arrest and trial, and he discovered that the component known as the "bandpass filter" was in fact a commercial component on sale to anybody who cared to buy one. To all intents and purposes the specification revealed in the "restricted" document (claimed to be used in the ALARM missile) was identical to the specification of a SAW filter

appearing in the GEC MEDL sales catalogue as type number DW9210. For your information I attach a photocopy of the relevant page from that catalogue in the format of a JPEG image - this page was taken from the Defence research bundle. Professor Lewis was aware that MEDL were manufacturing and selling this component before he came to Court - he had read Dr Maher's report - but Professor Lewis clearly dismissed this information because it would have undermined the prosecution case to have admitted the specification was in the public domain. So the detail of this specification is one element I am continuing to research through academic contacts. The other key element where I am seeking help from academic institutions is in the field of electronic counter-measures, and whether Professor Lewis's testimony would withstand critical analysis from those with more knowledge than he in the field of missile electronics. So far I have been unable to find any expert who would support Professor Lewis's theories."

361. The issue of what information was in the public domain was considered extensively at trial and the jury heard the evidence of the expert witnesses on the subject. It has been considered by the Commission previously at paragraphs 114-117 and 222-224 in this statement of reasons. Neither Mr Smith's comments as set out above, nor the enclosure to this letter, raise any new issue for investigation.

Letter dated 3 January 2007

362. In this letter Mr Smith makes a number of points at some length, but they can be summarised as follows:

(i) The Commission has failed to
- report the misrepresentation of fact by Michael Mansfield
- understand the relationship between Dowie Lewis and Simon McClemont
- grasp the significance of the point about Stella Rimington
- provide MI5's notes confirming Mr Smith is not a spy
- understand anything about the prototype SAW filter specification

(ii) He reiterates that Professor Lewis was not an expert in missile design or jamming techniques, he guessed that the SAW was in ALARM and misled the Court when he said he contacted the technical director of Marconi to confirm his guess.

(iii) He states that the Commission should pay specific attention to the consequences of the Security Commission Report's statement that '... at the time the document was created it was not specifically linked to a particular weapons system.'

363. The Commission considers that each of these matters has been addressed already. The points relating to Michael Mansfield QC and Stella Rimington have already been addressed. The Commission understands fully the significance Mr Smith attributes to the working relationship between Simon McClemont and Dowie Lewis (which is addressed in more detail earlier in this statement of reasons). It is not necessary for the Commission to disclose any notes that may have been made by Mrs C prior to trial. She told the jury there were no sightings of Mr Smith with Oschenko and whatever notes she made prior to trial could not alter that evidence. The matters outlined in (ii) have been considered extensively throughout this statement of reasons. The citation from the report of the Security Commission at (iii) relating to whether document 51-59 was linked to a weapons system does not alter the legal test the jury was required to apply to the facts, as set out earlier in this statement of reasons.

Points raised in e-mail of 10 June 2008

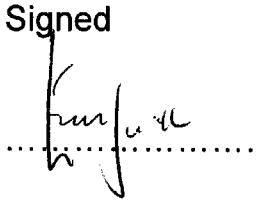
364. The Commission received an e-mail from Mr Smith on 10 June 2008 attaching a copy of a draft affidavit which he said he had sent to Professor Lewis for him to consider and sign. Mr Smith suggested that the Commission should contact Professor Lewis to ask him for his comments on the affidavit and to establish whether he intended to sign it. In the draft affidavit, Professor Lewis purports to retract his witness statements and trial evidence in relation to the restricted document and the ALARM missile.

365. The Commission has contacted Professor Lewis. He has told the Commission that he does not wish to retract any of his evidence to the court or to the Commission or anything said in his witness statements. In all the circumstances the Commission considers it inappropriate and unnecessary to take any further action in relation on the unsworn and unsigned affidavit upon which Mr Smith seeks to rely.

Decision

366. The Commission has decided not to make a reference and this statement sets out the Commission's reasons in accordance with section 14(6) of the Act. The decision has been made by a Commissioner and is signed by the Commissioner on behalf of the Commission.

Signed



Dated

08/07/2008.

Ewen Smith
Commissioner

Annex A

Summary of the Referral Powers of the Commission

1. Under sections 9 to 12 of the Criminal Appeal Act 1995, where a person has been convicted on indictment or by a magistrates' court in England and Wales or Northern Ireland, the Commission may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal, Crown Court or County Court as appropriate.
2. By section 13 of the Act, a reference shall not be made unless the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.
3. By the same section, this consideration must be reached because of argument, evidence or, in the case of a sentence, argument on a point of law or information, not raised in the proceedings which led to the conviction or any appeal or application for leave to appeal.
4. A reference shall not be made unless an appeal has been determined or an application for leave to appeal has been refused.
5. In exceptional circumstances, the Commission may refer a case where there has been no previous appeal or application for leave to appeal.
6. In exceptional circumstances, the Commission can also refer a conviction, verdict or finding (but **not** a sentence) even if the evidence or argument upon which the reference is based, has been raised previously before the trial court or on appeal.

Annex B

Disclosure by the Commission

1. The Commission has a legal duty to disclose any material that it has obtained during its review which would help the applicant to make his/her best case for a reference to the Court of Appeal. The material may be sent to the applicant in its original form, or as an extract or it may be summarised in the Statement of Reasons.
2. The following material has been sent to Mr Smith in the course of the review or with the Commission's Statement of Reasons:
   - (i) Notice of Additional Evidence dated 11 October 1993
   - (ii) First statement of Dr Lewis during trial, dated 11 October 1993
   - (iii) Second statement of Dr Lewis during trial, dated 11 October 1993
   - (iv) Statement of Dr Meirion Francis Lewis, dated 22 February 2005
   - (v) Statement of Dr Reginald Humphryes, dated 13 October 2005
   - (vi) First letter of instruction to Mr Martin Winstone, dated 3 October 2005
   - (vii) First report by Mr Martin Winstone, dated 16 January 2006
   - (viii) Second letter of instruction to Mr Martin Winstone, dated 22 March 2007
   - (ix) Second report by Mr Martin Winstone (undated)

CENTRAL CRIMINAL COURT

R

- V -

MICHAEL JOHN SMITH

TAKE NOTICE that, in addition to the evidence given in the Magistrates' Court, further evidence, the effect of which is set out herein, may be given at the trial.

Unless you serve notice on the Director within seven days of receipt of this Notice objecting to this course, the Director proposes that the evidence of the witnesses listed below in Column 'A' shall be tendered in accordance with Section 9 of the Criminal Justice Act, 1967, and that the witnesses listed in Column 'B' shall be called to give evidence in person.

'A'	'B'
Tendered - Section 9 Criminal Justice Act 1967	Witnesses to be called
	LEWIS - Meirion. p. 349 - 351

Susie Parfett.

For the Crown Prosecution Service

DATED THIS 11th. DAY OF October 1993

Form MG 11

Witness Statement

Statement of MEIRION FRANCIS LEWIS

Age if under 21 Over 21 **(if over 21 insert 'over 21').**

This statement (consisting of 2 **pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.**

Dated the 11 **day of** October **19**93

Signature M.F. Lewis

On 7th October 1993 I gave evidence in the case of R v SMITH at the Central Criminal Court. During my evidence I was referred to a RESTRICTED document entitled "Demonstrator Programme Requirement Specification Bandpass Filter Assembly" which was contained in the Prosecution exhibit bundle at pages 51-59 inclusive. The contents of this document concern sensitive equipment currently in service and should be treated in extreme confidence. I made a number of deductions from this document. These concern the fact that the knowledge of the if frequency and bandwidth could be useful to a potential enemy who wished to jam the airborne guided weapon concerned. In addition, I noted that the specification on the group delay matching of the if filters was significant in suggesting the mode of operation of the weapon. From this I deduced that the missile was likely to be an "ARM", i.e. an ANTI-RADAR-MISSILE. In the intervening period I have therefore contacted the Marconi Company who have confirmed my suspicions. They confirm that the receiver is used in a missile called "ALARM", which is currently in service with the R.A.F. It may be recalled that during the Gulf War, Saddam Hussein switched off his radars, giving us total air superiority. This was undoubtedly because of the threat from the ARMs. It is therefore clear that the document concerned is not of academic interest, but could affect the lives of service personnel. Concerning the technique of jamming, the Russians are of course expert, for example they have been jamming Western radio broadcasts for decades. I also note that the document contains information on the numbers of filters required, which relates to the numbers of missiles to be constructed.

Signature M.F. Lewis **Signature witnessed by**

Form MG 11

Witness Statement

Statement of MEIRION FRANCIS LEWIS

Age if under 21 Over 21 **(if over 21 insert 'over 21').**

This statement (consisting of 2 **pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.**

Dated the 11 **day of** October **19**93

Signature M.F. Lewis

On Thursday, 7th October 1993, I gave evidence in the case of R -v- Smith. During the course of cross-examination I was presented a Defence council research abstract on page 417 of the Defence bundle, the authors being Caliendo et al. The Defence contended that the data contained therein was in the public domain and replicated the content of a handwritten document entitled OLFACTORY RESEARCH PROJECT dated May 1992. I disputed this on a variety of grounds, and I undertook to study the full paper to ascertain the facts. I have obtained a full copy of the paper, which I now produce as Exhibit MFL/1. I have examined this document and I would contend that it vindicates each of the points I made during cross-examination. MFL

Point 1: This concerns the nature of the acoustic wave employed in the sensor. I contended during cross-examination that this was not a surface acoustic wave but one occupying the bulk of the medium. I also pointed out that the liquid used (water) would attenuate a surface acoustic wave. These points are confirmed in the paper. Thus on page 383 it is stated "..most liquids prevents the use of the Rayleigh mode, for which energy radiation into the liquid give rise to excessive insertion loss in the acoustic line". The penetration of the acoustic wave into the bulk of the medium is also fully evident in Figures 1 and 2 of this article on p.384.

Point 2: This concerns the Defence claim that the authors demonstrated a highly reproducible response. During cross-examination I expressed extreme scepticism on this claim, and this is vindicated by the authors description of their measurements. They say on pages 385/6 "The complete cycle was repeated several times in different days showing every time the same behaviour". This is a totally inadequate demonstration of reproducibility. Anyone with a knowledge of such matters knows that such a claim must be backed with evidence on at least several BATCHES of devices, the experiments being

M.F. Lewis

Signature **Signature witnessed by**

Continuation of Statement of MEIRION FRANCIS LEWIS

conducted in different ENVIRONMENTAL CONDITIONS (temperature, humidity, vibration, etc.), and taken over a period of months or years. The defendant worked in the Quality Assurance department and would be fully aware of such facts. His handwritten note is therefore infinitely more useful to a potential enemy than the scientific paper making ostensibly the same claim. MFL

This illustrates a much more general point, namely that documents originating from within a manufacturing Company such as GEC, are of much greater practical value than scientific papers, in which the authors prime aim is often to be the first to publish. As a result of this need to publish quickly the material published is often incomplete, and the conclusions tentative, and always optimistic. This is well understood in the scientific community, where research workers learn to interpret publications correctly.

Criminal Cases Review Commission

Statement of: Meirion Francis Lewis

Date of birth: Over 21

In October 1993, I gave evidence for the prosecution at the trial of Michael Smith at the Old Bailey in London.

I have been shown by the Criminal Cases Review Commission (CCRC) a copy of two witness statements which I made to the police (dated 11 August 1992 and 3 November 1992), together with a copy of a transcript of my trial evidence.

I have been asked by the CCRC to explain the circumstances in which I came to give evidence about the ALARM missile system.

When giving evidence I was asked to comment upon the sensitivity of various documents alleged to have been found in Mr Smith's possession, and to comment upon whether these documents, together with the information contained in them, might have been useful to an enemy of the UK.

One of the documents I was asked to comment upon (which is referred to as document number 51-59 in the transcript of my evidence) was a document sent by Marconi Space and Defence Systems (MSDS) to the Hirst Research Centre of GEC headed 'Demonstrator Programme Requirement Specification Bandpass Filter Assembly'. I gave evidence in chief that this document related to a programme to build surface acoustic wave filters for use in a receiver in an airborne guided weapon system (see page 13D-H and 17E-H of the trial transcript). I said that I did not know exactly what the missile system was (see page 19C and 25D-E of the trial transcript).

During the course of my evidence I referred to, and was cross-examined by defence counsel, on several documents, including document number 51-59 described above, and a document on sensors. My description of the sensitivity of this latter document was challenged by defence counsel by reference to the abstract of a published scientific paper. As neither of us had read this published paper in full the Judge asked us both to acquire and read the full paper and return to Court at a later date. I returned to the Old Bailey the following Monday to continue giving evidence.

course MFLewis

Over the ~~curse~~ of the next day, Friday, and the weekend, I acquired and read the published document on sensors, as requested by the Judge, and reread the sensitive document on sensors to prepare my evidence to the Court. I also took the opportunity to reread the other sensitive documents, including document number 51-59, especially as I felt that defence counsel policy was to challenge my expertise. Upon rereading document number 51-59 I noticed a number of pointers that eventually led me to conclude that the filters in question

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Signed: MFLewis

Witnessed by: GREGOR MCDONALD

Dated: 22 Feb 2005

might be for use in the ALARM missile system. I was aware at that time of the development of the ALARM missile through contact I had had with personnel at MSDS.

I decided to telephone MSDS to see if I could speak to the Technical Director, Dr Reg Humphryes, in order to discuss this matter with him. However, it being a weekend, he was not available. I had planned to travel back to London on the Sunday evening in order to resume my evidence on the Monday morning, and therefore decided to drop a letter into ~~Mr~~ Dr Humphryes at MSDS in Stanmore on my way. In my letter I identified the document in question and asked him some questions, one of which was whether this document related to the ALARM missile system. I left the sealed letter with the security guard at MSDS for Dr Humphryes' attention. I proposed to telephone him from the Old Bailey the following morning for answers to my questions.

When I arrived at court on the Monday morning I advised Mr Nutting (prosecution counsel) that I thought that I could now identify the missile system in document numbered 51-59. I explained what I had done and that I had arranged to telephone Dr Humphryes that morning. Mr Nutting agreed with this course of action.

I therefore telephoned Dr Humphryes and he confirmed to me that the document related to the ALARM missile system. I accepted what he told me. I informed Mr Nutting of my conversation and he asked me to make a further witness statement giving details of what had occurred, which I did.

I note that at page 59 F of the transcript of my trial evidence there is a reference to my making two further statements which were before the Court. I assume that these statements were disclosed to the defence. I cannot now recall precisely what I said in these statements, although I assume that in one of them I must have explained about my conversation with Dr Humphryes and the information I received from him. The second statement might well have been related to the papers on sensors described above.

I resumed giving evidence and in response to questions from Mr Nutting told the jury that I had discovered that the filters referred to in the document numbered 51-59 were used in the ALARM missile system which was currently in service with our armed forces.

Signed: N D Lewis 2

Witnessed by: GRETTA MCDONAGH

Dated: 22 Feb 2005

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CRIMINAL CASES REVIEW COMMISSION
Alpha Tower
Suffolk Street Queensway
Birmingham B1 1TT
Tel: 0121 633 1800

Statement of: Reginald Humphryes

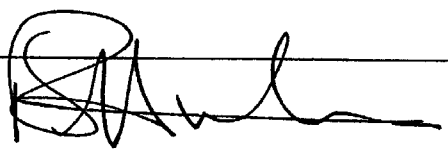
Address: C/O THALES
Aerospace Division, Manor Royal, Crawley, West Sussex, RH10 9PZ

Date statement taken: 20 July 2005

I am employed as a Project Director at THALES, Aerospace Division, at the above address. I have been asked by the Criminal Cases Review Commission whether I have any recollection of an incident that occurred when I was employed by Marconi during October 1993.

I have been shown a statement made by Professor Meirion Francis Lewis, dated 22 February 2005. I have also been shown a document which I am told relates to an Anti Radar Missile (ARM) known as ALARM. I do not have any recollection of the incident to which Professor Lewis refers, which is not to say that it did not occur. The ARM document is outwith my particular field of expertise so I could not say whether or not it related to the ALARM system without consulting colleagues.

It may be of some assistance if I explain the structure of Marconi and the location and nature of my employment at the relevant time. Marconi Space and Defence Systems (MSDS) ceased to exist in that name in the early 1980s, and the company split into (1) Marconi Space (dealing with space communications), (2) Marconi Defence Systems (dealing with electronic warfare systems) and (3) Marconi Dynamics (dealing with guided weapons). In 1985 I joined Marconi Defence Systems.

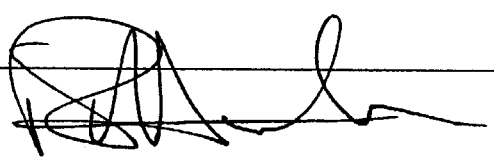
Signed: 

Witnessed by: J. Lee Dated: 13/10/05

My area of expertise is in microwaves and electronic warfare.. ARM systems were developed in Marconi Dynamics although some microwave components for ALARM were developed and produced in Marconi Defence Systems.

In October 1993 I was Technical Director at Marconi Defence Systems. At that time, Ray Matthews was the Managing Director of Marconi Dynamics, I believe his Technical Director was Mike Jones, and Jim Gailer or Martin Winstone was the resident expert/project manager on ALARM. I do not know the whereabouts of any of these people now, as I left Marconi in 2000, and the company no longer exists having been, I believe, subsumed into Matra BAe Dynamics. I think Messrs Matthew and Jones may have retired.

If a written query relating to ALARM had been left, marked for my attention, at the Security Gate of Marconi Defence Systems, I would have passed it to the team at Marconi Dynamics, but I have no recollection of the matter at all. Furthermore, I do not recall having a telephone conversation with Meirion Lewis on the morning of Monday 11 October 1993 relating to the contents of any such document.

Signed: 

Witnessed by: J Lee Dated: 13/10/05

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Strictly Private and Confidential
Mr Martin Winstone
Project Manager Air Systems
Technical & Projects Directorate
MBDA UK Limited
Six Hills Way
Stevenage
Herts SG21 2DA

Your ref:
Our ref: 00946/1998

3 October 2005

Dear Mr Winstone

Re: Michael John Smith

I write further to our meeting on 29 September 2005. May I take this opportunity to thank you for seeing my colleague and I at such short notice, thus saving us a trip from Birmingham to Stevenage.

As you are aware, the Commission is reviewing the convictions of Michael John Smith for three offences contrary to the Official Secrets Act 1911. Mr Smith was arrested on 8 August 1992. Following a lengthy trial during October and November 1993 he was convicted at the Central Criminal Court and sentenced to a total of 25 years' imprisonment, subsequently reduced to 20 years' imprisonment on appeal.

One of the key documents found in Mr Smith's possession derived from Marconi Space & Defence Systems Limited, which is dated January 1982. When we met, I left a copy of the document with you. I am advised by the Ministry of Defence that although the document is marked RESTRICTED, the information it contains is considered to be UK SECRET when its association with the ALARM missile is identified. Please ensure that arrangements are made to handle and store the document appropriately, and that it is destroyed or returned to your point of contact at the Ministry of Defence at the conclusion of your involvement in this matter.

During the course of Mr Smith's trial, a total of seventeen experts gave evidence in order to interpret the various documentation found in Mr Smith's possession at the time of his arrest. In relation to the document I left with you, Dr Lewis, one of the expert witnesses for the Crown, formed a preliminary view that it may relate to an anti-radar missile. Dr Lewis had no particular expertise in relation to this field, so he made some enquiries with senior staff at Marconi.

As a result of what Dr Lewis was told by Marconi, he went on to give evidence that the document related to ALARM. It seems that Dr Lewis' evidence was the only evidence at trial to confirm that the document did in fact relate to ALARM.

Mr Smith has now raised the issue of whether or not the document did in fact relate to ALARM; he asserts that it did not. He contends that Dr Lewis was not properly qualified to comment on this matter, and that he gave false and misleading evidence at trial. As a result, Mr Smith argues that his conviction is unsafe.

In order to resolve the issue raised by Mr Smith it is necessary for the Commission to obtain the written opinion of an expert. The expert would need to be fully conversant with the history of the development of ALARM, qualified to comment on the origin of the restricted document, and able to provide conclusive confirmation as to whether or not the restricted document related to ALARM. Following our discussion on 29 September 2005, you have agreed to provide the necessary report. As I indicated to you when we met, it is possible that your report, or at least a summary of it, will be disclosed to Mr Smith.

Ideally, I would like your report to cover the following matters:

(i) A brief résumé of your qualifications and career history.
(ii) Your position within Marconi in 1982.
(iii) Your involvement with the document in January 1982, as I note that your name appears on the front.
(iv) An opinion on whether the document provides any "clues" that it relates to an anti-radar missile; it certainly seems to have been identified by Dr Lewis, although he had no particular expertise in this area.
(v) Confirmation of whether the document does in fact relate to ALARM and, if so, an explanation of how and why you can be certain that it relates to ALARM.
(vi) A brief history of the development of ALARM, in particular the status of ALARM in January 1982 (the date of the document) and August 1992 (the date of Mr Smith's arrest).
(vii) An opinion on how an enemy of the UK might have utilised the information contained in the document in 1992.

You indicated that you would not be charging a fee for providing this report, but if that position should change then perhaps you would be good enough to let me know.

If you should have any queries, please contact me: my direct line at the Commission is [redacted].

I look forward to hearing from you in due course.

Yours sincerely

Angela Flower
Legal Adviser to the Commission

REPORT ON DOCUMENT 79481/PBH/BB/SO8: DEMONSTRATOR PROGRAMME REQUIREMENT SPECIFICATION, BANDPASS FILTER ASSEMBLY

1. Personal Résumé

I qualified from Liverpool University in 1974 with a 2nd class honours degree in Physics and remain an Associate Member of the Institute of Physics. In September 1974, I joined Marconi Space and Defence Systems (MSDS) Ltd as a Systems Engineer immediately from university working on the assessment of the performance of a seeker for a future anti-ship missile. In early 1977, I became the Systems Design Lead in the new business area of anti-radar seekers and shortly thereafter became the systems lead for all anti-radar work at MSDS including the winning of research programmes from the Royal Aircraft Establishment at Farnborough.

When in 1981 the MOD became interested in the possible purchase of an anti-radar weapon for Tornado, I was appointed the Systems Manager for the seeker. Working with BAe Dynamics, who were the ALARM Prime Contractor, a successful lobbying campaign was mounted, including the demonstration of the applicable technologies to the MOD decision makers, resulting in the contract being awarded in mid-1983. In 1983, I was confirmed as the Systems Manager for the development and production of the anti-radar seeker business at MSDS.

I continued in this role until 1987 when I started moving towards project management of the anti-radar business area, with the focus on achieving new business. In 1991, Marconi undertook due diligence on Ferranti Dynamics Ltd and I was seconded to the due diligence team for my combination of technical/project management expertise. In 1992, following the take-over of Ferranti Dynamics, I took on a role within the PGM (Precision Guided Munition) export project as Technical Manager with responsibilities to win additional business from our export customer and trouble-shoot/project manage any technical difficulties that arose.

In 1997/8, I transitioned back to UK business to lead the Marconi efforts to win the UK's Precision Guided Bomb programme as the Business Development Manager for Air Launched Weapons. I continued in this role until 2003 when, in June, it was announced that this contract would be placed with Raytheon.

Over the next 5 months, I managed the transfer of the Marconi weapons team at Borehamwood to MBDA, Stevenage following the merger of Marconi's and BAE SYSTEMS weapons companies. In December 2003, I moved to Stevenage as a Project Manager within Air Systems. Since March 2005, I have been the Programmes Executive for Air Systems Support with responsibilities for Sea Skua, Sky Flash, ALARM, RAIDS, PGM (UK elements) and a number of smaller programmes.

2. My Position within Marconi in 1982

In 1982, and for the previous year, I was the Systems Manager for all anti-radar seeker work undertaken within Marconi. Responsibilities included definition of design concepts for engineering implementation, assessment of performance and defining the qualification and test processes to be followed to prove that equipment meets its requirements.

3. Involvement in 79481/PBH/BB/SO8

Members of my team would have generated a system requirement document for the i.f. (intermediate frequency) stages of the seeker. A member of my team would have generated the engineering requirement specifications and the overall engineering solution from this system document. Document 79481/PBH/BB/SO8 is a component within the engineering solution to the system requirement. As a signatory of the document, my approval confirmed that the engineering requirement meets the system requirement prior to commitment to build.

4. Opinion on Content related to an Anti-Radar Missile

It is my opinion that the contents of 79481/PBH/BB/SO8, in particular the General Description and Electrical Parameters sections, provide clear and unambiguous indicators that the contents relate to an Anti-Radar Missile.

5. Relationship to ALARM

I am certain that the document related to a component within the ALARM seeker.

In 1981, MSDS committed to develop a demonstrator of the ALARM seeker to reduce the development risk to MSDS and to convince the MOD that any remaining risk was low and manageable. A key element in this was the design of the receiver system of which the bandpass filter was a key component.

6. Opinion on Content related to usefulness in 1992

It is my opinion that the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time.

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Mr Martin Winstone
Project Manager Air Systems
Technical & Projects Directorate
MBDA UK Limited
Six Hills Way
Stevenage
Herts SG21 2DA

Your ref:
Our ref: 00946/1998

22 March 2007

Dear Mr Winstone

Re: Michael John Smith

Thank you for agreeing to consider the matters raised by Mr Smith's further representations. What I have done is taken relevant extracts, preserving Mr Smith's original numbering, and they appear in the annexe to this letter. Perhaps you would be good enough to let me have your comments on the matters he has raised in due course.

I also enclose a copy of my original letter of instruction dated 3 October 2005. I assume that you will have retained the copy document (51-59) I left with you when we met in September 2005. If not, then please let me know and I can arrange for a further copy to be sent to you by an appropriate secure courier service.

I note that you agreed to compile your previous short report without submitting a fee note. I appreciate that this request will involve you in further work. If you intend to submit a fee note for this further work, could you perhaps give me some idea in advance of the hours that will be involved and an appropriate hourly rate.

If you do have any queries at this stage, then please do not hesitate to contact me. If you think it would be useful for us to meet in order to discuss matters, doubtless you will let me know.

Yours sincerely

Angela Flower

Extracts from submissions relating to the ALARM missile system, adopting Michael Smith's original numbering. To accompany letter of instruction to Mr Martin Winstone dated 22 March 2007

5. It is impossible to identify ALARM from the document as Prof Lewis did in Court

5.1 Mr Winstone states (in his statement para 4) that:

'...in particular the General Description and Electrical Parameters sections, provide clear and unambiguous indicators that the contents relate to an Anti-Radar Missile'.

5.2 The contents of the General Description states:

'The filter is to form part of an IF receiver incorporated in an airborne guided weapon. The filter determines the system bandwidth.

Because of the non-critical effect of input and output impedance matching on the filter's performance, the filters are to be supplied without any matching networks. It is intended that the filters be presented with a 50 ohm impedance on both the input and the output. MSDS will design the circuitry at each end of the filter accordingly.'

5.3 Only the first paragraph could support Mr Winstone's point, but the information is too general to connect it with an ARM, as any IF filter will determine a system's bandwidth response. Typically, missiles such as ALARM will contain more than one Intermediate Frequency stage (dual or triple conversion is common), and so somebody unfamiliar with the design of the receiver would find it difficult to identify which stage this document related to. Mr Winstone has omitted important technical details from his reply to the CCRC.

5.4 There is nothing unusual in the Electrical Parameters section to indicate how Mr Winstone arrived at his opinion. For example:

(a) an identical commercial filter, of 120 MHz centre frequency and 10 MHz bandwidth, was openly sold by Marconi during the period concerned (DW9210).
(b) 120 MHz centre frequency and 10 MHz bandwidth were common specifications within receivers of this type at that time (see my major submission in 2003).

If Mr Winstone claims that 2.5 nS group delay matching is the key parameter, as Professor Lewis did at trial, then the CCRC has failed to demonstrate how this requirement differs from any other missile designed to home in on a target, as the guidance systems are similar in all guided missiles. Mr

Winstone has not shown what details in the document can be used to identify ALARM.

5.5 When challenged in a telephone conversation with me on 3 January 2007, Mr Winstone admitted he was not familiar with the information that would identify ALARM from the sections he has indicated, and so it is difficult to believe that Mr Winstone can justify his claims. In answering the CCRC's questions he appears to be relying on hearsay evidence.

5.6 A key issue at the trial was Prof. Lewis's claim that he was able to identify ALARM from some information in the document, which he could not actually describe to the Court. The CCRC's report is also unable to identify what information in the document could identify its use on ALARM. In para 195 of the CCRC's second provisional report it is stated that:

'He [Prof. Lewis] went on to explain why he thought document 51-59 related to the ALARM missile ...'

Prof. Lewis's testimony did not reveal any detail that would prove he could identify ALARM from the document. In fact, Mr. Winstone's testimony is that the SAW was from a Demonstrator ARM, not ALARM.

6. The SAW filter specification used in ALARM

6.1 The Prosecution case is only valid if the SAW filter used in ALARM is the same as the 'restricted' document dated 8 January 1982.

6.2 Mr Winstone has made an ambiguous statement in his report para 6. He has not made it clear that the 'restricted' document related to ALARM in 1992. He says:

'the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time.'

6.3 Mr Winstone has not confirmed whether the component specified in the document dated 8 January 1982 (i.e. issue 2) was in fact identical to the component used in ALARM in 1992.

6.4 The Security Commission's report (Cm 2930) states the obvious about the 'restricted' document, that *'at the time the document was created it was not specifically linked to a particular weapons system'* (Annex A.5). The SAW filter was in fact used in a prototype ARM demonstrator in 1982. This is the reason the document was not marked "secret". The CCRC has failed to show that the SAW in the ARM went on to become the SAW in the ALARM after 1982.

7. When did the SAW filter become a "secret"

7.1 It is necessary to identify when, precisely, the SAW filter specification in the 'restricted' document developed from a prototype Anti Radar Missile (ARM) in 1982 to become part of the ALARM missile in service with armed forces. This date has been ignored throughout the legal process.

7.2 After the document was created on 8 January 1982, it was then used at Hirst Research Centre in 1983 and 1984 as part of the British Standards BS 9450 Capability Approval Exercise. During this period Copy No.14 of the 'restricted' document was passed from Mr F.S. McClemont to Mr D.T. Lewis, and it ended up in the desk which I inherited in December 1985.

7.3 The CCRC has not identified when the document became part of the ALARM missile, and therefore became potentially secret information. Mr Martin Winstone has not made this point clear in his statement at paras 5 and 6, and he leaves us to guess that this transition may have occurred anytime between 1982 and 1992.

7.4 When the document became a secret is relevant to its status in December 1985, when I joined HRC. I had no knowledge of what the documents left in the desk by Mr D T Lewis related to, and nobody advised me that I should take any special precautions regarding these documents.

7.5 It is mandatory in all military projects that the contractor maintains a configuration management system for documentation. ALARM will have a documentation system identifying the development of the ALARM build standard.

7.6 It is therefore possible to identify what components were used in ALARM at August 1992, by looking at the Parts List for the build standard at that time. Mr Winstone should be asked to show the CCRC the relevant Parts List page from ALARM (in confidence), to prove that issue 2 of the document was used on the build standard of 1992.

7.7 If a later issue of the document was used, or the document was not listed on the Parts List, then Mr Winstone should be asked to explain the effect this will have on the answers he provided to the CCRC in the second provisional Statement of Reasons. At this stage it is clear that the SAW filter in ARM is not the same SAW filter in ALARM circa 1992.

8. Susceptibility of ALARM to jamming

8.1 Even if it can be shown that the component specified in the 'restricted' document dated 8 January 1982 was used on the ALARM missile in service in 1992, this does not mean the information in the document would enable a potential enemy to jam that missile.

8.2 I was denied the opportunity to examine an expert on ALARM at my trial - no such expert was called by the Prosecution - and therefore the safety of my conviction relies on proof that the information in the document would be useful to an enemy to develop counter-measures. No expert at the trial was able to give that proof.

8.3 Mr Winstone's background as a physicist and administrator limits his capability to conduct a detailed analysis of the engineering issues involved. Therefore it is important to discover if there are test results from the commissioning process for ALARM, showing that jamming at the Intermediate Frequency of 120 MHZ had been considered a risk.

8.4 It is submitted that the CCRC should investigate the real possibilities of jamming ALARM by using the IF frequency. This point has never been properly tested in the legal process, and of course it is now widely known that the ALARM cannot be jammed. So once again the CCRC appear to have been misled by both Mr Winstone and Professor Lewis.

9 Whether it is possible to design counter-measures from the content of the document

9.1 Mr Martin Winstone claims that information within the document *'could have been used to design systems that would have reduced the effectiveness of any anti-radar missile within which the bandpass filter was employed at that time.'* (See para 6 of Mr Winstone's statement)

9.2 The 'restricted' document 79481/PBH/BB/SO8 was so important to the outcome of the trial that it should have been dealt with by experts in the field. The CCRC now acknowledges that Professor Lewis was not such an expert (*'Dr Lewis had no particular expertise in relation to this field ...'*. (Angela Flower's letter to Martin Winstone dated 3 Oct 2005).

9.3 The CCRC should also be aware that Mr Winstone is NOT an expert in missile design, or jamming technology. He is merely the manager of the talent team who did and still do such important work, and Mr Winstone would therefore need to ask the relevant person the specific details.

9.4. It is widely known that ALARM cannot be jammed; in fact it is designed to home in and destroy any attempt to jam it. Both Winstone and Lewis have been allowed to present a totally negative opinion, without their claims facing any engineering challenge whatsoever.

10.3 The expert consulted by the CCRC, Mr Martin Winstone, is apparently not sufficiently expert to be able to answer the questions asked by the CCRC. It is necessary to consult the person(s) who have advised Mr Winstone, and the conclusive proof will be an examination of the parts list showing which SAW filter was used in ALARM in 1992.

COMMENTS ON ATTACHMENT TO LETTER OF INSTRUCTION 00946/1998 DATED 22 MARCH 2007

5. It is impossible to identify ALARM from the document as Prof Lewis did in Court

I agree that ALARM is not explicitly mentioned in document 79481/PBH/BB/S08.

However, in my judgement, it is clear that the document does relate to ALARM when the document as a whole is reviewed rather than individual paragraphs and that this could be deduced easily by any competent analyst.

- On the cover of the document, the generating company is identified as Marconi Space and Defence Systems Ltd. As a company, our commercial remit at that time would have been easy to establish.
- On page 2, the document states "The filter is to form part of an IF receiver incorporated in an airborne guided weapon."
- On page 3, the document identifies that the demonstrator is an immediate activity followed by a "Full Scale Project Definition and Development Programme."
- In July 1983, the award of the ALARM contract was announced in the House of Commons and shortly thereafter entered Full Scale Development.
- Information on which missile systems were in the process of development and/or production at Marconi Space and Defence Systems (or its successor companies) would be readily available in the public domain from such events as Farnborough.

Addressing some specific points in the attachment:

- 5.1/5.2. Information only, no comment required.
- 5.3. I am not aware that any important details were left out of my original report that were needed to respond to the questions asked.
- 5.4. I agree there is nothing unusual in the bandwidth and centre frequency parameters as such, but they do become significant when related to "an airborne guided weapon." I would also dispute from the attachment that 'the guidance systems are similar in all guided missiles'. There are many different types of guidance that can be applied in a system and information on group delay is a very strong indicator of the approach adopted.
- 5.5. I recall the phone call but not the content. However, my response to CCRC is not based upon hearsay. In any conversation, I would not have had the documentation in front of me and as such would not be able to respond definitively to an ad hoc approach.
- 5.6. I can't comment on rationale used by Prof Lewis since I am unaware of it. With regard to my report identifying the device as for a demonstrator, the document identifies that the demonstrator is an immediate activity followed by a "Full Scale Project Definition and Development Programme."

6. The SAW filter specification used in ALARM

Answering the specific points of the attachment:

- 6.1/6.2. Information only, no comment required.
- 6.3. MRW/REP/79481_1 in section 5 states: "I am certain that the document relates to a component within the ALARM seeker." I can confirm that the component was in-Service with the RAF from the ALARM systems introduction and throughout the period of the trial.
- 6.4. See point above.

7. When did the SAW filter become a "secret"

Answering the specific points of the attachment:

- 7.1/7.2. Information only, no comment required.
- 7.3. I am unable to provide definitive information on when the information became secret. However, I would expect this to have been early during the Full Scale Development phase since each Ministry of Defence Contract is issued with a set of appropriate classifications for each aspect of the system. Thereby, this item would have become classified SECRET as soon as it was determined to be the chosen solution for the ALARM missile.
- 7.4. Information only, no comment required.
- 7.5. I can confirm that ALARM has a configuration management system and, in particular, a Master Record Index that identifies the build standard.
- 7.6. I have checked the parts list relevant to the ALARM system when it entered service with the RAF and throughout the period of the trial and it called up part number DA9210 (cf commercial part number DW9210 quoted in questions). Conventionally, the numbers define the device and the associated letters would be associated with packaging or it being military or commercial specification. The reason for the difference in the letters would need to be confirmed through other routes.
- 7.7. The document 79481/PBH/BB/S08 is not referenced on the parts list and it should not be. The parts list is used for the mustering of components for assembly and does not include any reference to performance. Following design, development and qualification of the component, all further references would be against a component number only for manufacturing at component level and then for build into higher level assemblies. Mass production of the component for the programme was against a separate document, for use by assembly personnel, referenced 1BK-511052. This 1BK-511052 document specifically includes the manufacturer's part number (DA9210).

8. Susceptibility of ALARM to jamming

Answering the specific points of the attachment:

- 8.1/8.2. Information only, no comment required.
- 8.3. The résumé included in the previous report clearly indicated my role. Systems Manager within MSDS is a technical role not administration. Indeed, a number of the classified patent applications for the ALARM seeker, and other anti-radar programmes, are attributed to me or jointly with other personnel. Today, I am still involved with ALARM as the Programmes Executive which is an overall responsibility for the programme including technical issues though these do not form a major part of my task today. Please note that the words used in the previous report (It is my opinion that the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any antiradar missile within which the bandpass filter was employed at that time) does not mention "jamming at the Intermediate Frequency."
- 8.4. I strongly deny having misled CCRC. Repeating the statement made previously, "It is my opinion that the information within document 79481/PBH/BB/SO8 could have been used to design systems that would have reduced the effectiveness of any antiradar missile within which the bandpass filter was employed at that time." I stand by that statement.

9. Whether it is possible to design counter-measures from the content of the document

Answering the specific points of the attachment:

- 9.1/9.2. Information only, no comment required.
- 9.3. I would claim that during the 1980's I was an expert in the field of anti-radar seekers and their susceptibilities. For much of the past historical activity related to the seeker, I was not only the manager of the talent team but an integral member of the team.
- 9.4. The statement made is an opinion.
- 10.3. See paragraphs 7.5 to 7.7 above.