

1 Friday, 7th March 2008

2 THE CHAIRMAN: Mr. Gilby, good morning.

3 A Good morning.

4 THE CHAIRMAN: I am sorry we weren't able to get to you
5 yesterday. You will appreciate we had quite a full day.
6 Indeed, we didn't finish the open CAAT appeal, I am
7 afraid.

8 What we are anxious to do today is, subject to your
9 views, is to start the closed session on the Gilby
10 appeal matters, your appeal matters, and to ensure we
11 are able to deal with that, because it involves
12 Mr. Patey, and this is the last opportunity.

13 We have read your opening, which is very helpful.

14 There is one point I wanted to raise with
15 Mr. Havers, just on Section 23, because, as I read the
16 skeleton from Mr. Havers with his Foreign & Colonial
17 office, or Foreign Office hat on, it didn't seem to me
18 that Section 23 is actually being relied on.

19 Mr. Havers, can you just clear the line on that?

20 MR. HAVERS: Yes. There is a few words in one of the
21 documents, which we will identify to you when we go into
22 closed session, which raises Section 23, but that is it.

23 THE CHAIRMAN: Was Section 23 part of the decision?

24 MR. HAVERS: I would have to go back and check that.

25 THE CHAIRMAN: Could you look at that and come back?

1 Because obviously it does raise issues about to what
2 extent it is relevant, when we are in the first part of
3 the exercise, to say if it is properly dealt with. You
4 know, if it wasn't actually one of the reasons there.

5 MR. HAVERS: I see, yes.

6 THE CHAIRMAN: I will raise it then, and we can clear the
7 lines on that before we return to open session, so thank
8 you.

9 Beyond that, as I say, we have read your opening
10 statement. Is there anything else you wanted to draw
11 attention to at this stage? Otherwise, I think we would
12 be minded to go into closed session, subject to getting
13 some indication of how long that may or may not take.

14 MR. GILBY: I would like to make a few words of
15 introduction, and also I was wondering because, as you
16 know, I would like to ask Mr. Patey some questions in
17 open session which obviously I am not going to --
18 obviously I am mindful of the fact that there is not
19 much time, so I am not going to cover the same grounds
20 as Mr. Hickman or raise any of the same subjects at all,
21 but it would be helpful, I don't know if that would be
22 better to have it before the closed session. My
23 suspicion is that it probably would.

24 THE CHAIRMAN: That sounds to me entirely sensible to have
25 it straight away, now, but after you have made your

1 additional introductory remarks, and then we go into
2 closed session. Does anyone disagree with that?

3 MR. HAVERS: Certainly not. All I would do is just to
4 remind the Tribunal, and Mr. Gilby, that you indicated
5 earlier this week that if Mr. Gilby had any significant
6 questions in terms of length, and quantity, of Mr. Patey
7 in open session he should attend on Wednesday of this
8 week for that purpose, so I am assuming that he hasn't
9 got very much in terms of the amount of questions to ask
10 in open session. Otherwise, we put at risk the closed
11 session.

12 THE CHAIRMAN: Yes.

13 MR. GILBY: I think there might have been a slight
14 misunderstanding, because my thought was in terms --
15 I thought it was agreed on Monday that the questions
16 relevant to my case were reserved to today. Certainly
17 I have no other questions relative to the subjects which
18 we have already covered by Mr. Hickman, which is why
19 I didn't turn up on Wednesday.

20 THE CHAIRMAN: That is history. We have today with
21 Mr. Patey, and we are going to make the best use we can
22 of it, all right? We have to rise at 4.30, and we
23 clearly need some idea of how long the questions --

24 MR. GILBY: I don't anticipate the questions -- you know,
25 I don't think they will probably take more than half an

1 hour at the most. It might be a bit longer, but I don't
2 have a great wodge of questions.

3 THE CHAIRMAN: We will see how we go. Can we hear --
4 because we have got your opening skeleton, or opening,
5 for which thank you. Would you like to make any
6 additional introductory comments you want to?

7 MR. GILBY: Yes I would, actually.

8 I have actually -- I didn't realise I would have
9 less time than that this morning, so I did prepare some
10 opening notes, most of which is replicated in the
11 skeleton, but it does have in writing one or two
12 additional points.

13 The first point I would like to make is that I would
14 like to actually very slightly refine my request.
15 Obviously, I have been going through the material very
16 carefully in preparation, and for this case, and clearly
17 it has occurred to me that there could be content of the
18 withheld material which could genuinely seem offensive,
19 and for which I can see no overriding public interest
20 disclosure, so I have come up with five categories.
21 I haven't refined it very much I should point out, but
22 I have come up with five categories of information for
23 which I would be content for the Tribunal to redact from
24 any documents it may wish to order disclosure from.

25 So, the five categories are; remarks which could

1 reasonably be held to constitute derogatory comments
2 about the personal appearance of members of the Saudi
3 royal family or Saudi Government officials --

4 MR. HAVERS: I am sorry to interrupt, I am just wondering if
5 Mr. Gilby has this in writing somewhere.

6 MR. GILBY: I do, actually. I would be happy to --

7 THE CHAIRMAN: Mr. Gilby, is this a document that
8 essentially replaces the opening you gave us earlier
9 this week, or is it supplementary?

10 MR. GILBY: Yes. Well, all it does is it puts in writing --
11 please understand, obviously, I am not a professional
12 advocate, so from my point of view it is helpful for me
13 to write down what I am going to say in each session,
14 then, of course, if I stumble I am then not completely
15 lost, so effectively this is what I was going to say by
16 way of opening which is written down, but Mr. Havers has
17 quite reasonably raised the issue of time, so I don't
18 know if you just want to read it, or whether I should
19 just make the points verbally.

20 THE CHAIRMAN: No, you can take us through it. You have
21 said you have identified five categories --

22 MR. GILBY: Just turn to paragraph 11 on page 4. That is
23 relevant. So, I think I just covered off the first
24 bullet, so just the second bullet there is remarks which
25 could reasonably be held to constitute derogatory

1 comments about the personal mannerisms of the Saudi
2 royal family or Saudi Government official, and then the
3 third bullet is; remarks which could be reasonably be
4 held to constitute offensive comments about the
5 religious beliefs or practices of members of the Saudi
6 Government or Saudi officials. Then the fourth bullet
7 is; references to any consumption of alcohol by members
8 of the Saudi royal family or Saudi Government officials,
9 and then lastly, references to the wives, mistresses or
10 any other lovers of members of the Saudi royal family or
11 Saudi Government officials where those references don't
12 relate to corruption.

13 I just want to make the point in paragraph 12, I do
14 not see there is an overriding public interest for those
15 five categories of information to be disclosed to me.

16 I do believe, however, that there is an overriding
17 public interest that the rest of the material is
18 disclosed.

19 I just want to make a point which isn't actually
20 articulated there, but obviously I have focused a lot on
21 corruption, and that is my chief grounds of appeal.

22 Now, when you look at documents about corruption,
23 many of the individual documents will not contain what
24 may be, on the face of it, very blatant evidence of
25 corruption. What it is, it is a piecing together of

1 a jigsaw, and the fact that certain individuals are
2 mentioned in certain documents, certain euphemisms are
3 used, there are references to certain transactions, the
4 way one researches and can build an accurate picture of
5 corruption is by piecing a lot of documents together.
6 It is in the very nature of historical research.

7 So, although some of the documents you may be
8 looking at in closed session -- this is obviously
9 speculation -- may, obviously, on the face of it, look
10 fairly innocuous, but what I want -- just to make the
11 point, that that does not mean there is not public
12 interest in disclosure because they might, still, be --
13 when you piece them together, be very useful in building
14 up an overall picture, but obviously I am in a difficult
15 position because I obviously haven't seen the closed
16 material, so I just want to make that point.

17 The last point I just draw your attention to, then,
18 is starting at paragraph 15. I just want to briefly
19 address some statements that have been made by the
20 Commissioner and the Foreign Office in their replies and
21 skeleton arguments, and I think the relevant parts of
22 the skeletons are paragraph 15 of the Commissioner's
23 skeleton, and paragraphs 35 and 36 of the Foreign Office
24 skeletons.

25 Now, in those skeleton arguments, reference is made

1 to various comments I have made, either in
2 correspondence or in my grounds of appeal, and,
3 obviously, looking back on it now in the cold light of
4 day, I can see that obviously those comments were, shall
5 we say, intemperate, and, in fact, mainly reflected,
6 obviously, the frustration I felt with a long process
7 which had come to fruition which obviously did not find
8 in my favour.

9 So, please bear that in mind.

10 Maybe I will just make three points which are in
11 paragraph 18 which relate to that. So, just for the
12 avoidance of any doubt, I accept, obviously, that in
13 this case there is the Section 27 exemption which is
14 engaged. Obviously, it is a balancing of the relative
15 public interest considerations put forward.

16 I acknowledge, of course, that the other side have
17 public interest considerations they feel strongly about.
18 Clearly, I do on my side as well.

19 I obviously accept that the Foreign Office have
20 taken my views of the public interest into account when
21 advising the national archives originally and then the
22 Commissioner into their decision, but I, of course,
23 dispute the judgment they have reached.

24 I would like to say also that I fully accept that
25 the Commissioner recognizes the public interest in

1 tackling corruption, and also, obviously, I accept that
2 the Foreign Office believed it was acting in the UK
3 national interest when it was making -- when it was
4 advising the national archives, but, of course, as
5 I have said, I dispute the judgment they have reached.

6 So, I just wanted to make those two points, really,
7 by way of opening.

8 I think the rest of the opening argument is very
9 much along the lines, obviously, of what is in my
10 skeleton.

11 THE CHAIRMAN: And we will hear you at the end in closing
12 remarks.

13 MR. GILBY: Yes.

14 THE CHAIRMAN: That is extremely helpful. Thank you very
15 much.

16 Well, probably the first stage, because I am going
17 to leave the rest of your opening until we have finished
18 with Mr. Patey's evidence, if you understand why, so
19 I think the next step I would invite Mr. Havers to take
20 is, if you would, tender Mr. Patey for any open
21 questions that Mr. Gilby has.

22 MR. PATEY

23 Examination-in-chief by MR. HAVERS:

24 MR. HAVERS: That I will do. Mr. Patey, would you like to
25 go back to the stand?

1 THE CHAIRMAN: You are already on oath, Mr. Patey.

2 MR. HAVERS: Mr. Patey, can I just confirm that you have, in
3 amongst the papers with you, your open witness statement
4 in both these proceedings?

5 A I am not sure I do, actually. I think I have got the
6 closed statement.

7 Q I think there is a grey file alongside you. Have a look
8 in there at page 95.

9 A I have it, yes.

10 Q That, I think, will be the statement that Mr. Gilby will
11 have --

12 THE CHAIRMAN: Yes. This is a joint statement for both
13 appeals.

14 MR. HAVERS: Yes. Just wait there please, Mr. Patey.

15 THE CHAIRMAN: I am assuming, Mr. Choudhury, you have no
16 questions?

17 MR. CHOUDHURY: I have got no questions.

18 THE CHAIRMAN: When Mr. Patey is ready, Mr. Gilby, it is
19 over to you, all right?

20 Cross-examination by MR. GILBY:

21 MR. GILBY: Just briefly, Mr. Patey, I would just like to
22 ask you about the background.

23 If you remember, Mr. Havers took you through some of
24 the sort of background on paragraph 1 of your statement
25 on Monday, and I would just like to just very quickly go

1 through some stuff which I don't think was covered, if
2 I may.

3 So, can I just check, when you joined the FCO in
4 1975 you initially worked on the Rhodesia desk. Is that
5 right?

6 A That's correct.

7 Q In 1977 you moved to the Middle East Centre for Arabic
8 Studies in Lebanon. Is that right?

9 A Yes.

10 Q Then in 1978 you became the Commercial Attache to Abu
11 Dhabi. Is that right?

12 A Yes.

13 Q In 1981 you were the Second Secretary in the Embassy in
14 Tripoli?

15 A Correct.

16 Q In 1984 you returned to the Foreign Office, and could
17 I just check, you worked on both the Libya and Syria
18 desks and then on the Iran/Iraq desk? Is that right?

19 A Correct.

20 Q That was until 1988?

21 A Yes, correct.

22 Q Then you became the First Secretary Political in
23 Canberra. Is that right?

24 A Correct.

25 Q Then in 1992 you became, I think, the Deputy Head of the

1 United Nations department?

2 A Correct.

3 Q Then lastly, the last bit I just want to cover is; in
4 1994 you became an Inspector, and I am not quite sure,
5 forgive me, I don't know what an Inspector in the
6 Foreign Office does, so I would be grateful if you could
7 just let me know?

8 A It is a system whereby a senior official travels the
9 world doing a sort of political audit of Embassies just
10 to make sure that they are pursuing the correct
11 objectives and they have the right resources to pursue
12 those objectives. It is a sort of central management
13 function, if you like, basically checking up that
14 Embassies are doing the right thing.

15 Q Hopefully, Mr. Patey, you will have my first witness
16 statement in one of the bundles. I am not quite sure
17 where it will be.

18 Mr. Havers, you might have to help me here as
19 I suspect my bundles are different to your bundles.

20 MR. HAVERS: I am told that -- there are two black files to
21 your left on the table, Mr. Patey. The second of them,
22 the bigger one of the two, should be marked -- is it
23 Bundle 1?

24 A It is Bundle 2. Bundle 1 is the smaller one.

25 MR. HAVERS: Bundle 1 is the smaller one.

1 THE CHAIRMAN: I have it at Tab E, but it may not be in the
2 same order.

3 MR. HAVERS: Yes. Bundle 2 is the correct one. You are
4 absolutely right. You should find the first document in
5 that bundle, page 227, is Mr. Gilby's statement.

6 MR. GILBY: Could I just ask, Mr. Havers, in terms of the
7 pagination, how it works? Because, obviously, on my
8 witness statements I have just paginated them as
9 I handed them in, so it sounds like your indexes might
10 be slightly different.

11 MR. HAVERS: If it helps, the copies that we have got are
12 internally paginated, I assume in the way that yours is,
13 so if it helps you you could use your internal
14 pagination.

15 MR. GILBY: Thank you. Okay. Could you turn to page 62,
16 please?

17 THE CHAIRMAN: 288 of the bundle.

18 MR. GILBY: It should have, "GACAEI Commissions", as the
19 heading".

20 A Yes. 289 on mine.

21 Q Could I just ask; before preparing for this hearing had
22 you seen this document before?

23 A I have seen your statement for this hearing, so --

24 Q But prior to seeing the statement?

25 A Prior to seeing the statement, no, I am not conscious of

1 that.

2 Q You hadn't heard of its existence from anyone else?

3 A No.

4 Q Presumably, then, the fact that this document is in the
5 public domain, and, in fact, can be viewed in an archive
6 less than five minutes' walk from this building has not
7 prejudiced the UK's bilateral relations with Saudi
8 Arabia then, has it?

9 A I am not aware of any direct prejudice.

10 Q It would be fair to say that I personally found this
11 document in July 2007, so since July 2007 this
12 document -- I don't know when it was put into the public
13 domain before then, but this document hasn't, therefore,
14 prejudiced the bilateral relations between the UK and
15 Saudi Arabia?

16 A No. I would be surprised if the Saudis are aware that
17 such a document is in the public domain, but I am not
18 aware of any prejudice.

19 Q Could you now just look at the bottom of the document?
20 There is the sentence starting, "The Saudi royal
21 family", and if you could just read that paragraph
22 I would be grateful.

23 A "The Saudi royal family have now learned that this
24 commission was paid ... or, in fact, for other British
25 companies".

1 Q That is fine. If you just stop there, would you say
2 that a fair reading of that is to say that this Prince,
3 who appears to be speaking on behalf of the Saudi royal
4 family, is demanding commission payments in exchange for
5 awarding contracts to British companies?

6 A Yes.

7 Q So, the fact that that evidence is in the public domain,
8 in your view, does not prejudice the UK's bilateral
9 relations with Saudi Arabia?

10 A No. I am not saying that. I think it could prejudice
11 the relationship.

12 Q But it hasn't so far?

13 A It hasn't so far because I am not aware that it has been
14 particularly drawn to the attention of the Saudi
15 Government.

16 Q Mr. Chairman -- I did send round by email, if you
17 remember on Monday you asked Mr. Hickman if further
18 additional evidence could be submitted in advance, and
19 I emailed it to the Tribunal and to the solicitors for
20 both sides on, I think, Wednesday evening, but I have
21 some copies with me now.

22 THE CHAIRMAN: I think we did receive it, but if you have
23 got copies there I would be very grateful.

24 MR. GILBY: I have got copies. I would be happy to hand
25 them up.

1 THE CHAIRMAN: Thank you very much.

2 MR. GILBY: Sorry, Mr. Patey, I don't suppose you were given
3 this document before? This is the first time you have
4 seen it, is it?

5 A No. I was given a copy on Thursday evening.

6 Q You were. Okay. Before Thursday evening, had you seen
7 this document before?

8 A No.

9 Q You hadn't heard of its existence from anyone else?

10 A No.

11 Q The fact that this document --

12 THE CHAIRMAN: Forgive me for interrupting, can we just call
13 this, "G1"?

14 MR. GILBY: Absolutely.

15 THE CHAIRMAN: I just need to have some reference to have in
16 mind. Thank you.

17 MR. GILBY: This document I found in July 2007, and between
18 July 2007 and now, the fact that this document is in the
19 public domain has not, has it, prejudiced the UK's
20 bilateral relations with Saudi Arabia?

21 A Not yet.

22 Q So, if you look at the document itself, it appears,
23 doesn't it, to be a list of proposed commission payments
24 to various individuals if a contract for Thunderbird
25 missiles is signed. Is that a fair reading, you would

1 say, of the document?

2 A Yes.

3 Q Do you know -- there is the gentleman in 3(a), there, in
4 the document, Prince Adbul Raman. Do you know him?

5 A Yes.

6 Q Do you know what position he holds in Saudi Arabia?

7 A He's the Deputy Defence Minister.

8 Q Could you just look at the bottom on 3(d), please?
9 Could I just ask; is that the same Prince Fahad that was
10 in the document in the Daily Telegraph that Mr. Hickman
11 asked you about on Monday?

12 A I assume it is, but without adding his full name --
13 there are lots of Prince Fahads -- but I am making -- it
14 is an assumption that it is Prince Fahad Abdul Aziz.

15 Q Could you now just turn to page 91, please, of my
16 witness statement? Mr. Chairman, you will be pleased to
17 know we are making good progress so it should not take
18 too much longer.

19 THE CHAIRMAN: Thank you.

20 A This is the middle of a document.

21 THE CHAIRMAN: I make it 317 in my bundle.

22 MR. GILBY: This document is from the national archives. It
23 is part of the Valedictory Despatch of your predecessor,
24 Mr. Willie Morris --

25 A Predecessor by some way.

1 Q Yes, absolutely. Mr. Morris left in 1972, I think.

2 A I think he died, as well.

3 Q If you look in the middle of the paragraph 18, you will

4 see there is a sentence that starts:

5 "A country where the Head of State has strong

6 personal views about the inequity of male sideburns and

7 where the barbers are ordered to cut them to levels

8 consistent with morality".

9 Then if you move down, we can see that it

10 describes:

11 "A dry country where one can find a Minister

12 incoherently drunk in his office before noon".

13 If we just turn over the page to page 92, if we see

14 there, you can see the end of paragraph 21, he talks

15 about how breathtaking it is about.

16 "... speaking to a Prince who will keep talking on

17 about rights and wrongs when you know and he probably

18 knows that you know, that his cut may be 20% of the

19 contract price".

20 So, again, before preparing for this hearing, and

21 obviously looking at my witness statement, had you ever

22 seen this document before?

23 A I am not conscious of having gone that far. I have seen

24 similar documents from similar Ambassadors since Willy

25 Morris.

1 Q Were you aware that that statement had been read out on
2 BBC Newsnight on the 16th of June, 2006?

3 A No.

4 Q You hadn't heard of its existence from anyone else at
5 all?

6 A Not that I am aware of. I mean, I know that each
7 Ambassador writes a Valedictory Despatch. I would have
8 known that Willy Morris would have written a Valedictory
9 Despatch, but specifically, no, I don't.

10 THE CHAIRMAN: Sorry, can I just -- a, "Valedictory
11 Despatch"? I know what the, "Valedictory", is, but what
12 is the tradition or custom?

13 A Usually, as an Ambassador leaves the country, he would
14 reflect on the nature of that country and give very
15 frank advice to the Secretary of State, drawing on his
16 experience, so it is a -- reflections of an outgoing
17 Ambassador, really.

18 THE CHAIRMAN: Directed to the Secretary of State?

19 A Yes. It is not designed for public consumption.

20 THE CHAIRMAN: That may be another story, but it is not
21 intended to go into the public --

22 A They have now been banned, as so many of them reach
23 public consumption, but it is a tradition that has now
24 been abandoned by the Foreign Office.

25 THE CHAIRMAN: Thank you, Mr. Gilby.

1 MR. GILBY: So, the fact that this document has been in the
2 public domain for some years in the national archives,
3 and read out, indeed, on BBC Newsnight, cannot have
4 prejudiced the UK's relations with Saudi Arabia because
5 you weren't aware of the document. Is that right?

6 A I am not aware of any direct prejudice.

7 Q Thank you. Okay.

8 Could you please now turn to page 29 of the main
9 bundle? It might be -- is it the grey bundle,
10 Mr. Havers?

11 MR. HAVERS: You mean your main bundle?

12 MR. GILBY: Thank you, yes. My main bundle.

13 MR. HAVERS: That would be the other bundle --

14 THE CHAIRMAN: Mr. Gilby, can I explain, we have had
15 prepared a composite bundle for your appeal, right, and
16 then there was a composite bundle for the CAAT appeal,
17 so do you know which -- what the document is?

18 MR. GILBY: Yes. It should be hopefully page 29 in both
19 mine and yours, because I have just got the one the
20 Commissioner sent me in November, but I didn't add in my
21 own witness statements.

22 THE CHAIRMAN: I follow that.

23 MR. WILKINSON: It is 29 of our main bundle.

24 MR. GILBY: Thank you. I do apologise.

25 MR. HAVERS: That will be, Mr. Patey, the other black bundle

1 to your left, which is slightly smaller than the one you
2 have been looking at. I hope it will be -- that is the
3 one, I hope, that you will find in there. This is the
4 newspaper article headed, "Newspaper Hoax"? Is that the
5 one?

6 MR. GILBY: Yes. That's right. Thank you, Mr. Havers.

7 Sorry, Mr. Patey, just before you saw the bundle for
8 this case, had you ever seen this Guardian article
9 before?

10 A As I read the Guardian every day I suspect I have.

11 Q But you didn't remember it until --

12 A Well, I do remember the articles by David Lee and
13 Bob Evans because they are frequent on this subject,
14 so --

15 Q If you look in the middle of the page you will see there
16 it says:

17 "Government files obtained under the Freedom of
18 Information Act have revealed an unexpected truth".

19 So, would you accept that the documents quoted in
20 this article are -- were obtained under the Freedom of
21 Information Act?

22 A I assume they were. I am taking their word for it.

23 Q If you turn the page to page 30, you will see there that
24 when you go down, it is talking about:

25 "The report's most sensitive revelations..."

1 It starts that paragraph, and then there is
2 a reference to a Mr. Fostock, and what relation he is to
3 someone who is quite high up in the Government of Saudi
4 Arabia.

5 This would seem to suggest, wouldn't it, that the
6 current king's brother-in-law appears, on the face of
7 the article, to have taken a 15% commission to a Swiss
8 bank account. Is that right?

9 A That is what they are claiming, yes. I haven't seen the
10 original documents, but that is what the article is
11 claiming.

12 Q Has there been any prejudice to UK bilateral relations
13 with Saudi Arabia by virtue of the existence of this
14 information in the public domain?

15 A I think I can help you out here. The answer to each of
16 those questions, to each document, will be, "No", but
17 I would argue that cumulatively the drip of revelations
18 and discussion of this in public as a result of public
19 documents being deliberately released has an impact on
20 the way King Abdullah and senior Princes will view the
21 United Kingdom, and obviously, in pursuing our
22 interests, that could have an impact.

23 So, the answer to each of your questions to each
24 document will be, "No", but cumulatively I would take
25 a different view.

1 Q Could I just ask; does the Embassy in Riyadh at the
2 moment have a Defence Attache?

3 A Yes, it does.

4 Q Could I just ask you what the name of the attache is?

5 A The current Attache is Brigadier Ian Liles.

6 THE CHAIRMAN: Is that L-Y or L-I?

7 A L-I.

8 MR. GILBY: Could you just turn to page 95 of my first
9 witness statement, please?

10 A Is that back to Bundle 2, is it?

11 MR. GILBY: Sorry, yes, that's right. If you just read the
12 first paragraph I would be grateful.

13 THE CHAIRMAN: Of your witness statement?

14 MR. GILBY: That's right.

15 THE CHAIRMAN: Don't read it out loud, just, Mr. Patey, read
16 it to yourself.

17 MR. GILBY: Yes. Absolutely. There is no need to read it
18 out loud.

19 A The first paragraph?

20 Q Yes.

21 THE CHAIRMAN: Which paragraph?

22 Q The first paragraph of the --

23 THE CHAIRMAN: I am sorry. I was in the wrong place.

24 A Okay.

25 THE CHAIRMAN: Can you just let me read it?

1 Yes. Thank you.

2 MR. GILBY: I think it is fair to say there, isn't it,

3 Mr. Patey, that the Defence Attache, Colin Fitzpatrick

4 as it was, appears to be passing on a request for

5 a bribe. Is that a reasonable reading of the document?

6 A Is Fitzpatrick the Defence Attache at the time?

7 Q He was.

8 A Okay. I will take your word for it. That appears to be

9 what he's doing, yes.

10 Q Could I just ask; to your knowledge, does Brigadier

11 Liles, in the Embassy at the moment, does he pass

12 requests for bribes from the top brass in Saudi Arabia

13 to British arms companies?

14 A No.

15 Q Suppose you found out he had. I presume you would

16 disapprove of the action?

17 A Yes.

18 Q It would actually be a really serious matter, wouldn't

19 it?

20 A It would be quite serious, yes.

21 Q Quite serious? Not very serious?

22 A Serious. We don't do adverbs.

23 THE CHAIRMAN: I mean, it would be serious, wouldn't it?

24 A Yes, I am saying it is serious. "Quite", "Very" --

25 serious is serious.

1 THE CHAIRMAN: Yes. But, I mean, if you are passing on
2 a request for unlawful -- if it is unlawful to obtain
3 corrupt payment of that kind, that is getting yourself
4 involved in it.

5 A It is unlawful now. I don't think it was unlawful when
6 Minister Fitzpatrick was doing it.

7 MR. GILBY: You would accept, I presume, that there is
8 a strong public interest in exposing wrongdoing of
9 public officials?

10 A Yes.

11 Q I think you have already really said that no sort of
12 individual document that is in the public domain, which
13 is in my bundle, has, in itself, prejudiced the
14 bilateral relationship between the UK and Saudi Arabia.
15 That's right, isn't it?

16 A Not yet.

17 Q I have been in possession of this document since
18 March 2007. So, if there is a strong public interest in
19 exposing wrongdoing of public officials which would now,
20 in fact, be criminal behaviour, and the existence of
21 this individual document at the moment has not
22 prejudiced the bilateral relationships between the UK
23 and Saudi Arabia, then the Foreign Office were wrong,
24 weren't they, to resist disclosure in this case?

25 A I do not see any wrongdoing. The documents don't reveal

1 any wrongdoing by public officials.

2 Q You don't think that Mr Fitzgerald Patrick's actions
3 there were wrongdoing?

4 A They were not wrong, given the law at the time. They
5 were not illegal.

6 Q Can I just ask, as a public official, are there not
7 other considerations beyond merely compliance with the
8 law? Is it not a reasonable expectation, for example,
9 that public officials should act with higher standards
10 of integrity?

11 A Yes.

12 Q Is it reasonable to believe that in 1968, public
13 officials were also expected to act with high degree of
14 integrity?

15 A Yes.

16 Q Do you still accept, then, that there was no wrongdoing
17 in the broad meaning of the term by Colin Fitzpatrick?

18 A In the 1960s the payment of commissions in the Middle
19 East in respect of contracts would have been normal
20 commercial behaviour, and would have been accepted as
21 such, and it wouldn't have been contrary to his public
22 duty to either brief companies about the existence of
23 such payments, or to brief companies on who was
24 receiving payments, standards of public morality and
25 integrity have changed in the past 40 years, so in the

1 1960s, I wouldn't apply the standards of 2000 to what
2 was happening in the sixties.

3 Q You are saying, is that right, that in the 1960s, it was
4 considered fine for civil servants to pass bribe
5 requests to arms companies? You are saying they had no
6 moral problem with that at all? There was nothing wrong
7 with that? Is that what you are saying?

8 A They would have thought it part of their providing
9 a service to British companies to brief them on how
10 business was actually done in the Middle East and in
11 Saudi Arabia, and that would have been -- they would not
12 have regarded themselves as shutting -- pretending that
13 commissions were not paid. I am just putting myself in
14 the position of somebody in the sixties.

15 Q Just thinking about now, because you accept that this
16 dispute in this case is actually under legislation that
17 is in force at the moment. Is that right?

18 A Yes.

19 Q That legislation wasn't in force in 1968, was it?

20 A No.

21 Q Is it reasonable to say that when we are making
22 judgments about what to disclose, we obviously make
23 judgments based on what is the case now, rather than
24 what was the case then.

25 So, for example, documents clearly under the 30-year

1 rule are released because they have less sensitivity, or
2 because circumstances have changed. That's right, isn't
3 it?

4 A Yes. Under the 30-year rule most politicians have moved
5 on. Most of the dramatis personae have left the scene,
6 but it is also -- there is no obligation to release the
7 documents after 30 years, is my understanding.

8 Q That's correct. If, then, the moral codes of society
9 have moved on -- I don't, by the way, accept your
10 premise that there was such a different moral code, but
11 we will leave that aside -- but if the moral codes have
12 moved on and now the Government talks about combating
13 corruption, new laws have been brought in to combat it,
14 then surely Mr. Fitzpatrick's behaviours ought to be
15 disclosed, should not it, because it is wrongdoing, as
16 we see it today?

17 A No. I think if something was legal then and it is not
18 legal now you don't apply the standards of now,
19 retrospectively, to the actions of a public official.
20 Frankly, I just disagree with you on that.

21 Q Could you just turn to page 48 and 49 of your witness
22 statement, please, Mr. Patey? Sorry, paragraphs 48-49.

23 So, in this statement here, you are talking actually
24 about the inadvertent disclosure of the Al Yamamah MoUs
25 which obviously were originally the subject of the CAAT

1 Freedom of Information Request and have now come into
2 the public domain. That's right, isn't it?

3 A Yes.

4 Q Now, I wasn't here for Mr. Pollard's evidence on
5 Tuesday, I don't think you were either, but maybe you
6 can help me nonetheless. My understanding is that when
7 these documents entered the public domain there was
8 quite a row with the Saudis. Would that be a fair
9 characterisation? They were quite upset?

10 A Yes. I understand they were.

11 Q The Ministry of Defence took the documents back because
12 the Saudis were so upset. They returned them to the
13 vaults in Whitehall. That's right, isn't it?

14 A That is my understanding.

15 Q In fact, you used that as your explanation of why the
16 disclosure of the MoUs wasn't, in the end, that
17 damaging, you know, because you say it is our
18 willingness to make clear this was an error rather than
19 a willingness on the part of the Saudis to accept what
20 had happened. That's right, isn't it?

21 A Yes.

22 Q What I don't understand is -- or maybe you can just --
23 perhaps I will just ask a factual question first. To
24 your knowledge, has the Foreign Office ever taken back
25 any of the documents it has put into the public domain

1 which relate to corruption in arms sales to Saudi
2 Arabia, along the lines which we have been discussing
3 this morning?

4 A I don't know.

5 Q You don't know. Okay. Well, Mr. Patey, if you could
6 turn to my supplementary witness statement, or second
7 witness statement --

8 A Where will I find that?

9 MR. HAVERS: We think that might be right at the back of
10 Bundle 2, the bigger of the two bundles. Right at the
11 very back. There will be a statement and a few pages of
12 exhibits attached to it.

13 A I have got it. Supplementary witness statement. I was
14 rather confused because your signature looks very much
15 like mine. I thought it was my signature for a minute.

16 Q Could you just read, please, paragraphs 2-5? You
17 understand that I am saying there that the Foreign
18 Office hasn't taken back any of the national archives
19 documents from its own files which are in my witness
20 statement?

21 A I accept that.

22 Q Can I just ask, then, why the Foreign Office hasn't
23 taken any of those back?

24 A I don't know.

25 Q You don't know?

1 A No.

2 Q But the Ministry of Defence did take them back, didn't
3 they?

4 A The documents they took back were MoUs that had been the
5 subject of an agreement with the Saudis that they would
6 remain confidential. Their inadvertent release was
7 a breach of that confidence. Taking them back was an
8 attempt to restore the established position that these
9 were confidential documents to us. I regard that as
10 a slightly different nature from other material which
11 might be embarrassing to the Saudi family. I think the
12 MoUs do represent an agreement between the two
13 governments and have a slightly different status.

14 Q What you are saying there, then, would it be fair to
15 say, that because the documents were confidential, that
16 was a bigger deal than stuff that is embarrassing about
17 the Saudi royal family?

18 A It is a different order of confidentiality. One is an
19 agreement between us, that we will maintain the
20 confidentiality of these documents, the other relates to
21 the impact disclosure would have on the relationship
22 between us. They are a different order, I think.

23 Q But presumably it has no impact because you retain the
24 documents in the public domain, don't you?

25 A Yes.

1 Q I think that is everything, Mr. Chairman.

2 THE CHAIRMAN: Thank you very much. Any re-examination?

3 MR. HAVERS: Just a little.

4 Re-examination by MR. HAVERS:

5 Mr. Patey, you have been asked to look at a range of
6 documents during the course of Mr. Gilby's questioning.

7 So far as you are aware, have those documents, or
8 their contents, been brought yet to the attention of the
9 Saudi Arabian Government?

10 A Not that I am aware of.

11 Q Secondly, if you had been asked to review those
12 documents with a view to indicating whether they should
13 have been released into the open files of the national
14 archive, are there any parts of those documents in
15 relation -- in respect of which you would have advised
16 against open release?

17 A I would have advised against open release on those parts
18 of the documents referring to serving members of the
19 Saudi Government. I am not sure I would have been --
20 I think one of the documents I was shown was an internal
21 memorandum of a private company, so I am not sure
22 I would have been in any -- I am not quite sure what the
23 release procedures are for that. Presumably it was
24 a leaked document, but had it been a public document
25 I would have argued against its release.

1 Q In particular, could you pick up Volume II? That is the
2 larger of the two bundles, and go to page 318, internal
3 numbering 91?

4 THE CHAIRMAN: Mr. Patey's numbering seems to be one page on
5 from ours, so it may be he's 319.

6 A 319, which is the last page of the Willy Morris
7 despatch, is it?

8 MR. GILBY: Yes. Your attention was drawn to a passage at
9 the top of that page. Is that -- what would have been
10 your view if consulted about the disclosure in the open
11 files of that passage?

12 A I would have been inclined to retain that for a bit
13 longer.

14 Q Could you just explain why?

15 A Because it refers to a system and a group of people who
16 are still in power in Saudi Arabia.

17 Q Can we just go on to 322, or rather internal numbering
18 nine 5, 323 in the Tribunal's numbering, another
19 document you were shown, in particular the first two
20 paragraphs? What view would you have taken about those
21 two paragraphs if asked to review?

22 THE CHAIRMAN: Can you just give me the page number again?

23 MR. HAVERS: Yes, internal numbering 95, 321 --

24 THE CHAIRMAN: Thank you very much. Yes. Thank you.

25 A I think that is marginal. I think I might have said

1 that General Tunis is dead, and Mr. Fitzpatrick has
2 moved on, and I think it is marginal. I would not
3 necessarily have objected to that one.

4 Q Thank you very much.

5 MR. HAVERS: That is all I ask in re-examination.

6 THE CHAIRMAN: Thank you. Mr. Patey, can I just ask one
7 thing? And it is very convenient we are on page 321.
8 Are you still on that page? You told us, or told
9 Mr. Gilby that in the sixties this was normal commercial
10 behaviour. Do you remember that?

11 A Yes. Yes.

12 THE CHAIRMAN: So, insofar as commission, to use a normal,
13 or a neutral phrase, was taken by those involved in
14 sales of arms, what is the sensitivity about that?

15 A In terms of -- you mean getting commissions and --

16 THE CHAIRMAN: Yes. It is normal commercial behaviour.

17 A I think the sensitivity is that things have moved on.
18 They are being judged by today's standards --

19 THE CHAIRMAN: Sorry, I am just asking you, you know, if we
20 are looking at that time, I mean, you have very
21 helpfully indicated now, that essentially what was
22 carried on there was normal commercial behaviour.

23 A I think it was well-understood -- I think what I was
24 arguing there was that it wasn't illegal in our terms,
25 it would not have been illegal for a British company to

1 have paid such a commission in the sixties, is my
2 understanding.

3 THE CHAIRMAN: Is there any sensitivity, then?

4 A I think it is sensitive politically in Saudi Arabia that
5 senior Princes and, you know, I probably want to say
6 most of this in closed session, but there is
7 a sensitivity surrounding the activities of Princes who
8 are in current positions on the historical record of
9 what they may or may not have done. I would prefer to
10 go into more detail in closed session.

11 THE CHAIRMAN: Yes. All right. Well, in any event -- but
12 your evidence is that it was normal commercial
13 behaviour, or understood commercial behaviour at that
14 time.

15 A What I was getting at is that Colonel Fitzpatrick, or
16 Brigadier Fitzpatrick at the time would not have thought
17 he was acting against his duties as a public servant in
18 passing on these details of a commission request,
19 whereas he would now, if he was the Defence Attache.

20 THE CHAIRMAN: Yes. I understand that. Yes. All right.
21 Thank you.

22 MR. HAVERS: Can I just ask one question arising from that?

23 THE CHAIRMAN: Can we just finish the questions from the
24 Tribunal, and then if you have got any we can hear them
25 together.

1 MR. HAVERS: Yes, of course.

2 THE CHAIRMAN: Right.

3 MR. HAVERS: Don't answer this question if you feel that it
4 would trespass into the closed evidence, rather than the
5 open evidence, but is the sensitivity that you have
6 described already in relation to members of the royal
7 family connected in some way with some action taken at
8 the time by the king, as he then was?

9 A Yes.

10 Q In relation to such payments?

11 A Yes. I mean --

12 Q If you prefer to explain that in detail in closed
13 session, please do.

14 A Yes. That goes to the heart of the closed session
15 evidence, I think.

16 THE CHAIRMAN: Right. Okay. Thank you very much. Well,
17 thank you very much, Mr. Gilby. That was extremely
18 helpful. I think at this stage -- sorry, did you want
19 to raise anything?

20 MR. GILBY: Just a housekeeping point, because I think you
21 were about to declare a closed session.

22 THE CHAIRMAN: How long we are going to be, probably, is one
23 of the housekeeping sessions.

24 MR. GILBY: Yes. It also bears on the CAAT case because
25 I have actually spoken to Mr. Hickman this morning, so

1 maybe -- should I just outline what the position is?
2 Would that be helpful?

3 THE CHAIRMAN: Yes. Very.

4 MR. GILBY: Mr. Hickman, as I understand it, is very keen to
5 finish the CAAT case today, or at least his closing
6 submissions in it. This is because of some commitments
7 he has next week, which I don't know the detail of.
8 Now, in terms of, obviously, my own personal
9 availability, obviously I can be here all day, if that
10 is required, but if you have a very long closing --
11 session in closed with Mr. Patey, and then after that
12 you decide you wish to hear Mr. Hickman and finish off
13 the CAAT case, then it might -- if you feel that is
14 going to take the rest of the day, then clearly,
15 obviously, there is no need for me to hang around
16 unnecessarily, so I just thought I would raise that with
17 you.

18 THE CHAIRMAN: Can you help me on that in open session? How
19 long do you think we are going to be? I imagine you
20 have just discussed that among --

21 MR. HAVERS: I am probably going to be about fifteen minutes
22 with Mr. Patey myself. I don't know whether
23 Mr. Choudhury has any questions for him. I doubt it.

24 MR. CHOUDHURY: I doubt it very much.

25 THE CHAIRMAN: Mr. Qureshi?

1 MR. QURESHI: It seems that we will certainly come close to
2 lunchtime in any event, so maybe the best thing would be
3 for Mr. Gilby to come back at two o'clock.

4 THE CHAIRMAN: Or leave a telephone number so can we
5 telephone you at lunchtime to see if we think we will
6 need you, and then, in any event, we will probably
7 interpose Mr. Hickman before we come back to you to
8 finish the CAAT appeal.

9 MR. GILBY: Yes. Okay. I will leave my 'phone number with
10 Sam.

11 THE CHAIRMAN: That would be very good. Thank you,
12 Mr. Gilby. Thank you very much indeed. What we might
13 do is just rise for ten minutes if that is convenient.

14 (11.12 am)

15 (Hearing adjourned)

16 (3.15 pm)

17 MR. HICKMAN: I finished yesterday by reference to the --
18 I was comparing the 1985 MoU and the memo that was
19 reported in the Guardian article in 1986, in early 1986.
20 I was explaining how the increase in the price between
21 the 1985 MoU and the later memo, without any
22 corresponding change in the hardware, was something that
23 knowledgable, informed individuals could infer,
24 particularly when that information is pieced together
25 with other information suggesting commission payments of

1 the same amounts as the price increase.

2 The point was to illustrate that although there
3 might be no evidence of bribery on the face of the MoUs,
4 or any other document, it is only when they are viewed
5 alongside other documents that it becomes apparent. It
6 is in the nature of investigative journalism, for
7 instance, to piece the jigsaws together and to follow
8 the money to see what happened in what month, and what
9 money comes in from where, and goes out from where, and
10 there is inevitably an incomplete picture, and
11 inferences have to be drawn.

12 Of course, the MoUs are the fixed point, as it were,
13 at the centre of the jigsaw.

14 So, that is where I left it before.

15 I would now like to refer the Tribunal, just on the
16 same theme of corruption, to Mr. Hildyard's statement,
17 and particularly page 145 of the main bundle.

18 I preface these remarks by reminding the Tribunal
19 that Mr. Hildyard has not been called for
20 cross-examination, although he was available to be
21 cross-examined. I invite the Tribunal, therefore, to
22 accept what is said in his statement. I would just like
23 to flag up some key passages in his evidence.

24 First of all, at page 145, paragraph nine:

25 "I make this statement in support of CAAT's appeal

1 because it is, in my view, imperative and in the public
2 interest that this Memorandum of Understanding does not
3 remain hidden from public view although these contracts
4 are unlike ... trade and poverty alleviation".

5 Again, these are statements that haven't been
6 challenged:

7 "Although the fight against corruption can
8 undoubtedly cause diplomatic frictions, these frictions
9 cannot be allowed to stand in the way of a fight against
10 a practice which benefits the few at the expense of the
11 many ... the public has a right to know about how far
12 we are enmeshed in it all".

13 I emphasise that last comment, because it is
14 important. These contracts are contracts that are being
15 entered into on behalf of the people of this country,
16 and therefore have enmeshed the people of this country
17 in things about which they know very little.

18 I invite the Tribunal to take that into account, and
19 to take the comments of Mr. Hildyard in that paragraph
20 into account when balancing the public interest in
21 favour of maintaining the exemption, and the importance
22 of transparency in particular in combating corruption.

23 I would also just highlight paragraphs 27 and 28
24 which relate specifically to corruption in Saudi Arabia,
25 and concerns about Saudi Arabia in particular. Again,

1 obviously, without meaning to suggest that the rest of
2 the statement isn't important reading, and I will try
3 and do this as quickly as possible, just the penultimate
4 paragraph.

5 THE CHAIRMAN: I think it is probably quicker if you just
6 leave us to read it when you get to it and -- the 69.3?

7 MR. HICKMAN: 69.3.

8 THE CHAIRMAN: We will just glance through that, if we may.

9 MR. HICKMAN: If I could then ask you to turn up the second
10 exhibit volume? I am just going to highlight a couple
11 of pages in that.

12 THE CHAIRMAN: If you just point us to them --

13 MR. HICKMAN: Page 874 to begin with. This is one of
14 a number of documents which are the sort of concluding
15 statements made by the G8, and there is a number of them
16 in there. This one I have just picked out really as an
17 example, deals, as you will see, with the importance of
18 transparency, fighting corruption.

19 Then at page 746 there is an extract, and I will
20 give you the full reference for this document, the
21 document is called --

22 THE CHAIRMAN: Can I just get there?

23 MR. HICKMAN: This is Kauffmann, K-A-U-F-F-M-A-N-N, Myths
24 and Realities of Government Corruption. That is the
25 title of the publication that is available on the

1 Internet, "The World Commission Forum, The World Bank",
2 it is a World Bank publication, Global Competitiveness
3 Report, and this is Chapter 2. I really just want to
4 highlight the text from -- in particular from page 744
5 through to 746, and I would just draw attention to the
6 box on page 746. You will see that there is a number of
7 bullet points there.

8 THE CHAIRMAN: Is this box one?

9 MR. HICKMAN: Yes.

10 THE CHAIRMAN: Shall we just read through that?

11 MR. HICKMAN: I am sorry, sir. I was trying to take this at
12 speed but perhaps I should slow down.

13 THE CHAIRMAN: No. That is all right.

14 MR. HICKMAN: You will see that the importance of Freedom of
15 Information laws is mentioned. That is just an example.

16 Page 606, so just working backwards through the
17 bundle, as it were, we find there the case of
18 Cornerhouse and Trade & Industry Secretary, 2005, 1,
19 Weekly Law Reports. That is also included in the
20 Authorities bundle, at Tab 14. It is paragraph 137 in
21 which the Court of Appeal stresses the important
22 public -- public importance in tackling corruption.
23 Where the taxpayer is involved, the question of whether
24 or not companies are obliged to provide details of money
25 paid to middlemen such as is required by the export

1 credit guarantee department with the strong endorsement
2 of the relevant Minister for the change to be made is
3 a matter of general public importance.

4 Sir, this then takes me to Article 5 of the
5 bribery --

6 THE CHAIRMAN: Of the convention?

7 MR. HICKMAN: -- of the bribery convention. I have realised
8 that somehow it is not --

9 THE CHAIRMAN: It is in the papers. I have certainly found
10 it.

11 MR. HICKMAN: It is in exhibit Volume 2 but I am not sure
12 that it is in the authorities.

13 THE CHAIRMAN: I have read it and I know it. Yes.

14 MR. HICKMAN: It is also referred to in my skeleton
15 argument. I set it out. Obviously that is principally
16 directed with -- at -- prosecutions, but it does also
17 refer to the investigation of corruption, and it
18 stresses that commercial interests cannot be taken into
19 account, and although that is not either binding on this
20 Tribunal or necessarily directly in play, it is,
21 nonetheless, an important consideration when one is
22 balancing the public interest in transparency.

23 THE CHAIRMAN: It has some qualifications. There is
24 a degree of, as I remember it -- maybe we ought just to
25 find it.

1 MR. HICKMAN: Yes. Shall we turn it up? Perhaps the
2 quickest thing would be if I just hand around --

3 THE CHAIRMAN: If you have got a copy there, yes. Which can
4 which can it is in the bundle at 620.

5 MR. HICKMAN: Yes, I think it is:
6 "Investigation and prosecution of the bribery of
7 a foreign public official ... potential effects upon
8 relations with another state or the identity of the
9 natural legal persons involved".

10 THE CHAIRMAN: It is the margin of appreciation at the end
11 of the first sentence that I had in mind. Subject to
12 the applicable rules and principles of each party. The
13 overall point I follow.

14 MR. HICKMAN: Yes. Well, I mean, in some respects I don't
15 think that takes things further in this context, because
16 we are trying to identify what the applicable rule is,
17 so it is the second line which assists in identifying
18 what the applicable rule is, in this context.

19 THE CHAIRMAN: Yes. What you say, I see, is that they
20 should not be influenced by considerations of the
21 potential effect upon relations with another state.

22 MR. HICKMAN: Yes, or economic impact. That is a general
23 principle that has been accepted by all the contracting
24 parties, including the UK Government, and that that is
25 expressive of a balance which clearly -- well,

1 excludes -- when it is directly in play, that article
2 excludes those considerations. Although it is only
3 indirectly in play here, nonetheless I do say that it is
4 relevant when the balance comes to be weighed.

5 At this point I did just want to refer to another
6 authority which only occurred to me yesterday evening.
7 It is a case called Ex Parte Simms which the Tribunal
8 may be familiar with. Solely on the point of the value
9 of investigative journalism, it was recognized by the
10 House of Lords in a different context, in the context of
11 uncovering wrongful -- miscarriages of justice, but
12 nonetheless, in my submission, it is relevant, and
13 I would like to hand it up, if I may.

14 THE CHAIRMAN: Yes. Certainly.

15 MR. HICKMAN: This case concerned a prison policy which
16 essentially prevented prisoners from being able to speak
17 to investigative journalists, and that was held to be
18 contrary to a constitutional right, and the
19 constitutional right that was found was essentially the
20 right of prisoners to consult with investigative
21 journalists, by extension of the right to access to
22 privileged legal advice, but it was also on the broader
23 freedom of expression. That is really not the point, or
24 only indirectly the point.

25 If, sir, you could turn to page 127 you will see

1 there a lengthy passage quoted which is a witness
2 statement by Gareth Pierce which was accepted by Lord
3 Steyn and the rest of the House of Lords. It is
4 particularly over the page, page 128 where the evidence
5 is the value of investigative journalism in uncovering
6 miscarriages of justice, and it is just around about D,
7 down the page.

8 THE CHAIRMAN: We will read that to ourselves. Gareth
9 Pierce, I obviously out to know --

10 MR. HICKMAN: He is a solicitor, Beinberg solicitors, who
11 does a lot of human rights work and is particularly well
12 known in the field of miscarriages of justice and
13 terrorism.

14 THE CHAIRMAN: Right. Thank you.

15 MR. HICKMAN: That, although a different context, is equally
16 applicable to this case, in the sense that the
17 uncovering of commission payments, fees, is something
18 that is likely to be advanced by television programmes
19 such as Panorama because they have the money to do so,
20 and committed, public-spirited individuals and
21 journalists who are able to burrow through piles and
22 piles of manuscripts and piece the jigsaw together, and
23 the fact that those individuals are not official
24 prosecutors or investigators should not, in any way,
25 downplay their significance in the grander scheme, and

1 it is those individuals who would be trawling through
2 the documents that Mr. Gilby invites you to disclose,
3 and which you are invited to disclose in this appeal,
4 because obviously, they are historic, and they would not
5 disclose actual criminal offences.

6 If I could then ask you to turn up the 1985 MoU
7 again, with I is in exhibit Volume I, page 206, I just
8 want to briefly explain the significance of some of
9 these other clauses. I have explained how they may be
10 significant, or I have given one example of how they may
11 be significant for someone seeking to uncover commission
12 payments and bribes, but there are other aspects of
13 these agreements that are -- of course, would be
14 relevant to other issues, for instance, the paragraphs
15 indicate that the Government was, at the time,
16 shouldering a considerable amount of risk by committing
17 support throughout to the Royal Saudi Airforce.

18 If, for example, at that time, what is now BAE
19 Systems had gone bust, then the Government was entering
20 an undertaking which it would have had to have
21 fulfilled.

22 In the third paragraph you will see undertakings to
23 purchase a Lightning aircraft. Now, that looks fairly
24 mundane, but is important because what that essentially
25 is doing, it is committing the UK Government to buy back

1 obsolete, possibly what some people would regard anyway
2 as potentially obsolete and, you know, useless, may be,
3 aircraft. The point is that it looks like a fairly
4 mundane clause but in the context it may be of
5 considerable significance.

6 The undertaking above that to support the service of
7 the Saudi Royal Air Force, for instance, I mean, it has
8 been suggested that obligations of this nature may still
9 be in effect, maybe even this one. I don't know. But
10 of course the political significance is very great
11 because the Government of whatever political persuasion
12 would be bound by this obligation, would be bound to
13 have -- provide support in Saudi Arabia, potentially
14 indefinitely, or throughout the service, whatever that
15 means, of the Royal Saudi Airforce -- provides for
16 upgrade, future development of the aircraft. That may
17 also have significant political implications, and it may
18 still do, if it is still in effect.

19 It may create, and may have created, knock-on
20 effects for exports, arms export control, because in
21 committing an advance to providing certain armaments,
22 they may well have encountered problems later on which
23 they may have had to have got round it another way, and
24 an informed person may be able to identify, it may make
25 sense to an informed person, to explain what has

1 occurred at a later date.

2 I am not putting this forward as fact, I am just
3 looking at these clauses and providing some ideas as to
4 how, to an informed person, they may be significant.

5 Of course, before this hearing, for instance,
6 I don't think it was known -- certainly it has become
7 apparent during this hearing -- that some of the clauses
8 with similar effect to this are potentially still in
9 effect.

10 In terms of -- if I could ask you to turn to page
11 209, you will see there that there is an undertaking to
12 start work in the absence of detailed planning, or
13 a formal commitment.

14 Again, there is a significant risk in doing so.

15 This was at a time when oil prices were falling.

16 THE CHAIRMAN: Where is the passage that they are committing
17 themselves to start work? I am on page to the.

18 MR. HICKMAN: If you look at paragraph two -- "Must commence
19 before detailed planning is complete".

20 THE CHAIRMAN: Yes. Thank you.

21 MR. HICKMAN: Then there is a commitment to provide adequate
22 interim funding, which was made in the context where
23 there was a considerable uncertainty in the market.

24 Of course, another issue that you may have read
25 about in some of the documents is the commitment to

1 provide equipment that is in some of these agreements
2 immediately, which, of course, prioritises their
3 deployment by UK forces.

4 You will have seen in the 1973 memorandum, for
5 example, far more detailed provisions about when
6 payments are due in, and provision going out, and those
7 are obviously of more use to someone trying to piece the
8 jigsaw together, and to follow the money, find out what
9 is going on.

10 I didn't want to go through any more of the clauses
11 in any more detail than that because I think I have made
12 the point.

13 If I can now turn on to the subject of the fact that
14 there is new contracts that have been entered into? In
15 substance, the position is that the contracts, the Al
16 Yamamah contracts have been superceded.

17 If I could ask you, please, to turn to exhibit
18 Volume I, page 168D(i), this is the memo -- sorry, this
19 is the press release.

20 THE CHAIRMAN: "Tornado Bribes"?

21 MR. HICKMAN: No. Sorry, 168D(i). It is the press release
22 about the Eurofighter Typhoon. This is the public
23 position of the Government.

24 If you look, for instance, at paragraph 4, the last:

25 "Typhoon aircraft will replace Tornado Air Defence

1 Variant aircraft and others currently in service with
2 the Royal Saudi Airforce".

3 It refers generally to the ongoing relationship
4 between the UK and Saudi Arabia.

5 Now, it seems clear from that, without, obviously,
6 having seen the documents themselves, that these
7 contracts, and this relationship, is now based on these
8 new contracts, and that insofar as the Al Yamamah deals
9 are still in effect, they are, in a sense, being run
10 down.

11 In substance, the public position, in any event, of
12 the Government is that there is a new regime in place
13 that is the principal basis for that relationship
14 between the UK and the Saudi Government.

15 In these proceedings the Ministry of Defence have
16 sought to distance themselves from that and have sought
17 to say, "Well, no, Eurofighter is completely separate
18 and Al Yamamah continues".

19 Well, that may or may not be the case in terms of
20 the legal niceties, but in terms of the substance and
21 the public face of the relationship, that appears not to
22 be the case.

23 Can I refer you, please, to page 91, which is
24 Mr. Pollard's statement? At paragraph 5 you will see
25 there he said:

1 "Al Yamamah continued its existence ... was
2 incorporated into a new Saudi British defence
3 co-operation programme".

4 Now that, he says, is separate from the Eurofighter
5 Typhoon, and there was some continuing extant
6 obligations under the original contract. I cannot
7 dispute that because I haven't seen the contract, but
8 nonetheless, the substance of the matter and the outward
9 position is that Al Yamamah is no longer -- in
10 Mr. Pollard's words -- "In existence".

11 It is certainly a very significant change of
12 circumstances. In that respect, I would like to refer
13 to the ombudsman's decision, which is at page 186L of
14 the bundle, which I don't think we have looked at
15 before.

16 THE CHAIRMAN: That is in the exhibits, is it?

17 MR. HICKMAN: Sorry. It is in the exhibits Bundle 1. It is
18 186L.

19 THE CHAIRMAN: Is this the additional pages you gave us?

20 MR. HICKMAN: Yes.

21 THE CHAIRMAN: I am not sure that I have those.

22 MR. HICKMAN: Sorry, it is at page 168L. This is the
23 ombudsman's decision not to disclose 1992 National Audit
24 Office reports, and at this point, the Al Yamamah
25 contracts were still the dominant governing contracts in

1 relation to UK's relationship with Saudi Arabia, because
2 this is 2004, and we find the Government's position is,
3 "Well, these are still the dominant contracts. We are
4 also negotiating a new contract, and therefore it would
5 be particularly bad news to release the National Audit
6 Office response at the moment", and if you see paragraph
7 11 at page internal numbering 4, you will see similarly
8 to the position that has been taken in this appeal, the
9 Permanent Secretary referred to the many thousands of
10 jobs which have been created by Al Yamamah, commercial
11 interests at stake, it goes on to say:

12 "The report contains sensitive commercial
13 information ... taxpayer".

14 Then it goes on:

15 "Due to the continuing nature of the contract ..."

16 And then in the very last line of that paragraph it
17 refers to the fact that there was a review of the
18 funding arrangements for the project.

19 Now, as we have learned, the funding arrangements
20 now have been changed, and Mr. Pollard said that the
21 funding arrangements have now been superceded, and there
22 is now a new set of funding arrangements. That, as
23 I understood it, was his evidence.

24 If we look at the basis of the ombudsman's decision,
25 she was impressed by these arguments, at page 168&L11.

1 I just wanted to flag this up.

2 First of all, if you track down to the second --
3 sorry, the third sentence:

4 "Both the MoD and the FCO have acknowledged that
5 there is a strong public interest in the NAO report and
6 the Al Yamamah project itself. However, they do not
7 believe public interest outweighs ... is still very much
8 a going concern".

9 Now, the situation has changed significantly since
10 then. It may be, and it apparently is the fact that
11 there is some obligations under the original MoUs which
12 remain extant, but nonetheless, it appears to be the
13 case that many others are not, and that the funding
14 arrangements have been superceded, and yet the Ministry
15 of Defence's position is the same, which appears to mean
16 that as long as any obligations, however minor remain
17 extant, the whole thing is confidential. There seems to
18 have been no adjustment in the Ministry of Defence
19 position, despite the significant change of
20 circumstances.

21 In relation to these extant obligations, I would
22 make the following points; first of all, and again,
23 without having seen them, so I am surmising, we surmise
24 that they are UK obligations, or principally -- possibly
25 principally UK's obligations because they seem to relate

1 to UK commitments to do things in Saudi Arabia. I could
2 be wrong. If that is right, there is a great deal less
3 sensitivity for those obligations than if they were
4 actually Saudi Arabia's undertakings, and there is
5 a great deal more public interest in the UK taxpayers
6 knowing what these commitments are.

7 They appear to be the reason for the exception that
8 has been made to DESO being wound up, and that is
9 a matter of public -- contemporary public concern, and
10 again, it is only an issue that has arisen since last
11 summer, because DESO was only starting to be announced
12 that it was going to be wound up last year.

13 It also is possibly the case that these obligations
14 relate to simply ongoing maintenance and possibly
15 I think Mr. Pollard said also upgrading, but that has to
16 be taken in the context of the fact that the public
17 position of the Ministry of Defence, as we have seen, is
18 that the Typhoon aircraft will replace the Tornado
19 aircraft.

20 It may be possible, if it is felt that those extant
21 obligations are sticking points, to redact those
22 obligations.

23 Insofar as other obligations and other parts of the
24 agreement have become historic, then there is no reason
25 why they cannot be disclosed. Certainly, the balance

1 must be very different in respect -- or may be very
2 different, I wouldn't want to say that it must be, but
3 it may be very different with respect to that.

4 Certainly, it must be necessary to very precisely
5 identify, and I presume this has been done, those parts
6 of the MoUs which are still in effect, and those parts
7 which are not.

8 Before I return to the evidence of prejudice,
9 I think at this point I need to turn to the question of
10 when the Tribunal --

11 THE CHAIRMAN: Right.

12 MR. HICKMAN: I will try to do so as quickly as possible.

13 I would like to make seven points.

14 THE CHAIRMAN: Do I need the Act?

15 MR. HICKMAN: We will do.

16 THE CHAIRMAN: Shall I get it out now?

17 MR. HICKMAN: Yes, let's get that out, but I am going to
18 make a number of points before we turn to the Act.

19 THE CHAIRMAN: Sure. Let me just get it out for the minute.

20 MR. HICKMAN: Point number 1. Mr. MacLean's first objection
21 that he made was that there had been no notice given
22 until our skeleton argument of this point. However, it
23 was made clear in the appeal that the point was being
24 taken that the MoUs had become historic, and this is
25 a legal submission, and the skeleton argument was

1 submitted in due time, over ten days ago, which --

2 THE CHAIRMAN: I don't think you need worry about any of
3 that.

4 MR. HICKMAN: Second point, Mr. MacLean's second objection
5 was that this point had been fully argued and decided
6 before.

7 Well, it is now probably even more exhaustively
8 argued on this occasion, and if anything the Tribunal is
9 in a better position than previously, although, of
10 course, we don't know the extent of argument in that
11 case. Certainly it has been fully argued now, or it
12 will be.

13 Third point, there is no --

14 THE CHAIRMAN: I mean, technically, plainly, previous
15 decisions of the Tribunal are persuasive, but they are
16 no more than persuasive, are they?

17 MR. HICKMAN: They are persuasive in some respects, but in
18 this respect I wouldn't say that it should be
19 persuasive, given that the full argument has been heard
20 on the point. If this Tribunal considers the previous
21 Tribunal to have been wrong it should depart from it,
22 and I do not see any reason why it should be persuaded
23 by the fact that it reached a different decision.

24 THE CHAIRMAN: Maybe it is the wrong word. Or, "Have regard
25 to". We will make our own mind up.

1 MR. HICKMAN: So that is point number three.

2 Point number Four. Policy considerations. Why is
3 this important? I think it is important to approach the
4 statute on this basis.

5 First of all, could I just refer you -- I know we
6 have turned the Act up but I forgot, I want to refer you
7 to the Hogan decision again, which is at the Authorities
8 bundle at Tab 6, paragraph 58.

9 The principles set out there:

10 "The passage of time will have an important bearing
11 ... diminishes over time".

12 THE CHAIRMAN: Where are you? Which paragraph?

13 MR. HICKMAN: Paragraph 58.

14 THE CHAIRMAN: Yes?

15 MR. HICKMAN: So, when interpreting the statute, it must be
16 interpreted against the Tribunal's own recognition that
17 the passage of time has an important bearing on the
18 public interest balance.

19 Second subpoint, I am on point four at the moment,
20 and I am going to make a number of points of policy or
21 principle. That is the first one.

22 The second one, there is a real difficulty in
23 winding the clock back for the Tribunal, in the
24 Tribunal's own mind, to, in this case, three years
25 previously. This is particularly so where, as in this

1 case, the evidence is largely postdates -- a lot of it
2 postdates. Let's think, for example, of Mr. Patey.

3 Mr. Patey wasn't the Ambassador in February 2005,
4 and his evidence is based on his experience since April
5 last year.

6 Third point, the effect of the interpretation that
7 has been previously given to the statute by this
8 Tribunal and previous Tribunals, is that any change of
9 circumstances cannot be considered. Can only be
10 considered insofar as it sheds some light on what the
11 public interest balance would have been at the date of
12 the information request.

13 Now, it is possible to think up any number of
14 hypothetical circumstances which would raise an issue.
15 Let's consider, for example, information about historic
16 defence outpost in a state somewhere in the world that
17 someone asks for some information about, and there is
18 a very tiny risk that this could be prejudicial to let
19 someone have this, but then between making the
20 information request and the matter coming before the
21 Tribunal, troops are deployed in that area of the
22 world -- just as an example I thought up --

23 THE CHAIRMAN: That is fine.

24 MR. HICKMAN: Suddenly, what was a historic defence outpost
25 might become of operational significance.

1 THE CHAIRMAN: Plainly, that is something I must turn my
2 mind to. Is the solution to that on the basis you are
3 then looking to see what steps ought to be taken in the
4 public interest then to exercise your decision as to
5 what enforcement action should be taken in the light of
6 the situation contemporary to the decision?

7 MR. HICKMAN: So you would say well, the public interest
8 balance actually is in favour of disclosure, or was this
9 favour of disclosure, but then the Tribunal would have
10 to go through the exercise again anyway.

11 THE CHAIRMAN: Well, it would be them exercising its
12 discretion, presumably in the public interest. I am not
13 sure it would be then -- it would have concluded that
14 the complaint wasn't handled in accordance with part one
15 of the Act, whatever that means, as at the date,
16 whatever date it is, for the part one purpose, but then
17 it needs -- if it comes to -- if it wasn't correctly
18 handled, then it needs to consider, in its discretion,
19 what action ought to be taken to comply.

20 MR. HICKMAN: Yes, but in exercising its discretion it could
21 only be properly exercised on the basis that it came to
22 a public interest balance in doing that.

23 THE CHAIRMAN: Yes. I agree.

24 MR. HICKMAN: So it would have to do the exercise.

25 THE CHAIRMAN: Yes, but I just wonder if that -- I mean,

1 precisely the point you make, going through my own mind,
2 and I just wondered if the language is being used
3 deliberately to distinguish looking back to the past for
4 deciding whether it has been handled correctly, if you
5 come to the view it wasn't, then those who legislate
6 said, "Well, it obviously is important", for the reasons
7 you say, but the decision as to what should be done to
8 comply with the duty is actually then considered at the
9 time of the decision.

10 MR. HICKMAN: Well, I will turn to the language of the Act,
11 but there are a number of examples that could be thought
12 up. A terrorist attack. Somebody dies, and therefore
13 the public interest balance changes; a contract
14 terminates.

15 THE CHAIRMAN: I think you are pushing on a totally open
16 door on that.

17 MR. HICKMAN: Okay, fine, but the distinction is not easy --
18 an easy one to draw between when there is a change of
19 circumstance, and when that change of circumstance is
20 relevant to what the public interest would have been
21 before.

22 Let's take an example from this case; disclosure of
23 a document in a newspaper. When is that event evidence
24 of a reaction that would have occurred before, and when
25 does it, in a sense, create a cumulative -- it would

1 create a cumulative reaction, because, for example, the
2 regime is upset about disclosure, then if there is
3 another disclosure it will be more upset, and it is
4 asking the Tribunal to draw very fine distinctions in
5 its mind, and if the Tribunal is not prepared to depart
6 from the previous law then those sort of cumulative
7 effects cannot be taken into account because that would
8 be a change of circumstance. So if it is thought, for
9 example, that a latter assurance or a latter disclosure
10 would make the Saudi Arabian Government now more upset
11 about disclosure of the document, that cannot be taken
12 into account. You can only take that into account as
13 evidence of how the Saudi Arabian regime would have
14 reacted at the time.

15 Point number five. That was all under policy
16 considerations --

17 THE CHAIRMAN: Yes. I made policy considerations your third
18 point. I have got one, two, three --

19 MR. HICKMAN: Number one was time, number two was been fully
20 argued before, number three was no binding precedent.

21 THE CHAIRMAN: Oh right.

22 MR. HICKMAN: Number four was policy considerations. Point
23 five is that the law already recognizes that this
24 distinction cannot be water tight.

25 If I could ask you to turn to the DFDS case in the

1 Authorities bundle at Tab 3, this is the original
2 decision where this was, as it were -- this point was
3 accepted by counsel on both sides, and paragraph 20,
4 subparagraph 4:

5 "The competing public interest must be assessed by
6 deference to the date of request or at least around that
7 time".

8 It is not a precise formulation. It is not very
9 satisfactory. It recognizes that it is not very
10 satisfactory to be tied to the date of the request.

11 The second point is, of course, and I don't really
12 want to go over this point, that the date of the request
13 probably isn't the correct date either.

14 THE CHAIRMAN: Again, if you are going to distinguish that
15 from the point I was discussing with Mr. MacLean --

16 MR. HICKMAN: I think they are two separate points, yes.
17 Perhaps we can come on to the statute.

18 THE CHAIRMAN: Hmm.

19 MR. HICKMAN: Features of the Act. The first point is that
20 Section 1 sets out an entitlement:

21 "Any person making a request for information is
22 entitled to have information communicated to him".

23 That is a statement of present entitlement. It is
24 a right which subsists for as long as Section 1
25 subsists, and I would point out two features here.

1 Well, it is a connected feature. If you contrast
2 subparagraphs 1(a) and 1(b), 1(a) refers to a right to
3 be informed by a public authority. No such reference is
4 made in 1(b). It is just a right to be communicated the
5 information.

6 That is then expressed to be subject to Section 2,
7 and if we turn to Section 2, again, we see that
8 distinction carried through into Section 2, subsection
9 2. Section 1(b) does not apply in all the circumstances
10 of the case. The public interest in maintaining the
11 exception outweighs the public interest in disclosure.
12 Again, it is simply a present -- it doesn't affect the
13 fact that it is a present entitlement.

14 I am sorry, I have passed over Section 1
15 subsection -- which also may be of relevance, which says
16 that regard may be had to later amendments and
17 deletions.

18 THE CHAIRMAN: I don't immediately follow. What is it
19 saying?

20 MR. HICKMAN: I think it is just saying that if the public
21 authority would have a duty under Section 1 read with
22 the Section 10, it would have a duty to provide the
23 information. Any later deletion or amendment would have
24 to be taken into account when considering an entitlement
25 under Section 1.

1 THE CHAIRMAN: What, amendment of the request?

2 MR. HICKMAN: Of the information, I believe. I think that
3 doesn't really advance matters but I thought I would
4 highlight it.

5 THE CHAIRMAN: All right.

6 MR. HICKMAN: Section 10.1 provides that a public authority
7 --

8 THE CHAIRMAN: I see. You are absolutely right. I see what
9 you are saying.

10 MR. HICKMAN: Section 10.1:
11 "A public authority must reply promptly and not
12 later than the 20th day".

13 It is clearly not a breach by the public authority
14 until the 20th day, but that does not mean that there is
15 not an ongoing general right to the information which is
16 provided for by Section 1. You have a right to the
17 information, the public authority itself would not have
18 been in breach unless it is complied within the 20th
19 day.

20 THE CHAIRMAN: Well, it is promptly, isn't it.

21 MR. HICKMAN: Yes. Promptly. Then that takes us through to
22 Section 45 which refers to the Code of Practice, and we
23 have already seen that the Code of Practice anticipates
24 a full fresh reconsideration, and indeed that must be
25 right, because if the initial decision was, as in this

1 case, flawed and hadn't taken into account the balance
2 correctly, then there would have to be
3 a reconsideration. We say that that is what follows
4 through each stage of the Act.

5 THE CHAIRMAN: I mean if, on the review, the
6 reconsideration, the re-evaluation, was concluded that
7 the -- 43 didn't apply but 27 did, I am taking
8 a hypothetical example -- what would be the operative
9 basis for disclosure or non-disclosure? It has to be
10 the ground, then, to be examined by the commission.

11 MR. HICKMAN: Well, it would have to be the later one, and
12 that is really the point.

13 Sir, that takes us on, then, to the Commissioner's
14 decision at Section 50:

15 "Any person may apply to the Commissioner for
16 a decision whether, in any specified request a request
17 for information has been dealt with in accordance with
18 the requirements of part one".

19 Now, the reference to, "Has been", doesn't really
20 take us anywhere, as it may mean, "Has been as the law
21 requires now", or it may mean, "Has been as the law
22 required then". I don't think it takes one further
23 either way.

24 If anything, it supports the construction which we
25 say is correct, because it doesn't say whether the

1 request was dealt with or had been dealt with, "Has been
2 dealt".

3 Now of course it may be that because of a latter
4 change of circumstances no criticism could be levelled,
5 but that, nonetheless, if the request is refused, and
6 the public interest now requires the information to be
7 communicated, the request hasn't been dealt with in the
8 way now required by the law.

9 Maybe that is just unfortunate because of the change
10 of circumstances.

11 Section 50.4 is relevant as well.

12 THE CHAIRMAN: Can you just give me a moment?

13 Thank you.

14 MR. HICKMAN: In any event, the Commissioner's position is
15 not framed in the same terms as this Tribunal's
16 jurisdiction.

17 If we look at 54.4, which refers to the
18 Commissioner:

19 "Where the Commissioner decides that a public
20 authority has failed to communicate information it may
21 specify the steps".

22 I emphasise there the reference to, "Is required to
23 do so by Section 1.1. Not, "Was required to do so by
24 Section 1.1", but, "Is required to do so by Section
25 1.1".

1 That refers back, because there is an ongoing
2 general entitlement to the information. So it is
3 saying; if another request was made today, would the
4 person be entitled, if so, the Commissioner must specify
5 the steps which must be taken by the authority for
6 complying with the requirements.

7 THE CHAIRMAN: Yes.

8 MR. HICKMAN: Then 51, the reference in 1(b)(i), and I am
9 going to try and speed up a little bit because I have
10 got my eye on the clock, "Complied or is complying";
11 that perhaps does not take things that much further, but
12 it does put beyond doubt that the Commissioner is not
13 limited to looking at the past.

14 And it refers in the paragraph underneath that to,
15 "Compliance with part one".

16 So far, there has been nothing to suggest that the
17 role is expost. If anything, it suggests the opposite.

18 We now turn on to Section 58, which is the
19 jurisdiction of this Tribunal, and it refers to:

20 "On appeal, the Tribunal considers that the notice
21 against which the appeal is brought is not in accordance
22 with the law".

23 That must mean that if the notice says you cannot
24 have disclosure when there is an entitlement under
25 Section 1.

1 In that respect I would like to refer you to the
2 position in immigration law, and I don't know that this
3 was something that was considered by the Tribunal
4 in Evans. I have put this in your supplementary bundle.
5 I have put an extract from MacDonald, which is the
6 leading text on immigration law.

7 THE CHAIRMAN: Yes.

8 MR. HICKMAN: I fear again that I have only photocopied one
9 of the --

10 THE CHAIRMAN: It is Tab 3.

11 MR. HICKMAN: Yes. I think you might be assisted if I pass
12 up the preceding page, because it sets out the powers of
13 the Tribunal on appeal.

14 I had bringing those copies of the statute
15 provisions, and if it would assist I can submit those
16 subsequently --

17 THE CHAIRMAN: Sorry?

18 MR. HICKMAN: I had considered bringing with me the actual
19 statutory provisions, but --

20 THE CHAIRMAN: Well, it might be helpful if you can just
21 supply them to me, or supply them to us on Monday.

22 MR. HICKMAN: I will do that, but it sets out there -- the
23 page I have just handed up says, "Powers of the
24 Tribunal". Paragraph 18.46:

25 "The nationality and immigration ... against which

1 the appeal is brought or is treated as being brought was
2 not in accordance with the law, including immigration
3 rules".

4 Then if you turn over the page, I am just going to
5 highlight this.

6 The issue is particularly important in immigration
7 law in a way that is analogous to this, because in
8 immigration law, a change of circumstances, you don't
9 deport someone if there is a change of circumstances.

10 If you look at paragraph 18.49, halfway down the
11 paragraph -- no, I am sorry, two-thirds of the way down:

12 "The differences in wording between the 1999 Act
13 and the 2002 Act provision provide more scope for
14 a successful argument now".

15 I am sorry -- it may be easier if you just read the
16 paragraph.

17 THE CHAIRMAN: Yes. All right.

18 MR. HICKMAN: Then I will make the point.

19 THE CHAIRMAN: I have read that.

20 MR. HICKMAN: Clearly an analogous provision is read in
21 a way which requires the law to be applied at the time
22 of the Tribunal decision, and the uncertainty that has
23 dogged immigration law doesn't apply here, because it
24 doesn't refer here. It doesn't say, "Was not in
25 accordance with the law", it says, "Is not in accordance

1 with the law".

2 So, this is an a fortiori case.

3 THE CHAIRMAN: Yes. I see. The notice we are looking at is
4 the notice of the Commissioner, so what you say is that
5 we should look at the Commissioner's notice, whether it
6 is not in accordance with law, or whether -- but the
7 exercise of a discretion is expressed in the past, isn't
8 it? Or maybe it is neutral.

9 MR. HICKMAN: I would say it is neutral.

10 The point is, the submission is that the previous
11 decision in Evans was simply wrong and that perhaps
12 there had not been a case such as this, where, although
13 it was said to be important in evidence, was quite as
14 stark as it is here.

15 It is a point of importance, and there is nothing in
16 this -- in the Freedom of Information Act which requires
17 the approach in Evans to be adopted, and there is
18 everything in it which requires -- and the approach
19 I have just summarized, and that the approach that is
20 supported by policy and common sense.

21 On Evans, I will not turn it up, but noting the
22 relevant paragraph in Evans refers to the Tribunal's
23 jurisdiction being, "Wrong", in law which may not be
24 significant but they clearly haven't framed the test in
25 the right way, is clearly in accordance with the law,

1 may not be significant, but, "Wrong", does perhaps
2 suggest that there was some previous fault, and it also,
3 of course, refers to the information request at the time
4 of the request. There was no consideration, at least
5 expressly, in the judgment of the immigration law
6 context, and on reconsidering that paragraph it is clear
7 that there was no actual reasoning, it was simply
8 assertion.

9 According to my watch it is quarter past.

10 THE CHAIRMAN: Well, I make exactly what that clock says but
11 don't worry. We will give you until twenty to, all
12 right? We may lose Sam at half past.

13 MR. HICKMAN: If I could turn, then, back to the evidence,
14 Mr. Havers and Mr. MacLean in their skeleton argument at
15 paragraphs 60-64, and I don't need to turn it up, but if
16 you just note it, 60-64, they cite a number of
17 authorities to the effect that foreign policy is not
18 generally susceptible to judicial assessment.

19 There is, however, an exception to that which
20 applies in this case, and I have handed up -- it is in
21 your supplementary Authorities bundle -- the case of
22 Pinochet, which is the case that is cited for this
23 exception, and in particular in the judgment of Lord
24 Nicholls at page 106 of the report where it refers to --

25 THE CHAIRMAN: Page 106?

1 MR. HICKMAN: Yes. I am afraid I think this preceded the
2 paragraph numbering practice.

3 THE CHAIRMAN: Just give me the number.

4 MR. HICKMAN: You will see it is under the heading, "Act of
5 state non-justiciability", and also dealt with by Lord
6 Steyn at page 117 in slightly briefer terms.

7 The point is simply that; what is the case where
8 Parliament has not required the courts to consider the
9 issue, is not the same position where Parliament has
10 expressly required the courts to consider the issue, and
11 here Parliament has expressly required a balancing
12 exercise to be undertaken.

13 So, the authorities cited are not in point.

14 This issue has been considered by the Tribunal on
15 a number of occasions, and I would -- I don't think we
16 need to turn it up, but if I can refer to the Foreign &
17 Commonwealth Office case at Tab 4 and the following
18 paragraphs, 36(3), paragraphs 38-39, paragraph 47, and
19 the Department for Education & Skills case, which is at
20 Tab 3 at paragraphs 22 and 72.

21 THE CHAIRMAN: Right. I will look at those.

22 MR. HICKMAN: Now, the issue of --

23 THE CHAIRMAN: I suppose you pray in aid also particular
24 procedures encompassed under Section 24 of the national
25 security, where the Tribunal is put in a particular

1 position with a certificate, and so on.

2 MR. HICKMAN: Precisely.

3 This Tribunal must grapple with these issues just as
4 it grapples with issues under the other exemptions.

5 That brings us on to the evidence of Mr. Patey.

6 Evidence of Mr. Patey should be treated with
7 caution, and it should be treated with caution for
8 a number of reasons. First of all, the shifting ground
9 that Mr. Patey's evidence displays.

10 For instance, in relation to confidentiality,
11 confidentiality seems to have become, at least, central,
12 and yet the basis for that supposed confidentiality
13 seems to be constantly changing.

14 Mr. Patey, in his witness statement, said, at
15 paragraph 39, that disclosure would, in the minds of the
16 Saudis, violate one of the express terms of the
17 agreement.

18 Now, he does not say in terms there that there is an
19 express term in the agreement, but he did say that in
20 his evidence, on Day 1 at page 92 Mr. Patey said:

21 "The MoUs themselves have a specific
22 confidentiality clause".

23 That, certainly in relation to two of the MoUs,
24 turns out not to be the case. Mr. Patey also suggested
25 that in his witness statement at paragraph 34 that the

1 MoUs are, by their very nature, confidential. That also
2 is not correct, and Mr. Pollard expressly distanced
3 himself from that assertion by Mr. Patey.

4 Thirdly it was said that the negotiations leading up
5 to the signing of the MoU were the basis for this
6 confidentiality, and that is at Day 1, page 105.

7 Within almost the same breath, we find Mr. Patey
8 departing from that, and saying, "Actually, it was
9 a later assurance", which he said was an assurance
10 provided after the Freedom of Information Act, and when
11 pushed, at page 109 of Day 1, he accepted that that
12 assurance must have been impliedly or expressly
13 qualified.

14 Those references are page 105 and page 109.

15 There is also an exchange which, at page 101 of
16 Day 1, in which the question which I put to Mr. Patey:

17 "Did you read through this memorandum before you
18 wrote your witness statement".

19 The answer which was received was, "No":

20 "Did you read through any of the memorandums?"

21 It must have been clear from that that that meant
22 before you wrote your witness statement:

23 "Yes, I read through the '85 and the '73 one,
24 I think. The '85 and the '73 one? Yes. Are you sure
25 ... looking at".

1 Clearly in one breath he says he hadn't read through
2 them before he wrote his witness statement and then he
3 said he had read through them. The position was he
4 hadn't read through them before writing his witness
5 statement, and yet he still saw fit to refer to an
6 express confidentiality clause and to come and give
7 evidence that there was an express confidentiality
8 clause.

9 More concerning is what Mr. Patey says about
10 national security.

11 Could I please refer you to his witness statement,
12 first of all at page 100 of the bundle, paragraph 18?
13 That is where Mr. Patey introduces the idea of sharing
14 information, and the physical and operational
15 co-operation between intelligence agencies. This is in
16 a section of his statement where he is dealing with
17 counter terrorism, and in general, it is at a part of
18 his statement where he is explaining the real importance
19 of his -- of the relationship with Saudi Arabia.

20 If we then go on to page 106, we see Mr. Patey
21 saying:

22 "In terms of counter terrorism matters we rely on
23 their full co-operation. If the Saudis are unable to
24 trust us with that information, in my view they would
25 simply not provide it to us. That would seriously

1 undermine... on consular matters wouldn't".

2 Either that should not be in that statement or it is
3 in that statement because it is suggested that
4 disclosure of these MoUs and Mr. Gilby's documents would
5 impact on counter terrorism matters.

6 However, we have seen, because Mr. Havers took us to
7 the sections in his closing submissions, that Mr. Patey
8 said very clearly, could not have said it in any clearer
9 terms, that disclosure of these MoUs would not impact on
10 national security matters.

11 Now, that is concerning, because national security
12 is not something that should be lightly referred to.
13 Counter terrorism is not something that should be
14 lightly referred to. It is something that courts, and
15 Tribunals, take with the utmost seriousness, and it is
16 known to be something that, when introduced to a court,
17 courts' instinctive reaction is to back off, and yet it
18 was introduced into this statement, and Mr. Patey
19 qualified it when taken back through his statement by
20 Mr. Havers.

21 Now that throws into doubt whether this statement
22 represents an overstatement, because if you can
23 overstate in relation to national security, then you can
24 overstate in relation to everything else.

25 In relation to the statement itself, I have already

1 drawn attention to the distinction between a breach of
2 confidentiality and a disclosure of confidentiality by
3 law, and I would ask the Tribunal to read the evidence
4 with that in mind.

5 I would also indicate that there are a lot of ifs in
6 this statement, and a not of, "Mights". For example, at
7 paragraph 2:

8 "This is intended to put what I will later say
9 about ... of the exempted information".

10 Speculation.

11 Paragraph 43, the first line:

12 "If we are to have an ongoing effective
13 relationship ..."

14 The implication is that this disclosure would
15 prevent an ongoing relationship. That is not actually
16 stated in terms.

17 It is the implication that is being suggested to the
18 Tribunal. It is not stated.

19 Again, paragraph 44:

20 "If the Saudis felt unable to trust us..."

21 Paragraph 46:

22 "If the Saudis are no longer able to trust us".

23 The extent to which Mr. Patey's evidence, oral
24 evidence, differed, was significant, and I think
25 evidenced by the fact that Mr. Havers felt necessary in

1 re-examination to go back and ask Mr. Patey whether the
2 relevant paragraphs of his evidence he still adhered to.
3 In what -- well, if not leading questions, then very
4 close to leading questions, and I would therefore invite
5 the Tribunal to look only at what was said in oral
6 examination.

7 The relevant passage is towards the end of the first
8 day, and I have set it out in my note.

9 THE CHAIRMAN: I have got a reference in the transcript.

10 MR. HICKMAN: You have got it in the transcript in.

11 THE CHAIRMAN: If you don't have a reference, don't waste
12 time on it.

13 MR. HICKMAN: He says that the Saudis would call into
14 question whether they would continue to have agreements
15 with us:

16 "There are negotiations going on. We have just
17 signed another contract. They would have second
18 thoughts. There could be some immediate consequences in
19 the defence field".

20 It is only that field that he identified any
21 consequences, and even then he said that there could be.

22 Reference to calling into question, reference to
23 second thoughts. It is speculation. It is speculation
24 that can be mitigated by an appropriate approach and
25 explanation to the Saudi Arabian Government.

1 I have set out at some length in my note the
2 passages that relate to what can be expected of the
3 Saudi Arabian Government, and there is a tension there
4 between the fact that the Saudi Arabian Government
5 appear to accept, for example, in relation to Al Nasari
6 and Sadiq Al Fuqi, that they accept things with
7 considerable more embarrassment and importance to them,
8 surely, than the release of a 20-year-old MoU, and
9 I would just refer, then, to what I have said about that
10 in my closing note.

11 We do say that the Tribunal should not take into
12 account reactions to disclosure that would be irrational
13 and disproportionate. That is countered bit Ministry of
14 Defence by reference to the case of Throssle.

15 THE CHAIRMAN: Where are you?

16 MR. HICKMAN: Unfortunately my note has different paragraph
17 numbers to your note.

18 THE CHAIRMAN: I have read the pass aiming, thank you.

19 MR. HICKMAN: I apologize for that. We say that Throssle is
20 concerned very much with impacts on national security,
21 and that it is not in point. It is certainly not in any
22 event binding on this court but we do say it is not
23 directly in point, but in any event, as a sort of
24 secondary point, this Tribunal should not proceed on the
25 assumption that a foreign -- or should not lightly

1 proceed on the assumption that a foreign Government
2 would take an irrational or disproportionate response,
3 should take real convincing that the foreign Government
4 would not understand the nature of disclosure under the
5 Freedom of Information Act, particularly where the
6 closeness of the relationship is as close as Mr. Patey
7 told us that it was between the UK and Saudi Arabia.
8 I would invite the Tribunal to review the opening pages
9 of Mr. Patey's oral evidence where he explains the
10 closeness. He says that relations were as close as they
11 have ever been. He explains about the Justice Minister
12 coming over to learn about the justice system over here,
13 about the two kingdoms' dialogue. He said there were
14 regular exchanges at the official level.

15 This Tribunal should very -- take some real
16 convincing before accepting that the Saudi Arabian
17 Government --

18 THE CHAIRMAN: Right. Well now like a rugby match, the ball
19 is on the ground, and it is not like a rugby match in
20 this way -- what areas have you not covered,
21 Mr. Hickman? I am afraid we have got to stop now. You
22 have an option. Either if you identify the points you
23 haven't covered to me, what areas --

24 MR. HICKMAN: If you could give me one-and-a-half minutes?

25 THE CHAIRMAN: All right. One-and-a-half minutes.

1 MR. HICKMAN: I ask you to read my note.

2 THE CHAIRMAN: We will.

3 MR. HICKMAN: The effect of the disclosure of the 1985 MoU
4 you will see is dealt with in there. One of the points
5 we would emphasise, although we don't know really what
6 that reaction was because it has been dealt with in
7 closed, first of all, that this occurred at a time when
8 the Saudi Government was leaning very heavily on the UK
9 Government to withdraw the BAE inquiry and that is
10 something that has been flagged up in my learned
11 friend's skeleton argument, and was threatening,
12 according to Mr. Pollard, to pull out of the Typhoon.
13 Therefore, ergo, they would want to make a stink about
14 this.

15 Secondly, there appears to be no equivalent stink
16 raised in relation to the 1973 MoU which came out
17 considerably later.

18 The points about Al Nasari and, "Death of
19 a Princess", I make in the note. As a final point, the
20 balance of public interest in this case must come down
21 in favour of disclosure. At the very least redactive
22 disclosure. We also invite the Tribunal to give some
23 guidance, both to the Ministry of Defence in relation to
24 how -- the obligations required of it under the Freedom
25 of Information Act, and to publicly interested

1 individuals as to circumstances in which they are
2 entitled to, and likely to receive information under the
3 Freedom of Information Act in this field, because it
4 obviously is in nobody's interest to have to have
5 a Tribunal hearing like this every time an information
6 request is made. We do submit, for the reasons that
7 I outlined at the very opening of my closing
8 submissions, that the Ministry of Defence handling, and
9 behaviour in relation to these particular MoUs is worthy
10 of criticism.

11 The final point is obviously in relation to special
12 advocate. We have no idea how beneficial that has been
13 to the Tribunal but we would remind the Tribunal that it
14 was resisted very strongly by the Ministry of Defence,
15 and the only observation that we are able to make about
16 that is that there appears to be, or there has clearly
17 been a very considerable amount of time spent in closed
18 session.

19 THE CHAIRMAN: Thank you very much, Mr. Hickman. You have
20 now covered the points you wanted to?

21 MR. HICKMAN: That is it.

22 THE CHAIRMAN: We are very grateful for your assistance. We
23 are going to adjourn now unless there is any other
24 matter. Are there points of law --

25 MR. HAVERS: Yes, there will be some.

1 THE CHAIRMAN: Yes. I think that is up to Mr. Hickman, how
2 it is covered. Either, Mr. Hickman, you need to be here
3 or you need to send a pupil or someone to cover your
4 case, all right? I am not going to hear it now, but
5 there is obviously opportunity to reply on law.

6 MR. HICKMAN: Okay. One way of dealing with it would be in
7 writing, of course, and I would be happy if Mr. Havers
8 wanted to put points of law in writing. I mean --

9 THE CHAIRMAN: It is easier for me if I have the opportunity
10 to explore points of law from the advocate in the
11 hearing. It is up to you.

12 MR. HICKMAN: When would it be?

13 THE CHAIRMAN: We won't take offence if you are not here,
14 but I would like you somehow represented.

15 MR. HICKMAN: Well, I will have to be here because there is
16 no other way I can be represented.

17 THE CHAIRMAN: We will do it first thing on Monday morning.

18 MR. HICKMAN: At 10.15?

19 THE CHAIRMAN: 10.15.

20 (4.42 pm)

21 (Hearing adjourned)

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