Neutral Citation Number: [2017] EWHC 3008 (Admin)

Case No: CO/5236/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2017

Before :

LADY JUSTICE SHARP

and

MR JUSTICE SWEENEY

Between :

R	**Claimant**
(On the application of NORMAN EDWARD GILFOYLE)	
-and-	
CRIMINAL CASES REVIEW COMMISSION	**Defendant**

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- -

Mr Ben Emmerson QC and **Anita Davies** instructed by **Birnberg Peirce Ltd** for the **Claimant**

Hearing date: 5 July 2017
Written submissions: 26 July, 1 August 2017

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Judgment Approved

Lady Justice Sharp:

Introduction

1. This is a renewed application for permission to apply for judicial review of a decision by the Criminal Cases Review Commission (the Commission) of 13 July 2016, not to refer the claimant's conviction for murder to the Court of Appeal. The claimant is Norman Edward Gilfoyle (also referred to in the documentation before us as Innocent Gilfoyle, Innocent Norman Edward Gilfoyle, Edward Gilfoyle and Eddie Gilfoyle).

2. On 4 June 1992, the claimant's wife, Paula Gilfoyle (Paula) who was 8 ½ months pregnant with his child, was found dead, hanging in the garage at the home she shared with her husband at 6 Grafton Drive, Upton, Wirral. The claimant was charged with her murder on 8 June 1992, a charge to which he pleaded not guilty. He has maintained his innocence ever since. His trial before Mr Justice McCullough and a jury at Liverpool Crown Court began on 10 June 1993. The Crown's case at trial was that the claimant murdered his wife and tried to make it look like suicide. The claimant did not give evidence and no evidence was called on his behalf. His defence, rejected by the jury's verdict, was that her death was suicide or accidental, a grand gesture gone wrong. On 3 July 1993 he was convicted by a unanimous verdict, and sentenced to life imprisonment with a minimum term to be served of 18 years. He has now been released on licence.

3. The claimant's first appeal to the Court of Appeal, Lord Justice Beldam, Mr Justice Scott Baker and Mr Justice Hidden was dismissed: see *R v Gilfoyle* [1996] 1 Cr App R. 302: 'the first Court of Appeal judgment'. On 20 December 2000, after a referral by the Commission under section 9 of the Criminal Appeal Act 1995 (the 1995 Act), the Court of Appeal, Lord Justice Rose, Mrs Justice Hallett (as she then was) and Mr Justice Crane, dismissed the claimant's second appeal: see *R v Gilfoyle* [2000] EWCA Crim. 81; [2001] 2 Cr. App. R 5: 'the second Court of Appeal judgment'. The claimant was represented at his trial by David Turner QC and Moores, Solicitors. He was represented at both appeals by a fresh legal team: Michael Mansfield QC, and Stephensons, Solicitors.

4. The two judgments of the Court of Appeal should be read in full to put the present application into context. The facts of the case, as summarised by Lord Justice Rose giving the judgment of the Court in the second Court of Appeal judgment, were these:

> "6. The appellant had served in the Royal Army Medical Corps. He left the army in 1986. From January 1991, he worked as an auxiliary nurse at Murrayfield BUPA Hospital in the Wirral. His job was to sterilise and prepare surgical instruments for use in operations. The deceased was his second wife. They married in June 1989. She worked at the Champion Spark Plug factory in Upton. She also ran a mail order catalogue business from home. In 1991, they bought 6, Grafton Drive. It needed considerable renovation, so, for a time, they lived with the deceased's parents. In the autumn of 1991, the appellant moved into 6, Grafton Drive, in order to spend more time on the house. The deceased remained with her parents, where the appellant also stayed from time to time. On November 11, the pregnancy

of the deceased was confirmed by her general practitioner. The expected date of confinement, as the appellant knew, was June 18 or 19 1992.

7. In the early summer of 1991, the appellant had started a relationship with Sandra Davies, who worked at the same hospital. At one stage she wrote a love letter to the appellant, at his request. The appellant told his wife about the relationship. He told Sandra Davies that he was separated from his wife and invited her to move into 6, Grafton Drive. The deceased moved in at the end of October or beginning of November 1991. She telephoned Sandra Davies telling her to have no more contact with the appellant and Sandra Davies broke off the relationship. However, the appellant sent Sandra Davies a birthday card on February 11 1992 and a Valentine card the same month. In April 1992, he showed her a letter which he said his wife had written to him. This was referred to at trial as the "Nigel" letter. It stated that the appellant was not the father of the child she was expecting, which was untrue, as subsequent DNA evidence showed. It said she had been having an affair for the previous 14 months with a man called Nigel: no man called Nigel existed and there was no evidence the deceased was having an affair with anyone. It said that the appellant had been tricked about the dates in relation to paternity: he had not, because he had attended the gynaecologist and knew the expected date of confinement from the beginning. The letter also asserted "I would like you to try and pick up the pieces with Sandra". After the deceased's death, other letters were found in notebooks in the house. One typed letter had been written about the end of October 1991, a day or two after the appellant had told his wife he had someone else. She referred to the coming baby "when I am at the lowest ever in my life" and to being undecided whether to bring up the baby herself or to give it for adoption. As a result of ESDA testing, another typed "suicide" letter, referred to as the "indented" letter was revealed in a notebook. A handwriting expert said that there was strong evidence that it had been written before March 1992, when some domestic accounts had been written in the same book. It contained falsehoods: in passages similar to the Nigel letter it referred to an affair which she said she had been having for the previous 16 months, it said that the father of the child that she was carrying was going away and she had nothing left to live for. Another note, of unknown date, hand-written, and addressed "To whom it may concern", was found in a footstool in the kitchen. It said "I Paula Gilfoyle am ending my life. I have taken my own life and I am doing..." In interview with the police, the appellant said his wife had told him two days before she died that her brother-in-law Peter Glover was the father of the baby. Mr Glover denied this in evidence and denied any

impropriety in his relationship with the deceased. DNA testing, as we have said, established that the appellant was the father.

8. A Miss Coltman, albeit criticised for partiality because she said on June 7 1992 that she "wanted to help clear Paula's name" and also said she had hated the appellant since Paula's death, gave evidence that the appellant had told her that, in connection with his job at the BUPA hospital, he was being trained to go on a crash team to go out to cases of suicide or attempted suicide. Miss Coltman remembered the conversation because she had asked why such people would be taken to a private hospital without knowing whether or not they had a BUPA card. Another witness, Mr Mallion, also said the appellant had told him he was on a suicide course at work. In interview, the appellant accepted he had had some conversations with the deceased and Mallion about the possibility of doing a course or project which involved a consideration of suicide. It was not suggested to witnesses from the hospital who gave evidence for the prosecution that the appellant had been offered any such training. Miss Coltman also said the appellant had claimed to help at operations at the Murrayfield, but she did not believe him. In April and May 1992 the appellant told a number of witnesses that the expected baby was not his and that either his wife had left him or she was going abroad.

9. Three weeks before the baby was due, a party was held when the deceased left work. She was described as "radiant". Seventeen witnesses described her as being, in the spring of 1992, happy and looking forward to the birth of the child, despite misgivings about the birth itself. Her GP, who saw her regularly and last saw her a week before her death, and her gynaecologist, both described her as fit and positive about the birth. She had no history of depression. She had bought two sets of baby equipment so that one could be left with her mother, who was going to look after the baby when she returned to work. Two days before her death she went to the library and, appearing happy and normal, borrowed six books on childcare and names. She had twice asked a vicar to christen the baby. She had prepared a nursery.

10. On the morning of June 3 she was happy and normal. On the afternoon of June 3 she had a conversation with a Miss Barber about a man whom they both knew, who had recently hanged himself. The deceased said "How could someone hang themselves? How could you get so low? His wife will feel guilty for the rest of her life." On the evening of June 3 she was her usual happy self.

11. On the morning of June 4, Mrs Brannan, a market researcher, called at the house in connection with a wine survey

and spoke to the appellant and the deceased. She was there for about 15 to 20 minutes. She was unclear about the time, but thought the visit was between eleven and noon. The appellant, in interview subsequently, said she had left by 11.10 to 11.15 am and he had left for work about 11.25 am. At 11.50 am Mrs Melarangi, a courier for Freemans catalogue company, called to deliver a package, but received no reply. Others called at the house between 2.00 and 2.30 pm and they obtained no reply. At 2.00 pm the deceased was due at an anti-natal appointment, none of which she had previously missed. She did not attend.

12. Meanwhile, the appellant, whose shift at work began at 12.30 pm was seen by Sandra Davies reading a paper in the works canteen from about 11.30 am to 12.20 pm. His shift was due to end at 8.30 pm, but he asked for time off and was allowed to leave at 4.30 pm. There was no evidence that he had been absent from work between 11.30 am and 4.30 pm. According to the appellant, in interview, he went home at about 4.40 pm, noticed his wife was missing and found a suicide note in the kitchen. It was typed and was before the jury. It started "I've decided to put an end to everything". It contained echoes of the October 1991 and Nigel letters and ended with an apology for causing pain and suffering by taking her own life. As a result of reading it, he said he panicked. He did not search the house but went straight to his parents house at about 4.50 pm. His mother was there. When his father returned, about 6.00 pm, the appellant and his parents went to Grafton Drive. This account of his movements was not confirmed by his mother or any other witness and was at variance with the evidence of three other witnesses. Mrs Melarangi said she visited 6, Grafton Drive to deliver a second parcel about 5.30 pm and the appellant was in the drive. He signed the delivery note and manifest in his wife's name. It was suggested to her, but she did not accept, that she was wrong about the date. It was also suggested that she was unreliable because in early June she was suffering from depression. A neighbour, Mrs Jones, said she saw the appellant in his drive at about 5.30 pm: she fixed the day and time by reference to her children's music lessons. No reason why she should be regarded as unreliable was suggested to her. A Mr Owen said he saw the appellant going into a shop in Upton at about 5.50 pm, which he fixed by reference to a timed cash withdrawal at 5.37 pm: he did not like the appellant, so it was said that his evidence might be biased.

13. Shortly before 7.00 pm, the appellant's father telephoned his son-in-law Paul Caddick, who was a police sergeant. He arrived at Grafton Drive at about 7.00 pm and searched the house. He telephoned the police and then found the garage was locked. He asked the appellant for the keys. The appellant gave him a bunch of keys from the kitchen which belonged to the

deceased. None of them fitted the garage. The appellant picked up the mat in the porch and gave Mr Caddick two single keys with one of which he opened the Yale lock of the garage. Caddick and another police officer said the two keys were identical. The appellant in interview said there should have been a garage key on Paula's key ring. No other garage key was found inside the garage or elsewhere.

14. In the garage, the deceased's body was hanging by a rope from a roof beam, with an aluminium step-ladder behind. The distance from the top platform of the ladder to the underside of the beam was 7´ 4" and to the topside of the beam 7´ 10". The legs were crossed behind and bent at the knee with the feet crossed at the ankle and one foot resting on the bottom rung of the ladder. Other police officers and the coroner's officer arrived. As the coroner's officer saw no suspicious circumstances, the body was cut down. According to the coroner's officer, the rope had been wrapped round the beam three times with a knot halfway up the side of the beam. He was 6´ 1" tall. The knot was only just within his reach when standing on the platform of the ladder. Regrettably, no photographs were taken of the body before it was cut down or of the rope on the beam, and no body temperature was taken. When Dr Roberts, the police surgeon, arrived at 8.20 pm he took, for teaching purposes, three photographs of the body on the floor of the garage. He was not asked to consider the time of death until the trial. At that stage, he and Dr Burns, the pathologist who carried out a second post mortem, estimated the time of death as having been between three and eight hours before Dr Roberts had examined the body. Both acknowledged that the margin of error could be considerable.

15. Post mortem examination confirmed that the cause of death was hanging. There was a single ligature mark and, apart from two small scratches immediately above it, no other injury to the body. There was no sign of drugs or alcohol. The deceased was 5' 8½" tall. Her total reach was 7´ 2". A mortuary technician removed the ligature from around the neck and it was thrown away. He subsequently re-constructed the two knots, one on top of the other, on the ligature as he remembered them. This would have permitted the ligature to tighten under the weight of the body. The end of the rope which had been attached to the beam was preserved. There was no evidence of the length of the rope, exactly where the knot was positioned on the beam, or the exact distance of the deceased's feet from the floor, although it was later estimated that her knees were about 15 inches from the floor, so that her feet would have been on the floor had her legs not been bent. A practice knot which could form a noose was found on a rope in a drawer but there was no evidence as to who had been practising.

16. Although, as we have said, the death was not initially regarded as suspicious, on June 8 1992, three of the deceased's friends, Diane Mallion, Julie Poole and Christine Jackson, (who did not give evidence before the jury because the Crown accepted that their evidence was inadmissible) made statements to the police about conversations they had had with the deceased in April or May 1992. They said that she had told them that the appellant had asked her to write suicide notes for a project at work and had told her what to write. This had worried or frightened her. According to one of the witnesses she said that, after she had written the notes, the appellant had taken her into the garage to show her how to put up a rope. It was these statements which caused the police to re-consider their initial assumption that the death was due to suicide and to investigate the possibility of murder.

17. On the occasion of the last appeal… Beldam LJ in giving the judgment of the court summarised the statements of these three ladies and, at p.321D, commented "Paula's state of mind was one of the principal issues in the case. The defence contended that the notes evidenced a suicidal frame of mind". At p.323D Beldam LJ said:

"we were satisfied that if we considered it necessary in the interests of justice the fact that the statements were made could be proved to show that when she wrote the notes Paula was not in a suicidal frame of mind and she wrote them in the belief that she was assisting the appellant in a course at work. That the appellant said he was on a course concerned with suicide was established by other witnesses. There was no evidence to suggest that it was true. Having reached this conclusion, we did not consider it necessary to consider the further question of whether the statements were admissible to prove that the appellant had, in fact, asked Paula to write the notes and had suggested their contents".

The court concluded that it was not necessary or expedient in the interests of justice to require the three witnesses to give evidence. We reached the same conclusion after considering the impact of the fresh expert evidence which we heard.

18. The prosecution case at trial was, in summary, that the appellant had tried to make murder look like suicide. He had tricked his wife into writing a number of notes including the suicide letter which he said he had found after her death, and had persuaded her to take part in a suicide experiment. The Crown did not, in opening, seek to prove the mechanics whereby the appellant had caused the death. But, in the light of evidence given by Dr Burns in cross-examination and re-examination, their case at the end of the evidence was that the appellant had persuaded the deceased to have the rope tied

around her neck or to put her head into a noose while standing on the ground. The position of the body was consistent with her having then suddenly been knocked off her feet, giving her no time to struggle, so that the ligature tightened under the weight of her body causing death quickly. Thereafter, he had dressed the scene to make it look like suicide. Dr Burns said that two small parallel scratches on the deceased's neck above the ligature were striking (a comment which, as the judge reminded the jury, he had not made in his original statement) and that, in deaths by hanging, scratches should be interpreted as attempts to release the ligature until proved otherwise. He said that in 12 years, seeing about 10 cases a year, he had seen no case of suicide in which there was a scratch mark on the neck. Most suicide victims had their feet well above the ground, though, in many suicides, the feet were on the ground and there were successful suicides when sitting, kneeling or even lying down. The coroner's officer said the body touched the floor in about half the many hanging deaths he had seen. It was the Crown's case that the deceased was not tall enough and was too heavily pregnant to put the rope round the beam several times and tie it at the side of the beam when standing on the aluminium step-ladder. Had she been set on suicide, loose timbers at about head height were far more obvious and accessible than the beam as a place from which to suspend the rope. A longer set of wooden step-ladders was kept in the storeroom and found there after the death, but if she had used them it was unlikely that she would have returned them to the storeroom before committing suicide. The appellant, however, could have used the wooden step-ladder to rig up the rope in advance and then put the ladders away. There was some imprecise evidence from neighbours of a noise from the direction of the garage at 4.00 am on June 4. It was said that the appellant, having prepared the noose in the garage, removed his wife's key from her key ring lest she go into the garage and see the noose. There was nothing in her personality or behaviour to suggest that she was about to take her own life. She had no record of depression and her approach to the birth was positive. The "suicide" letter and other letters were false, completely out of character and did not represent her true state of mind. The appellant had lied about his movements after leaving work. He had done so to avoid having to explain why he had not sought help or begun enquiries before he did.

19. In interviews, over many hours, the appellant denied murdering his wife and maintained that she had committed suicide or killed herself accidentally in the course of a grand gesture. His case was that she had not been herself for several days before her death and was petrified of the impending birth. Suicide was on her mind, as evidenced by the fact that she had raised the topic with others in the week or so before she died.

> She may have written the Nigel letter in order to gain the appellant's affection or increase it and she may have told him she was having an affair with Peter Glover for the same reason. The position of the body was consistent with suicide. It was not uncommon in suicide to find the feet within reach of the ground. There was no indication of any struggle in the garage and the two scratches could have been explained as the automatic movements of the hands as the ligature tightened. It was ridiculous to suggest that the appellant had persuaded his wife to go into the garage and let him tie a rope round her neck. There were bound to have been signs of a struggle. It was possible she had tied the rope to the beam with no intention of taking her own life but something had gone wrong and she had died by accident. The appellant was looking forward to the birth of the child. He did not have the opportunity to kill his wife between Mrs Brannan's departure and going to work. Mrs Melarangi was mistaken about the date and time she saw the appellant. Her evidence was unreliable. Mrs Jones and Mr Owen were also mistaken about seeing the appellant that afternoon."

5. At paras 36 to 38, Lord Justice Rose went on to say this:

> "36. …Mr Mansfield identified two areas of evidence, as to what the appellant said about a suicide course and as to the appellant's movements on the afternoon of June 4, which, he suggested, need re-evaluation and resolution of issues which can only properly be carried out by a jury in the light of the new expert evidence. Assessment of credibility is, of course, a jury function. But, in the absence of any evidence from the defence, there were and are, in our judgment, no factual issues which required resolution in the present case. Despite Mr Mansfield's legitimate criticisms of Miss Coltman and Mr Mallion, the appellant in interview admitted saying to Mallion that he was probably going to do a project on heart or suicide and that he had spoken to the deceased about doing a course involving suicide. Therefore, the conclusion was and is inescapable that the appellant had discussed the possibility of a suicide course with more than one person. Equally, so far as the appellant's movements on the afternoon of the June 4 are concerned, although Mr Mansfield challenged the reliability of Mrs Melarangi and Mr Owen, he ventured no criticism of Mrs Jones. These three witnesses did not know each other, so collusion can be excluded and it is in the highest degree unlikely, quite apart from the extrinsic confirmation of day and time in the case of both Mrs Jones and Mr Owen, that they were all three mistaken, or malicious, in putting the appellant at or near Grafton Drive when he claimed to be at his parents. The inevitable corollary is that the appellant lied about his movements.

37. Accordingly, the decision as to whether the deceased's death was and is proved to be murder depends not on the resolution of factual issues but on the inferences to be drawn from proved facts. The most significant of those facts are these. The deceased was taking all obvious steps to prepare for the imminent birth of a child, for which, on the lay and medical evidence, she was physically fit and to which her attitude was positive. She was behaving happily and normally in the weeks immediately preceding, and up to and including a few minutes before, her death. The study of suicide was in the appellant's mind for some months before the death. Much of the content of the alleged suicide notes was demonstrably false. The deceased's garage key had been removed from her keyring and was not in the garage where she was found. From the top of the aluminium ladder it would have been impossible for her, save by standing on tip-toe, even to touch the underside of the beam. It would have been impossible for her to tie the knot where it was found. It would have been only with the greatest difficulty that, 8½ months pregnant and unaided, she would have been able both to maintain her balance and to pass the rope over the beam not once but three times. If she was bent on suicide, there was a readily visible and accessible alternative from which to suspend the rope in the three loose timbers which were 5´ 6" above the top step of the ladder, that is at her eye-level. The appellant had ample opportunity and the physical means to obtain the "suicide" note and to position the rope before Mrs Brannan's visit and there was some evidence of noise from the direction of the garage at 4.00 am. He had ample time, following Mrs Brannan's departure and before going to work, and even more before he needed to go to work, to carry out the killing which, as the evidence from Professor Knight and Dr West before us emphasised, could have been achieved very quickly and without the need for a running noose. The appellant had claimed that after finding the "suicide" note he made no attempt to find his wife and clearly lied about his movements on the afternoon of June 4.

38. In our judgment, these facts and the inferences to be drawn from them are wholly unaffected by the evidence which we have heard, which did not, overall, assist the appellant's case. Mr Ide's expressed opinion was that the knot and rope evidence is slightly more supportive of murder than suicide. Granted that the new pathological evidence is neutral, in that it indicates that suicide is as equally likely as homicide, the decision as to which was the cause of death, now as at trial, depends on the non-pathological evidence. If that evidence proves, as in our judgment it plainly does, because that is the inevitable inference, that the appellant killed the deceased, it is immaterial precisely how he killed her."

6. Amongst the grounds of appeal settled by trial counsel in the first appeal against conviction, were the following. The Crown's case that as a result of her advanced state of pregnancy, Paula would have found it virtually impossible to balance on the stepladder and would not have been able to pass the rope over the beam, was incorrect. In the course of a reconstruction, a pregnant police officer managed to balance on the stepladder and pass the rope over the beam. The Crown's assertion that Paula could not have tied the rope at the side of the beam because she could not have reached that high was based on unreliable evidence from the coroner's officer (DC Jones) about the position of the knot. There was no doubt that Paula could not have tied the knot at the side of the beam from the aluminium stepladder, but neither could the claimant. There was another taller stepladder in the house that could have been used as easily by Paula as the claimant for putting up the rope. Mr Mansfield QC also asked the Court of Appeal to receive evidence from three witnesses who were available at trial, but where the failure to call them amounted, so it was said, to a gross misjudgement by the claimant's trial team. Two of these witnesses were Professor Bernard Knight, a pathologist, who could provide evidence about the significance of scratch marks identified on Paula's neck, and Dr Robert Hardcastle, a handwriting expert who gave a revised opinion about the signature on Mrs Melarangi's manifest. The Court declined to receive that evidence.

7. At the claimant's second appeal, the Court of Appeal was invited to receive fresh expert evidence from Professor Canter, a psychologist who had carried out what he described as a "psychological autopsy" of the deceased and from Mr Roger Ide, an expert in knots and ligatures. The Court of Appeal declined to receive the evidence of Professor Canter on the ground that the evidence tendered from him was not expert evidence of a kind properly to be placed before the court: see paras 23 to 28. The Court of Appeal did however receive the evidence of Mr Ide. As to that, it said:

> "30. We also heard evidence, on behalf of the appellant, from Mr Ide a forensic scientist for 30 years and a specialist in knots and ligatures. He prepared a report for the CCRC dated May 9 1998 and he made further statements on June 12 1998 and December 4 2000. His conclusion was that the deceased could not have been standing on the floor when the noose was put round her neck. She would have needed, initially, to be at a higher level in order to finish with her knees 15 inches above the floor, because the rope would have stretched and individual knots and the noose would have tightened. His conclusion was that she would have had to be standing on the ladder somewhere near the top. If sitting she would not have been high enough. His conclusion, in his report of June 12 1998, was that the knots and rope did not provide unambiguous evidence to indicate either murder or suicide but "this evidence provides slightly more to support the hypothesis that Mrs Gilfoyle had been murdered rather than that she had killed herself". That conclusion was not subsequently qualified. He said it would have been difficult if not impossible for the deceased to tie the knot in the position found at the side of the beam. It would have been technically possible, but considerably difficult for the deceased to wrap the rope several times round the beam. If a

> knot had been tied after wrapping round it would have had to be higher than it was found."

8. In January 2003, the claimant applied to the Commission for a second time. On 19 April 2005, the Commission concluded there were no new grounds on which to refer the claimant's conviction to the Court of Appeal.

9. The claimant's third application, and the one with which this Court is concerned, was received by the Commission on 13 August 2010. It was 205 pages long, and had a number of chapters including: "The failings at the scene – an abuse of the process"; "False diagnosis of the scene – the non-expert evidence"; "The Police Investigation – a result at all costs" (dealing for example with failures of disclosure and alleged oppressive and unfair interviews); "Trial –Eddie Gilfoyle denied his medication"; "Court of Appeal – a response" (which was highly critical of the two judgments of the Court of Appeal) and "Happy Pregnancy or prenatal depression? – a modern understanding of the issue".

10. This third application, and further representations made on the claimant's behalf to the Commission in 2011, in 2012 and in 2013, contained a 'root and branch attack' on every aspect of the police investigation, the trial, and associated events that took place after the trial, with a vast number of individual criticisms of the minutiae of each. This application was supported by a number of documents and expert reports (additional to those submitted in support of the two earlier appeals to the Court of Appeal). These included an advice from Henry Blaxland QC (acting for the claimant in relation to the claimant's criminal appeal) of 6 August 2010, a report from Mr Des Pawson of 8 February 2010, a report from Professor Edward Lloyd-Cape of 5 July 2010, a report from Professor Kopelman of 6 July 2010, a Statement of John Sutton of 13 April 2010 and prescription charts relating to the claimant's medication whilst in custody covering the period 4 April 1993 to 8 July 1993. The Commission subsequently obtained two reports from Dr Margaret Oates, of 3 February 2014 (including an addendum of 25 February 2014) and of 16 March 2015, and in addition, a letter from Mr Pawson of 29 October 2014. We were told that the documentation considered by the Commission on this third application, exceeded some 2,000 pages in length.

11. In early 2015, the Commission made a provisional decision, accompanied by a detailed Statement of Reasons, which was not to refer the case to the Court of Appeal. The claimant made further representations and served further expert reports. On 29 July 2015, the claimant was informed of the Commission's updated provisional view that there was no real possibility that his conviction would be overturned if it were referred to the Court of Appeal, and he was given until 30 October 2015 to make further representations. That date was extended until 2 May 2016 at the claimant's request. The claimant made further representations to the Commission on 29 January 2016, 20 April 2016 and 1 May 2016. He also submitted more documentation, including a report from Professor Kopelman of 22 October 2015, a report from Kevin Lawton Barrett of 27 April 2016 and a report from Dr McDonald of 29 April 2016. On 13 July 2016 the Commission gave its final decision not to refer the claimant's conviction to the Court of Appeal. That decision was communicated in a 188 page Statement of Reasons, consisting of some 804 paragraphs (I shall refer to the decision itself and the Statement of Reasons as the Final Decision). It is that Final Decision which the claimant seeks to challenge by these proceedings.

12. For the purposes of this application we have had placed before us, amongst other things, the documents, or most of them, referred to in paras 9 to 11 above. In addition we have been provided with the transcript of the summing up of the claimant's trial, the first and second judgments of the Court of Appeal, complete copies of two of Paula Gilfoyle's five year diaries (1972 to 1976 and 1977 to 1982) and a witness statement from the claimant's current solicitor, Matt Foot of Birnberg Peirce, dated 12 January 2017. At the parties' request we have also viewed two reconstruction videos made by Merseyside Police : the first on 14 September 1992 (the first reconstruction) and second on the 2 October 1992 (the second reconstruction) in the garage at 6 Grafton Drive, where Paula was found hanged. In the first reconstruction, a volunteer police officer, DC Hilton-Parry, who was the same height as Paula, attempted to loop the rope round the beam from which Paula was found hanged, and to tie a knot. In the second reconstruction, another volunteer police officer, DC Wareham, who was in the same advanced state of pregnancy as Paula and one inch shorter than her, attempted to do the same.[1] DC Hilton-Parry used the rope from which Paula was found hanged; DC Wareham used a softer more flexible rope. Both officers gave evidence at the claimant's trial, and the two reconstructions were shown to the jury in some edited form.

13. The claimant's case to the Commission in 2010 and as then presented through the successive representations and documents referred to above, was based in part on what the claimant said was significant new evidence that had emerged since 2000, when his case last came before the Court of Appeal, regarding the alleged crime, the subsequent investigation by Merseyside Police, and the trial, namely:

    i) Diaries written by Paula that were never disclosed to the defence;

    ii) Prescription charts showing the claimant's medication was not assigned to him throughout the trial;

    iii) Details of the scale of Merseyside Police's mismanagement of the initial scene and investigation;

    iv) New expert evidence regarding:

        a) The rope with which Paula was hanged, demonstrating it would have been possible for her to have passed the rope over the beam and tied it in the manner in which it was found;

        b) Current understanding of ante-natal depression and suicide in pregnant women.

The challenge as originally formulated

14. The claimant's detailed Statement of Facts and Grounds, issued on 25 January 2017 contained four challenges to the Final Decision. These were:

    Ground 1: that the Final Decision was irrational in:

[1] Both officers are referred to as Police Constables. However, they identify themselves as Detective Constables in the reconstructions and I shall refer to them as such.

i) Dismissing the fresh evidence of Paula's diaries and the expert evidence of Dr Oates and Dr McDonald regarding depression and suicide in pregnant women;

ii) Finding that the claimant had access to medication throughout his trial.

Ground 2: The Commission made an error of fact amounting to an error of law in its review of the expert evidence of Mr Pawson regarding the cord. In the alternative, the Commission's dismissal of Mr Pawson's evidence was irrational.

Ground 3: The Commission took into account irrelevant factors in relying extensively on the opinion of original defence counsel Mr Turner QC, in matters where it was inappropriate to do so, including in its assessment of the claimant's mental state at the original trial.

Ground 4: The Commission misapplied the statutory test for referring the case to the Court of Appeal, in particular, using 'proven facts' from a previous Court of Appeal judgment as a starting point in deciding whether there was a 'real possibility' of the Court of Appeal finding the conviction unsafe.

15. On 16 February 2017, the Commission filed its Summary Grounds of Resistance to the claimant's detailed grounds. In short, the Commission submitted there was no reliable basis upon which to challenge the decision of the Commission. The Commission undertook a lengthy and thorough analysis of the claimant's application; it did so pursuant to the correct legal test and with the benefit of equally detailed prior applications from the claimant. On 23 February 2017, the claimant served a Reply to those Summary Grounds. This sought, it was said, to clarify a number of points in the Summary Grounds of Resistance. On 10 April 2017, Dove J refused permission to apply for judicial review on the papers, giving careful and detailed reasons.

16. On 27 April 2017, the claimant served a further document entitled "Rider to section 4: Grounds for seeking reconsideration" which essentially re-iterated the grounds of challenge. In both the Reply and Rider, the claimant emphasised the error of law that was said to underlie the Commission's whole approach (Ground 4). For example, in the Reply it was said that: "*The Defendant is wrong to say that that the proven facts did not provide the basis and structure of the [Commission's] analysis. The Claimant is not, as the Defendant suggests, arguing that no account could be taken of previous [Court of Appeal] decisions concerning the case…The relevant error of law is the Defendant's decision to use the Court of Appeal's "proven facts" as the framework for the whole analysis resulting in the Defendant reviewing the Court of Appeal's decision rather than the original trial. "*

The claimant's change of position

17. On 28 June 2017, the claimant's solicitors informed the Court that the claimant had now abandoned Grounds 3 and 4 as set out in the Statement of Facts and Grounds. Under Ground 1 i) the claimant had also abandoned his reliance on the report of Dr Oates and therefore, the submission that the Commission acted irrationally in concluding that Dr Oates' evidence (of recent advances in the medical understanding of ante-natal suicide) was not sufficient to require the Commission to refer his case to the Court of Appeal.

18. In a Skeleton argument dated 29 June 2017, and in his oral argument to us, Mr Ben Emmerson QC, now appearing for the claimant, used the abandonment of Ground 4 as a springboard for a series of arguments not previously made in relation to what remained of the case on Grounds 1 and 2. These included in particular an argument centred on para 37 of the Court of Appeal's second judgment, which Mr Emmerson said contained the 'foundational facts' for its conclusion that the claimant's conviction was safe.

19. Contrary as I have said to the case made by the claimant in the original grounds and indeed earlier to the Commission in a detailed critique of its Provisional Decision, it is now submitted that the Commission was *entitled* to conduct its analysis against the factual matrix recorded in para 37, and to treat this as the fundamental basis for the safety of the claimant's conviction. The Commission was therefore correct to ask itself whether any new arguments or evidence had since come to light that cast significant doubt on any of the facts that go to make that composite factual matrix. However – to use a short hand at this point – having asked the right question, the Commission came up with the wrong (or as Mr Emmerson submits) an irrational or unreasonable answer. This was because the Commission's review had yielded new arguments or evidence to undermine these 'foundational facts.' It follows, so it is submitted, for these reasons amongst others, that the decision not to make a second reference to the Court of Appeal was legally flawed.

20. The Commission had originally said it was content to rely on the Summary Grounds of Resistance in opposition to the claimant's renewed application for permission. In view of the claimant's very late change of position, and what amounted to a significantly recast if not an entirely new case, at the commencement of the hearing we directed that the Commission should be given the opportunity to serve further written submissions in opposition to the claim if it wished to do so. These were received by the Court on 26 July 2017, and were replied to by yet further written submissions from the claimant of 1 August 2017.

The legal framework

21. Under sections 9 to 12 of the 1995 Act, where a person has been convicted on indictment or by a Magistrates' court in England and Wales, or Northern Ireland, the Commission may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal, Crown Court or County Court as appropriate.

22. Section 13 of the 1995 Act sets out the statutory test that the Commission has to apply in deciding whether to make a reference. It provides that:

> "(1) A reference of a conviction, verdict, finding or sentence shall not be made under any of [sections 9 to 12B] unless – (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made, (b) the Commission so consider – (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and

> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
>
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it."

23. Section 23 of the Criminal Appeals Act 1968 ('the 1968 Act') provides in part that:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –…(c) receive any evidence which was not adduced in the proceedings from which the appeal lies. (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to – (a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in these proceedings."

24. The law in relation to the application of section 13 of the 1995 Act is well-settled, as is the approach to be adopted by the court when determining whether there has been any public law error by the Commission in reaching its decision to refer or not in the exercise of its statutory powers. Nonetheless, in view of the arguments of the parties on this application, it is pertinent to set out certain aspects of the legal framework within which the legal challenge in this case must be considered.

25. In *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 All ER 498, [2000] 1 Cr App Rep 147G to 148E, Lord Bingham of Cornhill CJ said:

> "Under section 23 as it now stands, it is plain that the Court of Appeal has a discretion to receive evidence not adduced in the trial court if the court think it necessary or expedient in the interests of justice to receive it. The Court of Appeal is never subject to a mandatory duty to receive the evidence, but is bound in considering whether to receive the evidence or not to have regard in particular to the specific matters listed in subsection (2). The Court of Appeal is not precluded from receiving fresh evidence if the conditions in subsection (2)(a), (b), (c) and (d) or any of them are not satisfied, but the Court would for obvious reasons be unlikely to receive evidence which did not appear to it to be capable of belief, or which did not appear to it to afford any ground for allowing the appeal, or which would not have been admissible in the trial court. The Court of Appeal would ordinarily be less ready, and in some cases much less ready, to receive evidence which the appellant

> had failed without reasonable explanation to adduce at the trial, since receipt of such evidence on appeal tends to subvert our system of jury trial by depriving the decision-making tribunal of the opportunity to review and assess the strength of that fresh evidence in the context of the case as a whole, and retrials, although sometimes necessary, are never desirable. On any application to the Court of Appeal to receive fresh evidence under section 23 in an appeal against conviction, the question which the Court of Appeal must always ask itself is this: having regard in particular to the matters listed in subsection (2), does the Court of Appeal think it necessary or expedient in the interests of justice to receive the new evidence? In exercising its statutory discretion to receive or not to receive fresh evidence, the Court of Appeal will be mindful that its discretion is to be exercised in accordance with the statutory provision and so as to achieve, in the infinitely varying circumstances of different cases, the objective for which the discretion has been conferred. The exercise of this discretion cannot be circumscribed in a manner which fails to give effect to the statute or undermines the statutory objective, which is to promote the interests of justice; the Court will bear in mind that the power in section 23 exists to safeguard defendants against the risk and consequences of wrongful conviction."

26. He went on to say at p.149 C-D to 150 D-E:

> "…the Commission's power to refer under section 9 is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else. Save in exceptional circumstances, the judgment must be made by the Commission, in a conviction case, on the ground of an argument or evidence which has not been before the court before, whether at trial, on application for leave to appeal or on appeal. In the absence of such exceptional circumstances, the Commission cannot therefore invite the court to review issues or evidence upon which there has already been a ruling. Resort to the Commission must ordinarily follow and not precede resort to the Court of Appeal.
>
> The "real possibility" test prescribed in section 13(1)(a) of the 1995 Act as the threshold which the Commission must judge to be crossed before a conviction may be referred to the Court of Appeal is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge

> that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant's prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.
>
> The judgment required of the Commission is a very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take. In a case which is likely to turn on the willingness of the Court of Appeal to receive fresh evidence, the Commission must also make a judgment how, on all the facts of a given case, the Court of Appeal is likely to resolve an application to adduce that evidence under section 23, because there could in such a case be no real possibility that the conviction would not be upheld were the reference to be made unless there were also a real possibility that the Court of Appeal would receive the evidence in question. Thus, in a conviction case of this kind, the first task of the Commission is to judge whether there is a real possibility that the Court of Appeal would receive the evidence. The Commission has, in effect, to predict how the Court of Appeal is likely to answer the question which arises under section 23 [of 'the 1968 Act'], as formulated above. In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: Do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? If so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an affirmative answer to both questions. The parties are agreed, and we accept, that the test of "real possibility" is the appropriate test in asking both questions and not only the question arising under section 13(1)(a)."

27. Later on, when considering a criticism of the Commission in that case, that though it had in its reasons paid lip service to the "real possibility" threshold prescribed by statute, it had in truth usurped the function of the Court of Appeal by itself purporting to decide whether the evidence should be admitted, and whether the verdict should be regarded as unsafe, Lord Bingham CJ said this at p.168F to 169A:

> "That is not in our judgment, a fair criticism. The Commission had, bearing in mind the statutory threshold, to try to predict the response of the Court of Appeal if the case were referred and application to adduce the evidence were made. It could only make that prediction by paying attention to what the Court of Appeal had said and done in similar cases on earlier occasions. It could not rationally predict the response of the Court of Appeal without making its own assessment, with specific reference to the materials in this case, of the considerations to which the Court of Appeal would be obliged to have regard and of how it would be likely to exercise its discretion. If one wants to predict what a reasonable person, on given facts and subject to a measure of guidance, would decide, there is no rational way to approach that task otherwise than by considering what, on the same facts and subject to the same guidance, one would decide oneself. That is not to usurp the decision of that other person but to set about predicting his decision in a rational way. In our view the Commission stated and also applied the right test, fully conscious of the respective roles of the Commission and the Court of Appeal."

28. As has been repeatedly emphasised, the Court's only role on an application for judicial review is to ensure that the Commission acts lawfully; its role is not to decide whether the Commission's discretionary decision is objectively right or wrong (indeed the Court would be exceeding its function if it did so) and a high threshold must be crossed to persuade the court to intervene in what Parliament has determined and the courts have emphasised, is a matter for the judgement of the Commission. In *Pearson* for example, Lord Bingham CJ said at p.171F that a decision to refer in that case (based on a proper direction and reasoning) would have been reasonable and lawful, but so too was the decision not to refer. See further *R (Cleeland) v The Criminal Cases Review Commission* [2009] EWHC (Admin) 474, at para 48; *Mills & Poole v The Criminal Cases Review Commission* [2001] EWHC (Admin) 1153 at para 14; *R (on the application of Steele) v Commission* [2015] EWHC 3724 Admin at para 19; and *R (Charles) v Criminal Cases Review Commission* [2017] EWHC 1219 (Admin) [2017] 2 Cr. App. R. 14.

29. In the latter case Gross LJ observed at para 47 that:

> "…though the decisions of the CCRC whether or not to refer cases to the CACD, clearly are subject to judicial review…(1) the CCRC should not be vexed with inappropriate applications impacting on scarce resources; the court's scrutiny at the permission stage is thus of importance; and (2) on a judicial review, CCRC reasons should not be subjected to a "rigorous audit" to establish they were not open to legal criticism".

30. Against that background, I turn to the three areas of the Final Decision that remain the subject of challenge.

Ground 1 i): The Diaries

31. A five-year personal diary kept by Paula between 1982 and 1986 was disclosed to the defence before the trial, but played no part in it. However two five-year diaries (the two diaries) and other personal papers relating to an earlier period in Paula's life were found by police during a search at 6 Grafton Drive conducted on 21 January 1994. The search was conducted as part of what was known as the Gooch inquiry (this was an inquiry conducted by a senior police officer into complaints made by the claimant's family to the Police Complaints Authority after his conviction). One diary was found in a metal box (JAG2); and another was found in the garage. The two diaries were kept by Paula between 1972 to 1981 when she was between 13 and 18 years old (20 to 15 years before her death) and when she was between 18 and 23 years old (15 to 10 years before her death);[2] they were first seen by the claimant's representatives (his current solicitors) at the end of July 2010.

32. Representations about them were made to the Commission on the claimant's behalf in 2011. One of the allegations made at that stage was that the two diaries had been or may have been deliberately suppressed by Merseyside Police, or not disclosed through error; the Commission considered that issue, but decided there was no basis to conclude this was the case, and this decision is not the subject of legal challenge. Some missing pages from the two diaries were provided to the claimant's representatives by the Commission in 2012. Following the Commission's provisional decision on 29 July 2015, in April/May 2016 the claimant's representatives provided the Commission with an expert report from Dr McDonald, a Consultant Perinatal Psychiatrist, giving her opinion on certain entries from the two diaries and Paula's medical records.

33. There was no issue that the two diaries, and accompanying personal papers was fresh evidence, since they had not been available at the time of the claimant's trial. However after a very full and careful analysis, the Commission concluded that the material provided no grounds to refer the case to the Court of Appeal. The gravamen of the claimant's case as advanced to them, was identified by the Commission at para 186 of the Final Decision, where it was recorded that it had focussed on two specific matters identified as central to the diaries' worth in a meeting held with the claimant's solicitors on 14 August 2014.

34. The Commission said the overarching point made on the claimant's behalf was that the diaries cast doubt on the claim made by the Crown at trial that Paula had been in a happy or positive frame of mind, one of the proven facts relied on by the Court of Appeal in its second judgment, and that two matters were relied on in particular. First, the diaries indicated Paula had suffered appalling mental trauma during and after the period that she had been in a relationship with a young man called Mark Roberts.[3] His treatment of Paula, and the effect of his conviction must, so it was said, have had a tremendous effect on her character and set the pattern for future dysfunctional

[2] This is taken from the Commission's Final Decision. We do not have Paula Gilfoyle's date of birth however, and there are some minor and immaterial variations to be found as to her age when certain events occurred, to be found within the papers.

[3] Paula Gilfoyle had a relationship with him when she was between 14 and 17 years old (between 1973/4 to 1978). They were engaged in 1974. The engagement was broken off shortly before Roberts murdered a teenage girl. Roberts was convicted of that murder in 1977.

relationships, including with the claimant. Secondly, they disclosed that Paula was capable of telling lies and practising deceit: during the course of a subsequent relationship she had with a man called Gordon Gurnley she had had an affair. This latter point was also said to be relevant to the "Nigel letter", whether it was possible Paula thought she was pregnant by another man, and whether she had had, as the claimant was to allege in his latter police interviews, an affair with her brother-in-law, Peter Glover (an allegation Peter Glover steadfastly denied at trial).

35. The Commission certainly acknowledged that Paula had suffered mental trauma in her early years and was capable of telling lies and practising deceit, but it plainly considered such matters, and the limited extracts from the diaries relied on, had to be seen in their relevant context including the rest of the diaries.

36. Other contextual matters cited by the Commission included:

    i) The positive picture of Paula's state of mind in the weeks before her death (paras 163 to 164);

    ii) The picture painted of her by the defence at trial (paras 165 to 166);

    iii) The evidence adduced from Paula's GP (paras 169 to 170). Thus the jury at the claimant's trial knew for example that Paula had been in a relationship with Roberts in her teens; that he had been convicted of murder, and that she had been treated for anxiety arising out of these events by her GP;

    iv) The relevant parts of the summing-up re Paula's state of mind (paras 167 to 169);

    v) The evidence of Professor Canter and the conclusions he reached (paras 173 to 176);

    vi) The significance of the diaries when seen in conjunction with other evidence such as Dr McDonald's report; and

    vii) The fact that the diaries related to times more distant than those recorded in the diary which had been available, and not used at trial.

37. The Commission's conclusion in short was that it had not identified any basis on which the diaries might have significantly assisted the defence had they been available at trial. The diaries related to matters significantly distant in time, concluding in 1981, some 11 years before her death; more distant than those contained in the 1982 to 1986 diary, which played no part in the trial, and they arguably disclosed no more than normal adolescent experiences. The other personal papers did not add to the picture; nor did the Gordon Gurnley letters add significantly to the knowledge at trial that Paula, had at times felt low during her pregnancy, something about which the trial judge reminded the jury during the course of his summing-up. Further, the Commission said it regarded the submission that Paula had been severely mentally affected by Mark Roberts' conviction as entirely speculative. Paula had severed ties with him completely in 1980, and on the one occasion he had contacted her after that, in 1984, she had complained to the police. There was no evidence that her relationship with him was a factor operating in her mind at the time

of her death. The diaries provided no evidence of an affair with "Nigel". From the diaries, it was arguable that Paula's relationships might fairly be described as dysfunctional; however there was an equally arguable trend towards stability.

38. Dr McDonald had reviewed the diary entries for suicidal indicators. She had concluded "Paula Gilfoyle had factors in the background history, her current circumstances, and personality structure that put her at risk of developing a mental disorder that could have led her to commit suicide by various means" noting amongst other things, that Paula had previously tried to kill herself, and that her reaction to the murder committed by Mark Roberts was abnormal, becoming closer to him.

39. The Commission gave its response to Dr McDonald's report, and to other submissions from the claimant postdating the Provisional Decision in a separate section at the end of the Final Decision. The Commission said it did not consider that the Court of Appeal would accept that her report afforded any ground for allowing an appeal. In its opinion, the factors referred to by Dr McDonald could only be applied to Paula's mental health at the time of her death in an entirely speculative way; they did not rest on any evidence contemporaneous to her death and did not recognise the absence of evidence indicating either that Paula had been clinically depressed at the time, or more specifically, suicidal. Dr McDonald's remote opinion of Paula's personality could not in the Commission's view be of greater importance than the evidence of witnesses who were able to give first hand accounts of her demeanour at the time, including the medical professionals who had dealt with her during her pregnancy. Nowhere in Dr McDonald's report was any reservation expressed about the distance in time between the events described in the diaries and her death; neither was there any recognition of the distinction between the risk of developing a depressive illness and the likelihood of such an illness remaining undetected and leading to suicide, the latter presumably being by far the more rare. The Commission considered the attempts to apply an interpretation of psychological vulnerabilities partially gleaned from events described in historical diaries to Paula's state of mind at the time of the death took the position no further than that considered by Professor Canter, and it highlighted Dr McDonald's observation that: "It is not possible to assign a diagnosis in retrospect to her."

40. As for Dr McDonald's conclusion, the Commission considered it could not be taken to be indicative of Paula's circumstances at the time of her death; whatever it might indicate about her teenage years. By the time of her death, she had become conventionally settled, in comparison to her position when a teenager; she had married, and acquired her own home; she had maintained stable employment and operated a catalogue distribution business; witness evidence indicated she had a wide social circle, that was supportive of her, as was her family. Plans were in place for support and assistance following her birth, and proposed return to work. In the context of all the evidence available, the Commission could not conclude that the factors identified by Dr McDonald, could reasonably have been operating at the time of Paula's death in the absence of evidence supporting that conclusion.

41. On behalf of the claimant, it is said that the Commission failed to address key aspects of the evidence; its stated reasons for dismissing the evidence were unreasonable and the overall conclusion that this material could not have affected a jury's assessment of Paula's personality was irrational.

42. Mr Emmerson submits, for example, that the diaries showed that Paula had a "morbid obsession with suicide in the past"; an "on-going obsessional attachment" to Roberts for a period after his conviction, which was part of "a wider pattern of disturbed and deeply ingrained morbid behaviour" well outside the range of normal behaviour, and an "on-going interest in suicidal self harm." He submits the evidence at trial did not reveal, as the diaries do, that Paula had continued to support Roberts until 1978, when their relationship ended, or that she subsequently had many liaisons before becoming engaged to Mr Gumley; or that she had an affair with another man whilst engaged to Mr Gumley or that amongst her personal effects were letters from him in one of which he threatened to commit suicide using a phrase "Please don't blame yourself" a phrase found in one of the alleged suicide notes which were before the jury at the claimant's trial. Mr Emmerson is also critical of the Commission's failure to mention in the operative part of the Final Decision, a "prior suicide attempt" by Paula. This relates to one entry in her diary for 2 August 1974 (when she was 15, some 18 years before her death) which reads: "Slept at Marks took some sleeping ..tablets 10 Mark went mad but I done it to him".

43. Mr Emmerson submits that if such evidence, and other evidence of Paula's character traits had been available, it may well have acted as a counterweight to the testimony of numerous lay witnesses at the trial of her apparently positive disposition at the time of death, and which suggested there was nothing in Paula's personality or her behaviour to suggest that she was about to take her own life.

44. However, it is plain that the Commission took a very different view of this material and the various diary entries highlighted by the claimant when read in their context and in my opinion, it was open to the Commission to do so. In its written response to this application, the Commission says in terms that the claimant is considerably overstating the evidence. In relation to the purported suicide attempt, the Commission says for example, "the event" thereafter remained unrepeated; it is simply not accepted that Paula had "a morbid obsession with murder and suicide"; or that it is accurate to say, on the basis of one entry, that Paula had a "proven propensity for attempting suicide". Indeed after the "so-called suicide attempt" of 2 August 1974, the diaries show that Paula went out with friends, and the day after that, went to a friend's house to see their "tiny and gorgeous baby" before returning home to do some crochet.

45. The case now made by Mr Emmerson in relation to the diaries seems to me to be expressed in considerably stronger terms than in the submissions made to the Commission and in the original Grounds, and to be rather more narrowly focussed. There were for example only brief references to the entry of 2 August 1974 in the claimant's submissions to the Commission. As it is, however, I do not find any of the arguments mounted on this aspect of the application to be remotely persuasive. This new material was carefully and fully considered by the Commission in its Final Decision at paras 142 to 193 (the diaries) and paras 629 to 649 (Dr McDonald) and in my view it is not arguable that the conclusions it drew (as outlined above) were unreasonable or irrational or that the reasoning which underpinned those conclusions was legally flawed. It was open to the Commission to take the view, as it obviously did, that the diaries amounted to no more than adolescent "musings" from a period far too distant in time, to be relevant to Paula's state of mind at the time of her death; and that, for example, there was nothing particularly significant (in psychological terms)

in the fact that Paula kept various personal documents from this early period of her life, such as letters, notes and birthday cards amongst her personal effects. The Commission submits that the claimant's submissions, however framed, seek to draw the Court, impermissibly into a detailed textual analysis of the evidence and amount to no more than a disagreement with the Commission's evaluative judgement. I agree.

46. One final matter I should address on this aspect of the case is an application by the claimant to add to his grounds of challenge. In its Final Decision, the Commission made brief mention of the hearsay witnesses referred to in paras 16 and 17 of the Court of Appeal's second judgment (set out at para 4 above) saying the merits of the claimant's submissions in relation to the diary had to be considered in the context of the evidence given at trial, but, if any new evidence is considered compelling, in the context of the hearsay witnesses too. In Mr Emmerson's most recent submissions, it is asserted that it is demonstrable from what the Commission now says in its submissions made after the hearing, that these witnesses were a central feature of the Commission's decision in relation to the diaries; and this was an erroneous approach – since the Commission did not engage with the arguments made by the claimant about the reliability of that evidence. Mr Emmerson therefore asks, if necessary, for permission to add this as a discrete ground of challenge. This seems to me to be an attempt to resurrect Ground 4 only recently abandoned, albeit in another guise, and I would not be prepared to give permission to the claimant to do this at this stage of these proceedings. In any event there is nothing in this point since there is nothing in the Final Decision that suggests the hearsay witnesses were a central feature of the Commission's reasoning. On the contrary, as Dove J said when refusing permission on Ground 4 there was no legal error by the Commission; see para 529 of the Final Decision, where the Commission makes clear that hearsay witnesses were not part of the evidence which led to the claimant's conviction and the Commission's consideration of them was solely to recognise that they would be part of the context of evidence likely to be considered at any future appeal.

Ground 2: The Rope and Knot Evidence

47. Mr Pawson is an expert in ropes and knots. A report from Mr Pawson dated 8 February 2010 (the February report) formed part of the material submitted on the claimant's behalf to the Commission on 6 August 2010. The claimant's case at that stage was first, that the February report showed that Paula Gilfoyle would have found it far easier to have passed the rope over the beam and tie it off than was portrayed at the trial, as the use of a "bight" (a loop formed from the rope) would have allowed the rope to be passed over the beam with greater ease than had previously been appreciated; and secondly, that it was possible that the rope could have been knotted below the beam and travelled [upwards] around one corner of the beam to the side, when loading was applied (the "knot travel" point). This "disproved" so it was said, the "impossibility" of Paula Gilfoyle tying the knot herself, a feature of central significance to the Court of Appeal's rejection of the claimant's second appeal. The February report contained Mr Pawson's illustrations of how he said a rope would have to be looped or configured in order for the "knot travel" theory to work. He provided illustrations of three possible permutations – "A", "B" and "C": see Figure 1 of the Appendix to this judgment.

48. In a letter of 17 October 2014, the Commission subsequently asked for and received Mr Pawson's response to two specific questions. Mr Pawson's response came in a

letter dated 29 October 2014 ('the October letter'). The February report and the October letter were dealt with in the Provisional Decision in paragraphs replicated in the Final Decision (paras 278 to 280 in each case).

49. The Commission said it had made a number of inquiries of Mr Pawson in order to fully understand his theories, including at a meeting where he provided a practical demonstration. Mr Pawson's [knot travel] theory was far from new. It was aired publicly in a television programme, Trial and Error, aired in June 1996 before the claimant's first application to the Commission; it was referred to in submissions made on behalf of the claimant to the Home Office by his then solicitors a few months later and in the Grounds of Appeal prepared by his junior appeal counsel in 1997. And it was also referred to in the Commission's subsequent Statement of Reasons referring the claimant's conviction to the Court of Appeal, although not forming part of the reasons for the subsequent referral. At that time, the Commission had not pursued the 'knot travel' theory with Mr Pawson, but had obtained a report from Mr Ide, whose evidence was considered at the claimant's second appeal to the Court of Appeal. Though the Commission had not pursued Mr Pawson's theory, it said there was no reason why it could not have been advanced by his legal team at the second hearing before the Court of Appeal.

50. Further, the Commission said that Mr Pawson's theory was based on the same unsound factual premise as were the theories advanced by Mr Ide and Mr Stockdale (an expert instructed by the defence but not called at his trial). This was that the rope had been tied and *then* wrapped round the beam. However this factual premise was contrary to DC's Jones's firm recollection that the load bearing length of rope had descended directly from the knot, a recollection that did not appear to have been challenged by Mr Mansfield QC at the second appeal to the Court of Appeal.[4] The Commission considered that, in the absence of good reason, the Court of Appeal would be most unlikely now to accept that DC Jones might have been wrong.

51. The Commission recorded, at para 279 of the Final Decision, that on 17 October 2014 it had written to Mr Pawson asking him two questions: could the theory of 'knot travel' in the February report and as demonstrated to the Commission, be correct if DC Jones's description of the knot and cordage was correct; and was he was aware of a possible alternative mechanism whereby Paula Gilfoyle might have been capable of tying the cordage so as to result in the findings that DC Jones described?

52. As the Commission also recorded, in his response Mr Pawson confirmed that the 'knot travel' theory could not apply if DC Jones's evidence was correct. (In his October letter he did not know, until then, of DC Jones's evidence of what he had seen); however, as the Commission also went on to record, Mr Pawson was able to "theorise an alternative mechanism by which Paula might have been able to pass the cordage over the beam so as to produce something akin to DC Jones's recollection, with the weight bearing length descending directly from a knot lying against the side

[4] DC Jones had given evidence at the claimant's trial that the rope was looped three times over the beam, and then tied off, or knotted to the vertical side (nearest the house) of the beam. This meant the rope from which Paula Gilfoyle was found hanging came down from that knot (in the trial judge's memorable description of this in a question to DC Jones, so that if you were a fly running up from the body, the first thing you would come to would be the knot).

of the beam." Mr Pawson's illustrations in the October letter for this alternative theory are set out in Figure 2 of the Appendix to this judgment.

53. The Commission said that although it had considered this alternative theory, it was sceptical of it, as the mechanism relied on Paula Gilfoyle having at stages passed the cordage over the beam from both sides. Bearing in mind that the garage had a 'mono pitch' roof, sloping uphill towards the wall of the house, it must be unlikely that Paula Gilfoyle could have worked against the slope of the roof to pass the cordage from the uphill side of the beam downwards. At para 280 the Commission said it was not at all clear that the use of a bight would have made this possible and it considered it unlikely that the Court of Appeal would be receptive of this level of speculation.

54. In the event the Commission said it did not consider there was any real possibility that the Court of Appeal would consider Mr Pawson's evidence impacted on the safety of the claimant's conviction.

55. The Commission considered the claimant's further representations on the rope and knot evidence (made after his receipt of the Provisional Decision) at paras 650 to 656 of the Final Decision. In those representations, made on 29 January 2016, the claimant had said that the Commission's scepticism was unfounded because in the second reconstruction the police officer managed to get the rope over the beam three times; "and she found it natural to pass the beam over from both sides, including from the uphill side of the beam downwards"; and that Mr Pawson's 'report' [presumably the February report] was fresh evidence, because he had been provided with the actual rope used for the first time, and was able to demonstrate that use of the bight could have made reaching the beam significantly easier. Further, Mr Pawson's further "statement" (presumably the October letter) meant there was fresh evidence that Paula Gilfoyle would have been able to tie the rope [so that the knot ended up] in the position in which it was found. Further, the Commission had applied the wrong test. The test was not whether the Commission was sceptical of that theory, but whether a jury acting reasonably may have relied on it.

56. The Commission said that following those representations it had considered again the two reconstructions, and the Trial and Error programme in 1996, in which Mr Pawson's proposed evidence was first aired publicly. It said that during the first reconstruction DC Hilton-Parry, using the actual cordage, was able to pass the actual cordage from the downhill to the uphill side, but not in the opposite direction; she was shown in the footage attempting to use a bight to pass the cordage, but was unable to do so. DC Wareham however, using a less rigid cordage was able to pass the cordage round the beam three times from the uphill to the downhill side and did not use a bight to achieve this. Further during the Trial and Error programme, Mr Pawson had demonstrated the use of a bight with cordage of apparent greater rigidity than that used in the second reconstruction, but considered the possibility only from the downhill to the uphill side. The Commission said that nothing it had considered regarding Mr Pawson's evidence indicated that there was a real possibility that a reasonable explanation existed for the failure to use his evidence at the previous appeal, or that his evidence afforded any ground for allowing the appeal.

57. The Grounds of Challenge assert first, that the Commission made an error of fact, amounting to an error of law "in rejecting expert evidence regarding the rope on the basis of the police video reconstruction." In the alternative, it is asserted that the

Commission's dismissal of Mr Pawson's expert evidence regarding the cord was irrational. No particulars are given of the latter complaint. As to the former, two errors of fact are identified. First, that it was erroneous for the Commission to conclude it was "unlikely" that Paula Gilfoyle would have been able to pass the rope around the beam from the uphill to the downhill side, when the reconstruction showed DC Wareham doing just that, and DC Jones (though admittedly taller than Paula Gilfoyle) doing so, using a bight. Secondly, that the Commission was wrong to say [in its response to the claimant's further representations] that DC Hilton-Parry had attempted to use a bight to pass the rope from the uphill to the downhill side, and had failed, since the reconstruction did not show DC Hilton-Parry using a bight. The Grounds of Challenge assert: "The issue as to whether Paula Gilfoyle would have been able to pass the rope round the beam herself was key to the Crown's case. New evidence regarding whether it was in fact possible goes to the heart of the safety of the conviction. The [Commission's] clear factual mistake as to what is shown in the police reconstruction, which is then relied upon to dismiss the expert evidence of Mr Pawson, amounts to an error of law."

58. I am prepared to assume for present purposes, without deciding, that it is possible to challenge a decision of the Commission on the ground that a mistake of fact has given rise to unfairness. If so, the ingredients for such a challenge are those identified by Lord Phillips of Worth Matravers MR (as he then was) in *E v Home Secretary* [2004] EWCA Civ 49; [2004] QB 1044 where he said at para 66:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are…First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

59. In my view, the Commission's view on "likelihood" cannot properly be described as an error of fact for this purpose whether by reference to what was shown in the second reconstruction (involving DC Wareham) or at all. It was instead, the Commission's view or evaluation of the relevant material.

60. As to that, the passages put under the microscope by the claimant in this respect have to be looked at in the context of the rest of the Commission's analysis, not subject to challenge.[5] There can be no doubt, for example, that the Commission was fully cognizant of the fact that it was possible for a rope to be passed over the beam from the uphill to the downhill side: indeed it acknowledged in terms that DC Wareham

[5] See by way of example, paras 70, 72, 255 652 and 654 of the Final Decision.

had managed to pass a rope over the beam in that direction three times. Further, the Commission expressly acknowledged that far from indicating that Paula Gilfoyle would have found it "virtually impossible" to pass the rope over the beam, the reconstructions demonstrated that, although difficult, a determined woman could do so. It also pointed out, correctly, that during the reconstruction, DC Hilton-Parry had described her task as extremely difficult; that she had tried, but failed to pass the actual rope over the beam from the uphill to the downhill direction (not using a bight) and that in the 1996 Trial and Error programme, Mr Pawson's demonstration of the use of a bight considered the possibility only from the downhill side of the beam upwards (making no reference, therefore as the Commission also said, to the difficulties that might be encountered because of the pitch of the roof). The Commission had the advantage of seeing the reconstruction videos and could therefore make up its own mind from what could be seen and heard, about how difficult or not it was to pass the rope over the beam given factors such as the height of the beam, Paula Gilfoyle's height, her advanced state of pregnancy, and other material matters in the locus in quo, in particular the pitch of the roof. The Commission also had before it what was said by the Court of Appeal in para 37 of its second judgment, namely that: "It would have been only with the greatest difficulty that, 8½ months pregnant and unaided, she would have been able both to maintain her balance and to pass the rope over the beam not once but three times. If she was bent on suicide, there was a readily visible and accessible alternative from which to suspend the rope in the three loose timbers which were 5´ 6" above the top step of the ladder that is at her eye-level". The Commission had the additional advantage of hearing from Mr Pawson in person, and seeing the practical demonstrations that he gave.

61. The ultimate matter for the Commission to decide in accordance with its statutory (predictive) function, was whether it considered that there was a real possibility that the claimant's conviction would not be upheld by the Court of Appeal were the reference to be made. En route to that decision, the Commission was bound to evaluate the merits/likelihood of any of the various theoretical scenarios presented to it (on this and other issues) against the background of the other evidence in the case, with a view to exercising its predictive function: see *Pearson* at p.168F. On the material before the Commission, it was unquestionably open to it to consider that it was unlikely that Paula Gilfoyle would have been able to pass the rope around the beam from the uphill to the downhill side and to be sceptical of Mr Pawson's theory. Its judgment on this issue cannot be described as one that was irrational or perverse. The claimant may not agree with the Commission on this issue, but that is neither here nor there.

62. The Commission acknowledges in its latest submissions that it was wrong to say that it was DC Hilton-Parry who had attempted to use a bight in her failed attempt to get the rope over the top of the beam from the uphill to the downhill side. As can be seen from the reconstruction videos, the officer who attempted to use a bight without success when trying to get the rope over the beam from the uphill to the downhill side was DC Wareham, not DC Hilton-Parry.[6] (For what it is worth, Mr Emmerson's own submissions are in error in asserting that DC Hilton-Parry threw the rope over the beam from the uphill to the downhill side, when it is DC Wareham who did so). Be

[6] DC Wareham succeeded in getting the rope over the beam in that direction by flicking it, not by using a bight.

that as it may, I find the submission that this was somehow a material error, or that the error played a material part in the Commission's reasoning, to be unconvincing. The error appeared for the first time in the Commission's response to the further representations from the claimant (which were themselves inaccurate in several respects as to what the reconstructions showed). By then the Commission had already concluded that Paula Gilfoyle was unlikely to have passed the rope over the beam from the uphill to the downhill side and that Mr Pawson's theory was too speculative, as can be seen from the relevant paras of the Provisional Decision, which were, as I have said, reproduced in identical terms in the Final Decision. The Commission's decision was not therefore materially based or founded on the error. It also remained the case as the Commission correctly observed, that *neither* officer had used a bight to successfully pass a rope over the beam from the uphill to the downhill side: DC Hilton-Parry had tried and failed to pass the rope in that direction (not using a bight); DC Wareham had tried and failed to do so when using a bight; and that Mr Pawson's demonstration of the use of a bight in the Trial and Error programme considered the possibility only from the downhill side of the beam upwards. In short there was no successful use of a bight on the occasions one was used (only DC Wareham did so) and there was no evidence or demonstration that the use of a bight would have made a difference.

63. There is another reason for rejecting this Ground of Challenge however. As was said in *Pearson* at p.150C-D, in a conviction case depending on the reception of fresh evidence "the Commission must ask itself a double question: [first] do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? if so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an affirmative answer to *both* questions." (Emphasis added). The Commission answered the first question in the negative. The Commission did so because it concluded (i) that Mr Pawson's evidence (as to the increased ease with which the rope could have been passed over the beam, using a bight) was not new and could have been advanced at the claimant's second appeal; and (ii) there was no real possibility that the Court of Appeal would accept a reasonable explanation existed for the failure to use it. This conclusion is not challenged in the Statement of Grounds. It follows that any error of fact made by the Commission in answering the second question was immaterial in the sense that it made no difference to the decision not to refer.

The further submissions by Mr Emmerson

64. In his skeleton argument and orally, Mr Emmerson made a number of further submissions.

65. First, that Mr Pawson's further statement (the October letter) was sufficient in itself to demonstrate that the Court of Appeal was in error on one of its key factual conclusions, since the evidence of Mr Pawson demonstrated a possible mechanism by which Paula Gilfoyle could have tied the knot herself, beneath the beam, that is consistent with the evidence of DC Jones. Given that it was the Crown's case that it was impossible for her to have done so, and this factual reasoning formed an important part of the reasoning of the second Court of Appeal judgment in upholding the safety of the claimant's conviction, the Commission had no reasonable alternative but to refer the case back to the Court of Appeal.

66. Secondly, the Commission erred in shifting the focus of inquiry from the second Court of Appeal's finding that this was *impossible* to whether it was *likely* that it happened. Once it became clear that Court of Appeal had proceeded on a false factual premise, the assessment of the weight to be attached to the supplementary report became a matter for the Court of Appeal to determine, and the Commission could not reasonably decline to refer the issue to the Court of Appeal. It is said that the reasoning in para 280 is also flawed, because it is inconsistent with the Commission's stated approach which is to use the factual matrix in para 37 as its starting point, and to ask whether there is any new argument or evidence that significantly undermined any of the key factual findings recorded there.

67. Thirdly, there are a number of factual and logical flaws in the Commission's approach – in particular, the Commission were in error in saying that DC Hilton-Parry tried and failed to pass the cordage from the uphill side to downhill *using a bight*. It also failed to relate its finding that DC Wareham had been able to pass the rope three times from the uphill to the downhill side – without the use of a bight – to its conclusion that it was unlikely that Paula could have done so.

68. Fourthly, the Commission's overall conclusion on Mr Pawson's evidence was flawed in concluding it was not new; that it was inconsistent with the evidence at trial of DC Jones and was in large measure similar to the evidence of the other experts, not used at trial. None of this could be said about the supplemental report.

69. It will be immediately apparent that save for the third submission, the arguments presented to us by Mr Emmerson are new. No application for permission to add new grounds of challenge was made to us nor was the Commission alerted to the fact that the claimant proposed to argue new grounds at the renewal hearing. The letter from the claimant's solicitors to the Court of the 27 June 2017, referred merely to the abandonment of existing grounds, not to the proposed addition of new ones. It is one thing to abandon existing grounds; it is quite another to use that abandonment to mount a wholly new case, without asking the court's permission or alerting other parties affected. This is irregular. The Civil Procedure Rules lay down a detailed code that applies to the conduct of civil proceedings, including those in the Administrative Court. As a matter of generality, there is no special dispensation from the CPR for applications for Judicial Review. As the Administrative Court Guide makes clear, the overriding objective set out in CPR 1.1(1) is central to civil proceedings, including judicial reviews: see para 1.2.1. If parties wish to add new grounds, at whatever stage, including after the claim has been filed with the Administrative Court Office but before permission has been given to apply for judicial review, then an application must be made in accordance with the rules for an order allowing them to do so. In the absence of any such application, even at the hearing, these additional grounds cannot form a proper basis for the grant of permission.

70. I should add, however, that I do not consider there is any substance in these additional grounds for the following reasons. As to the matters referred to at paras 65 and 66 above, the Commission (correctly) founded its approach on the relevant statutory provisions and it is beyond argument that this guided its analysis throughout: see for example paras 137 to 138 and 621 to 628 of the Final Decision.

71. The Commission certainly considered the Court of Appeal's analysis at para 37 of its second judgment to be relevant to the exercise of its predicative function. This did not

mean, however, that the Commission abrogated its own statutory function to the extent that it could not exercise its own judgment on the cogency of Mr Pawson's 'new' theory, in the light of the other evidence in the case with a view to exercising its predictive function, nor did it mean that the Commission was bound to refer the claimant's conviction to the Court of Appeal regardless of the view it considered the Court of Appeal may take. The overarching question as the Commission consistently reminded itself, was whether, in its view, there was a real possibility (in the light of the 'new' evidence) that if the claimant's conviction were referred to the Court of Appeal, it would not be upheld. There was therefore nothing flawed or inconsistent in the Commission's approach.

72. I turn next to the submission referred to at para 68 above. The suggestion is made that the Commission's reasoning was "incoherent and inexplicable" because, for example, it rejected Mr Pawson's amended theory on the ground that it was inconsistent with the evidence of DC Jones given at trial, when the premise of his amended theory was that DC Jones's evidence was reliable. It seems to me that these criticisms are based on a misreading of the Final Decision. The Commission acknowledges that it could have expressed itself more clearly in distinguishing those conclusions that were referable to Mr Pawson's February report, and those that related to his amended theory. Notwithstanding this acknowledgement, a careful and fair reading of the relevant passages makes it plain that the Commission dealt discretely with Mr Pawson's amended theory (at paras 278 to 280) and the points made later on, as to the inconsistency of Mr Pawson's evidence with that of DC Jones for example, related to Mr Pawson's earlier February report.

Ground 1ii): Medication and the failure to give evidence:

73. The claimant did not give evidence at his trial, against the advice of his trial counsel, Mr Turner QC. The claimant put before the Commission a new expert report from Professor Kopelman, a consultant neuropsychiatrist and a witness statement from Mr John Sutton, a retired Prison Hospital Officer who trained at HMP Liverpool in 1980/1 but otherwise worked at HMP Strangeways. Mr Sutton set out his interpretation of the claimant's prescription charts covering the period of his trial. According to Mr Sutton, the appearance in those charts of the word "court" "Ct" or "issued for Court" on each of the relevant court sitting days indicated the claimant had not received his prescribed medication on those days. Professor Kopelman, for his part, considered there was clear evidence that the claimant had not received his medication viz. Amitriptyline and Propranolol during the material period, and concluded that it was more likely than not that the claimant was suffering from "severe withdrawal syndrome" (because of sudden and repeated withdrawals from the drugs he had been prescribed) which would have severely compromised his ability to make an informed decision about whether or not to testify

74. The claimant relied on this material, and his own account of events in a 29-page statement provided to Professor Kopelman and then to the Commission, to found a submission that because he did not receive his medication as he should have done (except at an early stage of the trial, where the trial judge ordered it to be provided to him) he was unable to give evidence, lacked engagement during the trial process and was unable to make reasoned decision about whether to give evidence. This told against him at trial and at his subsequent appeals.

75. In the course of its analysis the Commission identified a number of matters it considered to be relevant to these issues, from the time of trial itself, and subsequently.

76. Such matters (bearing on the claimant's mental state, his receipt of medication, or not and his reasons for not giving evidence and the consistency of his account) included the following. Dr Tucker, the Head of Medical Services at HMP Liverpool, where the claimant was held on remand, provided a report to the court, which said that apart from a degree of reactive depression, the claimant had not exhibited any signs of mental disorder and he would confidently state that he was not mentally ill. The trial transcript recorded that a discussion had taken place between the trial judge and counsel on "medication for the defendant which was later provided" on the 11 June 1993, a Friday, the second day of the claimant's trial. Mr Turner's contemporaneous note (entitled Matters for Consideration as to whether the Defendant should give Evidence) recorded that: "The defendant has repeatedly expressed his concern about giving evidence. He says he has bottled up his emotions and feels that he could explode. But this may not always harm the case if it is a credible explosion. However, we would not want to force a reluctant defendant into the witness box." Mr Turner had also spent a lengthy period (on 25 June 1993) attempting to persuade the claimant to give evidence; the claimant remained reluctant to do so, but took the weekend to think about it, before signing counsel's note confirming his decision not to give evidence.

77. Further, the Commission noted that though his two appeals were dealt with by fresh counsel, at neither had the claimant raised any issue about his failure to give evidence. Moreover, what the claimant now said about his receipt of medication was inconsistent with what he had said to the Commission in 1998 during its first review of his conviction, and with had been said on his behalf at the Commission's second review. Thus, at an interview between the Commission and the claimant in 1998, conducted during its first review, the claimant said: *"I didn't have any medication for the first few days of the trial."*

78. At the second review, a 16-page document from a Dr Bruce, a psychologist, made submissions on the claimant's behalf in a non-professional capacity. This document said amongst other things that the claimant was affected by the fact that his medication had been stopped suddenly on the Sunday before trial; that by the time he was told by his counsel of the possibility he might have to give evidence, *he was back on his regular medication* and this possibility alarmed him "*but only because he was aware of his condition under medication, and because of the shock of it being put to him so immediately and bluntly*. By Monday [the claimant] had concluded it was so inevitable that he was going to be convicted…that he could see no point in going back into the witness box…*He was still on the medication referred to,* and was not thinking clearly…" In the light of this material, the claimant's case to the Commission at the time of the second review was that as a result of the medication he was on at the time of the trial, he was unable to participate properly, and the judge should have ordered a retrial.

79. The Commission said that Professor Kopelman was content to accept that the claimant had been deprived of his medication during the trial, as the claimant alleged, and appeared to have based his conclusions largely on the claimant's self-reporting. However, the Commission did not consider that the Prescription Charts could be

interpreted as indicating unequivocally, that the claimant did not receive his medication on those days when he attended court. For example there was no record in the Prescription Charts of the medication the claimant received on 11 June 1993.

80. The Commission went on to analyse in some detail a number of potentially relevant discrepancies in the accounts given by various persons, including the claimant over the years. Further, it said that the claimant had not raised the issue with his legal team at the time. The Commission said it was unclear why he was not capable of doing so, especially after 11 June 1993 once he was aware the court would intervene, and when he was capable of arguing with prison staff in reception in an attempt to get medication (as he claimed he had done in his 29-page statement to the Commission). In addition, in his most recent statement, the claimant described being in an extreme mental state whilst on remand before his trial, presumably, at a time when he was in receipt of regular medication; and this account was inconsistent with what was said about his mental state by Dr Tucker. Moreover, a number of arguably different reasons had been given as to why the claimant had chosen not to give evidence; and his submissions about his inability to follow proceedings at his trial and mental incapacity arguably conflicted with other statements made by him (indicating, in summary, attention to detail, and an ability to raise specifics with his legal team).

81. The Commission said it had discussed with Mr Turner his recollection of the claimant's state of mind, demeanour, and ability to instruct and engage at the time of his trial. Mr Turner said he saw the claimant in conference each morning and later in the day, and his recollection was that the claimant was vocal and opinionated both pre-trial and during the trial. Mr Turner said he had no doubt that the claimant would have raised the subject of medication with him had he not been receiving it: the fact that the matter had been addressed satisfactorily on the second day of the trial indicated that had it become an issue again it would have been addressed. Mr Turner said he did not notice any change in the claimant's demeanour in the run-up to his decision not to give evidence. He was sure however the decision was not influenced by an inability to understand or engage: his opinion was that the change was natural, reflecting the stress of the trial, and the situation in which the claimant found himself.

82. The Commission said amongst other things that it was concerned about the level of reliance that Professor Kopelman had placed on the claimant's self-reporting in reaching his conclusions, a fact that would not escape the Court of Appeal, and the Commission considered it was not at all certain the Court of Appeal would admit his evidence.

83. In the event, the Commission said it had given consideration to all factors it had identified as potentially relevant to the claimant's state of mind during his trial, and his decision not to give evidence; and balancing all those factors, concluded there was no real possibility that the Court of Appeal would accept that Professor Kopelman's report impacted upon the safety of the claimant's conviction; or that the Court of Appeal would be persuaded that any of the various factors complained of by the claimant rendered his trial unfair or that he had not been in any state to decide rationally not to give evidence.

84. Ground 1ii) states that the Commission's "finding that concerns regarding the claimant's access to medication do not affect the safety of the conviction is irrational". As was pointed out on behalf of the Commission in its Summary Grounds

of Resistance, the claimant is somewhat non-specific as to where there is irrationality in the Commission's analysis or conclusions. The high point appears to be an assertion that "In dismissing the objective evidence of the prison charts and relying instead on the recollection of original defence counsel 22 years after the event…the [Commission] made an error of fact such as to amount to an error of law." This Ground inevitably overlaps with Ground 3, now abandoned, where it was said that the Commission had erred in relying so extensively on the opinion of trial counsel, in two key areas, one of which was "the effect of potential lack of medication on Mr Gilfoyle's decision not to give evidence".

85. In his most recent submissions, however, Mr Emmerson mounts what in substance is a reasons challenge. He submits the reasoning of the Commission on this issue is wholly inadequate. It is he says insufficient to enable the claimant (or the public) to know why the decision was reached, so as to know whether it was lawful and reasonable or unlawful for irrationality. In particular, the decision appears to cast doubt on the veracity of claimant's complaint that his medication was not administered, though there is no express finding to that effect. Nor is there an attempt to grapple with the significance of the evidence of Mr Sutton and the Prescription Charts. Further, the Commission could not reach a lawful decision about the relevance of Professor Kopelman's report without first determining whether the medication had been administered. The Commission's objection that Professor Kopelman relied heavily on self-reporting is question begging; and it is inadequate for the Commission to state that it is not at all certain that the Court of Appeal would admit the Kopelman report since it is critical to the safety of the claimant's conviction,

86. In my view, none of the criticisms made of the Commission have any substance. The Commission's approach to the issue was a perfectly reasonable one and its reasons for reaching its conclusion were clear. In essence, it took the view that the Prescription Charts and the claimant's latest version of events could not be looked at in isolation. There were instead a significant number of other matters that were relevant to the case now made by him that he had not received his medication for most of his trial and to the view that the Court of Appeal might take of his case in the circumstances. In my view, the claimant's submissions to us, focusing as they do very narrowly on what was said in the Prescription Charts, and Mr Sutton's statement, miss out this important and contextual part of the picture and what the Commission said about it.

87. The rest of the picture included Mr Turner's detailed recollection of what happened at the time which the Commission found of particular assistance – in particular, his satisfaction as to the claimant's competency, his view that the claimant would unquestionably have raised the subject at the time had it become an issue and his view that the claimant had always been reluctant to give evidence; Dr Tucker's assessment made at the time that the claimant had been fit to stand trial and was not mentally ill and the inconsistencies and contradictions in what the claimant had said over many years about his mental state, his medication and his reasons for not giving evidence. Neither the Commission's analysis of this material nor its view that there was no reasonable explanation for the claimant's failure to raise the matter at the time is the subject of challenge.

88. The Commission was obviously entitled to form its own view of the significance of the Prescription Charts in the context of all the other evidence; and in my judgment, its view that the charts were ambiguous and not determinative was one that was

reasonably open to it to take. As the Commission noted, the claimant received his medication on a day that the trial judge ordered it be brought to court, yet the entry for that day was the same as for those when he was said not to have received his medication. The Commission was also entitled to form its own view of the significance of Professor Kopelman's report and the extent to which it relied on the Prescription Charts and the claimant's own account, in the context of all the other factors it had considered, including the various inconsistencies and discrepancies which it had identified. As has been said on behalf of the Commission, Professor Kopelman's view of the claimant's mental state only gathers significance if it can be shown that he did not receive his medication during the relevant period; and for the reasons clearly set out in the Final Decision, this was not a conclusion the Commission felt able to reach.

89. The Commission could have said that in all the circumstances, the claimant's latest account was not credible and/or inherently improbable. In my view however it was not necessary for the Commission to go that far, nor was it incumbent on the Commission to determine whether the claimant had in fact received his medication in order to make its judgment that it was not at all certain that the Court of Appeal would accept Professor Kopelman's evidence or that, balancing all the factors – as it did – there was no real possibility that the Court of Appeal would accept that his report impacted upon the safety of the claimant's conviction.

Conclusion

90. In all the circumstances, I reject the submission that the Commission's Final Decision of 23 July 2016 was arguably flawed and it follows that I would dismiss the renewed application to apply for judicial review.

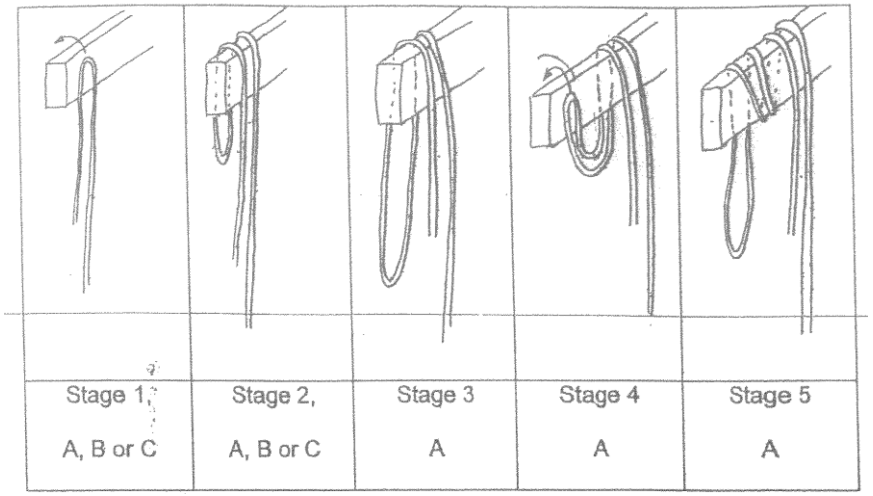
Mr Justice Sweeney

91. I agree. For the reasons that my Lady has given, I too would dismiss the renewed application.

Judgment Approved by the court for handing down.

Appendix

Fig 1



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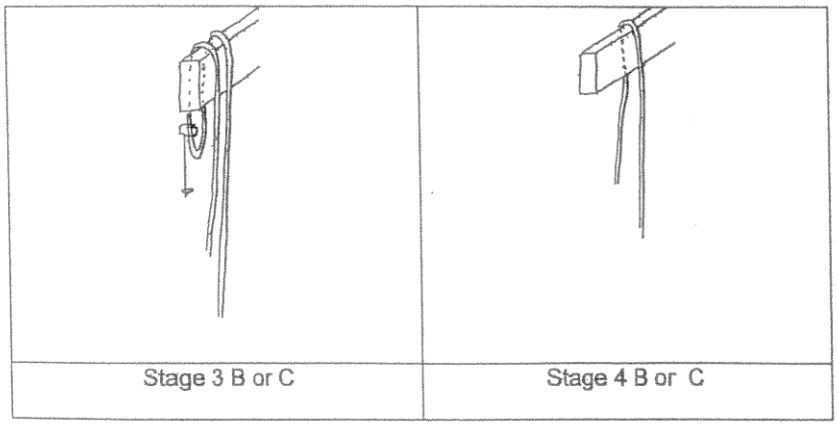

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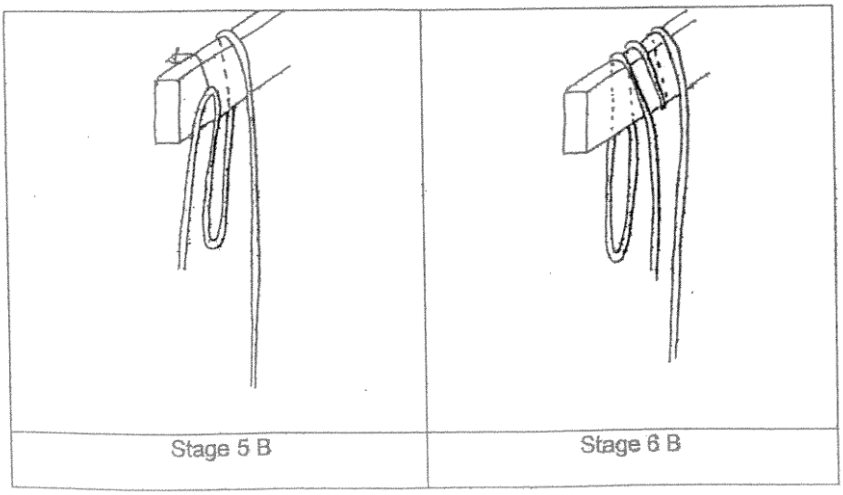
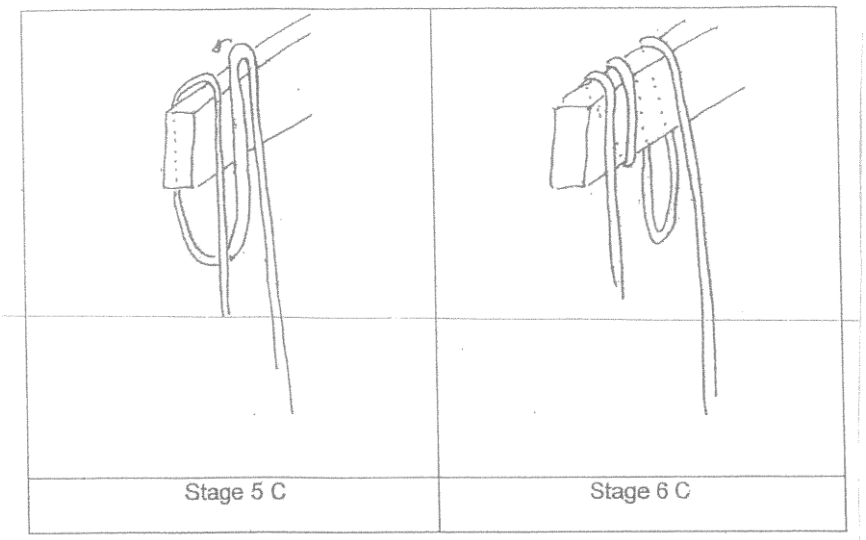


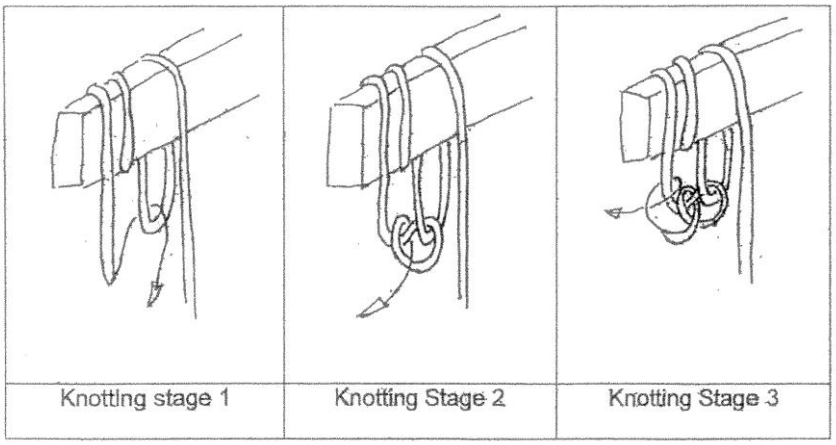
Stage 5 B	Stage 6 B

Judgment Approved by the court for handing down.



Stage 5 C

Stage 6 C



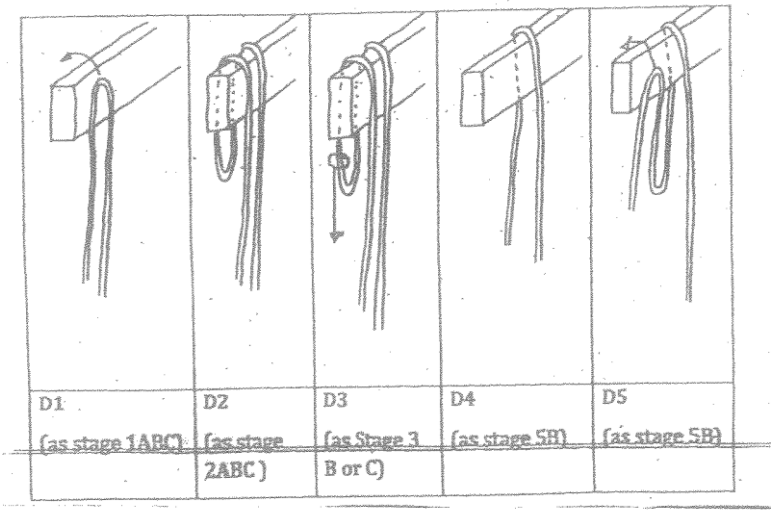
Knotting stage 1

Knotting Stage 2

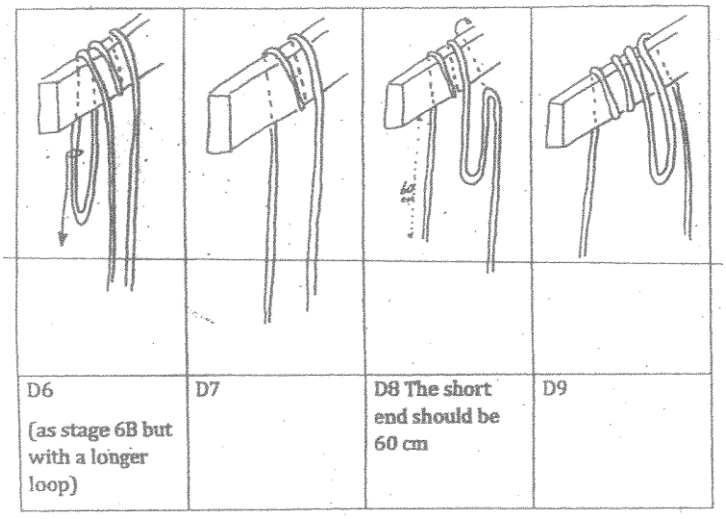
Knotting Stage 3

Judgment Approved by the court for handing down.

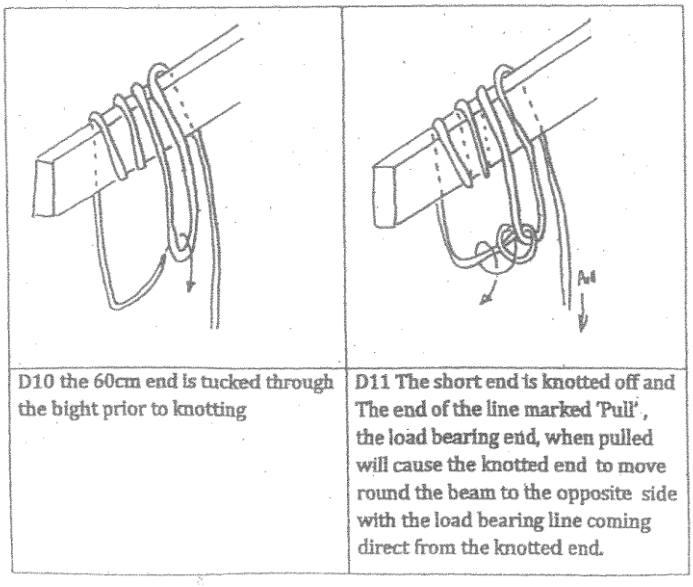
Fig 2



D1 (as stage 1ABC)	D2 (as stage 2ABC)	D3 (as Stage 3 B or C)	D4 (as stage 5B)	D5 (as stage 5B)



D6 (as stage 6B but with a longer loop)	D7	D8 The short end should be 60 cm	D9



D10 the 60cm end is tucked through the bight prior to knotting	D11 The short end is knotted off and The end of the line marked 'Pull', the load bearing end, when pulled will cause the knotted end to move round the beam to the opposite side with the load bearing line coming direct from the knotted end.