Neutral Citation Number: [2019] EWHC (Admin) 1175

Case No: CO/3848/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2019

Before:

LORD JUSTICE SIMON
MRS JUSTICE FARBEY DBE

- -

Between:

THE QUEEN on the application of PAUL CLEELAND	**Claimant**
and	
CRIMINAL CASES REVIEW COMMISSION	**Defendant**

- -
- -

Mr Edward Fitzgerald QC and **Mr Richard Thomas** (instructed by **Arora Lodhi Heath**) for the Claimant

Ms Sarah Clover for the Defendant

Shortly after the opening of the application, the Claimant dispensed with the services of counsel and conducted the case in person, assisted by Mr Arora. However, the Court benefitted from skeleton arguments settled by counsel.

Hearing date: 9 April 2018

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Approved Judgment

Lord Justice Simon:

1. This is the judgment of the Court.

Introduction

2. On 25 June 1973, nearly forty-five years ago, the claimant, Paul Cleeland, was convicted of the murder of Terrence Clarke, following a retrial before Geoffrey Lane J and a jury in the Crown Court at St. Albans. Since then he has pursued appeals against conviction and challenges to the decision of the defendant ('the CCRC') not to refer his case to the Court of Appeal. In each case, his purpose has been to establish that there are, at the very least, doubts as to the safety of his conviction.

3. The present claim seeks to quash the CCRC Final Decision, dated 24 May 2017, refusing to refer the conviction to the Court of Appeal Criminal Division. The basis of the claim is that the CCRC acted perversely or at least irrationally primarily in the light of new evidence from Mr Dudley Gibbs, a forensic scientist.

4. On 18 October 2018, permission was granted to bring the claim on the grounds that it was arguable that, in reaching its decision, the CCRC had given insufficient weight to Mr Gibbs's evidence. In summary, this evidence (contained in a number of reports) raised questions as to the expertise and reliability of a prosecution witness, John McCafferty. Mr McCafferty had given evidence in relation to three areas of the case: the gun that was said to have been used in the shooting of the victim, the ammunition that was said to have been used and the deposit of lead on the Claimant's coat which, the prosecution contended, might have been deposited in the course of discharging the firearm.

5. On 19 March 2019, the Claimant applied to amend and add a further ground of challenge, based on a further report by Mr Gibbs (dated 23 January 2019). In this report he advanced for the first time a contention that the cartridges, which the prosecution said had been used in the killing contained a different size of shot (No.6) to the size of shot found in and around the victim's body (No.7).

The trial and subsequent forensic history

An outline of the prosecution case at trial

6. At about 0200 on 5 November 1972, Mr Clarke returned by car to his home in Grace Way, Stevenage. He and his wife, with a man named Caldon, were returning from a night out. Grace Way was a cul-de-sac ending in a fence containing the back gate to the Clarkes' house. Mr Clarke drove past the line of garages on the right-hand side; and parked his car with the bonnet close to his garden fence. As he got out of the car, he was fatally shot by a gunman who was waiting for him to return. The weapon was a shotgun that was discharged twice.

7. The prosecution case was that the Claimant was the gunman. The prosecution relied on a number of strands of evidence which can be summarised. (1) The Claimant had known Mr Clarke, a fellow criminal, for a number of years, and harboured a grudge against him. (2) He had previously threatened to shoot him. (3) He knew about Mr Clarke's movements that night. (4) On 3 November 2017, shortly before the shooting,

he had purchased a Guy & Moncrieff 12 bore shotgun ('the G & M shotgun') from a member of a family called Sells. (5) He had also asked two criminal associates named Newton and Graham to buy shotgun cartridges. (6) The cartridges which Graham bought and which he said that he had handed over to the Claimant were Blue Rival waterproof No.6 shot. (7) Wadding of the type used in Blue Rival cartridges (coloured red, green and white) was found at the scene of the murder. (8) A number of undischarged Blue Rival cartridges and the stock of the G & M shotgun were found at a distance of less than a 10 minutes' walk from the scene of the shooting. (9) Police officers gave evidence of incriminating conversations between Graham and the Claimant at a time when both men were detained in police cells on suspicion of the murder. (10) There was evidence of lead deposits on the Claimant's clothing that was consistent with the discharge of a firearm at close proximity. (11) The Claimant's alibi, that he was at home with his wife at the time of the shooting (which was supported by her evidence), was contradicted by the evidence of a Mrs Roethenbaugh, who was a neighbour of the Claimant.

8. Although it is not necessary to consider all of these matters for the purpose of the present claim, we set out in summary what the Claimant said about this evidence. As to (1) and (2), he accepted that there had been a falling out with Clarke and that he had threatened to shoot him. However, the falling out had been two years before the killing. It arose out of a misunderstanding by Mr Clarke. The Claimant had explained the misunderstanding and he accepted the explanation. In any event, since they had subsequently worked together on scaffolding at building sites, it was inherently unlikely that he would run the risk of buying a shot gun and cartridges to kill him shortly before the shooting, when he could easily have pushed him off scaffolding at a high level. In any event he emphatically denied shooting him or having anything to do with the shooting. As to (3), he acknowledged that he was aware of Mr Clarke's movements that evening; they were friends. As to (4), (5) and (6), the prosecution witnesses were lying both about the purchase of the G & M shotgun and the purchase of the cartridges. The initial statements of the witnesses had not implicated him. The witnesses had changed their evidence as the result of police pressure. As to (7) and (8), in the light of what he said about items (4)-(6), there was no significance in this evidence. If the G & M shotgun and the Blue Rival cartridges had been used to kill Clarke, they had not been used by him. In his oral submissions, he suggested that Mr Clarke had been targeted by serious criminals due to fears that he might give evidence as a police informant, and that he had been shot by a pump-action shotgun. As to (9), the police evidence was fabricated and untrue. At no point had he said anything while in custody; and he could not have been understood to have said anything, which amounted to a confession to the shooting. Although, Graham's evidence supported the evidence of the police officers, he was lying about it for his own reasons. As to (10), this evidence was entirely equivocal and should have been accepted as such. Finally, as to (11), the evidence to contradict his alibi, was at best unreliable and was, in any event, inconsistent with other prosecution evidence.

9. We note that many of these points have previously been considered by the Court of Appeal and that the Claimant's submissions to us went very considerably further than addressing the issues that arise on this application for judicial review. We also note that this has been a feature of previous hearings before the courts. When the Claimant has represented himself, as he often has, he has been permitted to make submissions

that went beyond what a professional advocate would have been permitted. In summing-up the case to the jury, Lane J said this (s/u p.7B):

> … the defendant has declined the offer of professional assistance in the shape of a barrister to present his case. He has conducted his own defence, as he is perfectly entitled to do. He has, as a result, I think it is fair to say, received more latitude than would otherwise be the case.

10. Similar latitude was given to the Claimant when he represented himself on the hearing of the appeal in 2002, see [4] of the judgment in the Court of Appeal, *R v. Cleeland* [2002] EWCA Crim 293, and in the two previous Divisional Court hearings.

11. During the hearing of the present challenge, the Claimant again sought to enlarge the argument beyond the grounds for which permission was given. Some of the points had been previously considered and, to a greater or lesser extent, rejected by the CCRC and the Courts. While we accept, as did Ms Clover, that the CCRC must consider the impact of fresh evidence on matters which have already been considered by the CCRC, the statutory regime established by Part II of the Criminal Appeal Act 1995 cannot operate satisfactorily if challenges to decisions of the CCRC consist of nothing or little more than reiterations of points which have already been considered.

Previous court hearings

12. Although the Claimant has made a large number of applications and there have been many court hearings, it is only necessary at this point to mention four.

13. On 26 February 1976, the Claimant's application for leave to appeal against conviction was heard and dismissed by the Court of Appeal (Lawton LJ, MacKenna and Swanwick JJ). There is no published report of this decision.

14. On 13 February 2002, the Court of Appeal (Potter LJ, Wright and Penry-Davey JJ) dismissed the Claimant's appeal against conviction. The appeal followed a reference by the CCRC and the decision is reported (as noted above) at [2002] EWCA Crim 293. During the hearing of the appeal, the Court heard from witnesses (including experts) and addressed many points which were said to give rise as to the safety of the conviction. The judgment of the Court extends to 138 paragraphs and covers some of the points advanced in the present claim.

15. On 19 February 2002, the Divisional Court (Scott Baker LJ and David Clarke J) heard and dismissed the Claimant's application for judicial review of a decision by the CCRC refusing to refer his conviction to the Court of Appeal, see *Cleeland v. CCRC* [2009] EWHC 474 (Admin). We refer to this as Divisional Court (2009).

16. On 9 March 2015, the Divisional Court (Beatson LJ and Holroyde J), dismissed a further application for judicial review of a further CCRC decision refusing to refer the Claimant's conviction to the Court of Appeal. The decision is reported as *R (Cleeland) v. CCRC* [2015] EWHC 155 (Admin). We refer to this as Divisional Court (2015).

The applicable legal test

17. There are two particular legal questions which need to be addressed in relation to the powers of the CCRC under s.9 of the Criminal Appeal Act 1995. The first is, what considerations bear on the judgment of the CCRC in deciding whether to refer a case to the Court of Appeal; and the second is, what considerations bear on the judgment of this Court when considering a challenge to the CCRC's decision?

18. The first question is answered by the provisions of sections 9 and 13(1) of the 1995 Act which set out the test for a reference to the Court of Appeal by the CCRC.

> 9. Cases dealt with on indictment in England and Wales.
>
> (1) Where a person has been convicted on indictment in England and Wales, the Commission –
>
> (a) may at any time refer the conviction to the Court of Appeal …
>
> 13. Conditions for making of references.
>
> (1) A reference of a conviction shall not be made ... unless -
>
> (a) the Commission consider that there is a real possibility that the conviction ... would not be upheld were the reference to be made.

19. In *R v. Criminal Cases Review Commission, ex parte Pearson* [1999] EWHC (Admin) 452, [2000] 1 Cr App R 141, the Divisional Court (Lord Bingham LCJ sitting with Ognall J) considered this test.

> [16] Thus the Commission's power to refer under section 9 is exercisable only if it considers that if the reference is 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 ...
>
> [17] 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 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 ... The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.
>
> [18] 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 ... In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: do we consider that if a 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?

20. Lord Bingham's double question at [18] requires a refinement in the light of the decision in *R v. Pendleton* [2001] UKHL 66, [2002] 1 WLR 72. In that case the House of Lords held that the Court of Appeal can only ever have an imperfect and incomplete understanding of the process which led a jury to conviction; and while it can make its own assessment of the evidence that it has heard, it is (clear cases apart) at a disadvantage in seeking to relate that evidence to the rest of the evidence that was before the jury. It is for this reason that it will usually be wise for the Court of Appeal to test its own provisional view by asking whether the evidence, if given at trial might reasonably have affected the decision of the jury to convict.

21. The second question was also considered in *ex parte Pearson* (above). At [55] Lord Bingham described the nature of the Court's role when considering a claim to judicially review a decision of the Commission:

> ... We are not sitting as a court of appeal but as a court of review, and it is no part of our duty to decide whether the Commission's conclusion was right or wrong but only whether it was lawful or unlawful. We are clearly of opinion that it was not irrational. Nor was it vitiated by legal misdirection. It is not, however, in our judgment appropriate to subject the Commission's reasons to a rigorous audit to establish that they were not open to legal criticism. The real test must be to ask whether the reasons given by the Commission betray, to a significant extent, any of the defects which entitle a court of review to interfere ...

22. At [59] Lord Bingham illustrated the confined role of the Court by reference to the broad nature of the Commission's judgment.

> Had the Commission decided to refer this case to the Court of Appeal, that would (if based upon a proper direction and reasoning) have been a reasonable and lawful decision. The decision not to refer was in our view equally reasonable and lawful. The question lay fairly and squarely within the area of judgment entrusted to the Commission. If this court were to hold that a decision one way or the other was objectively right or objectively wrong, it would be exceeding its role. The Divisional Court will ensure that the Commission acts lawfully. That is its only role.

23. That it is the judgement of the CCRC that is important has been emphasised in three later cases.

24. In *R. (Hunt) v. Criminal Cases Review Commission* [2001] 2 Cr. App. R 76 (DC), Lord Woolf CJ noted at [3]:

> ... [Section 13] is worded in a manner which reserves a residual discretion to the Commission not to refer albeit the case is one where there is a real possibility the Court of Appeal would not uphold the conviction.

He added at [16]:

> ... It is a residual but a very important jurisdiction which the Commission exercises. It imposes a heavy burden on the Commission. It is a jurisdiction which requires the Commission carefully to exercise the discretion which it is given by Parliament. In these circumstances it is important that the courts should not in inappropriate cases allow the Commission to be sucked into judicial review proceedings which are bound to detract it from fulfilling its statutory role.

25. In *Mills & Poole v. Criminal Cases Review Commission* [2001] EWHC (Admin) 1153, Lord Woolf CJ (giving the judgment of the court) repeated the warning.

> [14] ... It is important that this court does not fall into the trap of forming a view as to how the Court of Appeal would react and then concluding that that is what the Commission should necessarily have concluded, since this would be to usurp the Commission's function. Decisions of the Commission cannot be quashed merely because a court on a judicial review might have or indeed would have come to a different view of the significance of the material or the prospects of success.

26. In *R (Charles) v. Criminal Cases Review Commission* [2017] 2 Cr. App. R. 14 at [47] (Gross LJ and Singh J) the court helpfully synthesised the points which emerge from the relevant authorities:

(i) The CCRC exercises an important residual jurisdiction in the interests of justice.

(ii) The decision whether or not a case satisfies the threshold conditions and is to be referred to the CACD is for the CCRC and not the Court; it is not for the Court to usurp the CCRC's function.

(iii) The judgment required of the CCRC is unusual, carrying with it the predictive exercise as to the view the CACD might take.

(iv) The threshold conditions serve as an important filter, not least in preventing the CACD from inundation with threadbare cases; they also assist in striking the right balance between the interests of justice on the one hand and those of finality on the other.

(v) Even if the threshold conditions are satisfied, the CCRC retains a discretion not to refer a case to the CACD.

(vi) Though the decisions of the CCRC, whether or not to refer cases to the CACD, clearly are subject to judicial review (see recently, *R v. Neuberg* [2016] EWCA Crim 1927, at [52]-[53]): (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; (2) on a judicial review, CCRC *reasons* should not be subjected to a 'rigorous audit' to establish that they were not open to legal criticism.

The Claimant's 'new evidence'

27. The opinion evidence of Mr Dudley Gibbs has been at the centre of a number of the Claimant's challenges to the CCRC. Prior to the hearing in the Divisional Court in 2015, Mr Gibbs produced reports, reviews and letters dated: 2 November 2007, 11 February 2008, 24 March 2008, 18 February 2009, 25 June 2009, 2 August 2013, 7 October 2013, 17 October 2013, 2 November 2013, 2 December 2013, 12 December 2013, 3 April 2014 and 12 December 2014. Following the judgment of the Divisional Court on 9 March 2015, he continued to produce material dated: 15 March 2015, 3 July 2016, 31 August 2016 and 20 October 2016. Since the CCRC decision of 24 May 2017, he has produced further material dated: 22 February 2018, 23 March 2018 and 20 January 2019.

The basis of the claim

28. At the heart of this application is the contention that the scientific evidence relied on at trial by the prosecution was wholly unreliable. The focus of the argument is directed to the evidence of Mr John McCafferty who gave evidence in relation to four issues: (1) the G & M shotgun, (2) the wads from shotgun cartridges found at the scene of the shooting, (3) the Blue Rival cartridges as the ammunition used in the killing and (4) lead residue found on the Claimant's suit.

29. It is said that the effect of Mr Gibbs's evidence is to raise fundamental doubts as to (a) the expertise and the evidence of Mr McCafferty, (b) the significance of the lead residue, and (c) part of the evidence of Mr Jonathan Spencer, an expert who was instructed by the CCRC prior to the hearing of the appeal and from whom the Court of Appeal heard oral evidence.

The Claimant's arguments on the present claim for judicial review

30. It is convenient to consider the Claimant's case under four headings: (1) Mr McCafferty's expertise and evidence, (2) the G & M shotgun, (3) the Blue Rival cartridges and the two wads found at the scene, (4) the evidence of lead residue; and then consider both the criticism of and reliance upon the evidence of Mr Spencer.

(1) Mr McCafferty's expertise

31. At trial, the trial judge introduced Mr McCafferty as a 'scientific gentleman' with 'something like a quarter of a century' experience of giving evidence about guns; and a man whom, 'whatever else you may think about him, is plainly of very great experience indeed.' The Judge went on to remind the jury that it was not merely his expertise but his competence that had been put in question.

32. Following his researches into Mr McCafferty's background, Mr Gibbs's reports of July and August 2016 contended that he had misled the jury or at least exaggerated his expertise. He had no scientific qualifications, had no right to claim to be a scientist and had not been giving expert evidence for 25 years. He appears to have been a policeman who had been seconded to the Metropolitan Police Laboratory as a liaison officer. As Mr Gibbs put it at §2.8 of his report of 20 October 2016: 'At the very best, McCafferty was a technician and not a very good one at that.'

33. The criticism of Mr McCafferty's expertise is not new. In 2002, the Court of Appeal considered his evidence. At [81] the Court noted:

> The G & M shotgun and spent cartridges were examined by Mr McCafferty, who was at the time a Principal Scientific Officer in the Metropolitan Police forensic science laboratory. He was a man without formal academic qualifications, but he had been in charge of the firearms section of the forensic science laboratory since January 1964, and at the time of this trial he had had 25 years of ballistic experience as an examiner of firearms and ammunition.

34. It is unclear what material was relied on for this summary, but Mr Gibbs suggests that in any event this overstated Mr McCafferty's experience and therefore his ability to give opinion evidence.

35. However, it is important to note that it was the doubts about the evidence given by Mr McCafferty at trial that had led the CCRC to refer the case to the Court of Appeal, see [52] of the judgment:

> … On 21 November 2000 the CCRC … referred the appellant's case to this court on the *sole basis of the reliability of Mr McCafferty's evidence*. (emphasis added, see also [90])

36. Grounds 1, 2 and 12 of the grounds of appeal argued before the Court of Appeal in 2002 involved direct attacks on Mr McCafferty's evidence, although we accept that the argument was not directed to his ability to give expert evidence. The doubts about the scientific evidence relied on by the prosecution had led to the instruction of Mr Jonathan Spencer of Keith Borer Consultants.

37. The Court of Appeal set out an analysis of the points made on the appeal. As to whether Mr McCafferty had examined the G & M shotgun, the Court concluded he had ([81]-[88]). As to Mr McCafferty's evidence that the Blue Rival wads found close to the body were comparatively rare, the Court accepted that this overstated the position. However, the Court also found that this did not cast significant doubt on his evidence that the finding of the Blue Rival wads was consistent with the cartridges that had been fired were of Blue Rival manufacture ([89]). As to whether Mr McCafferty's evidence about the distance between the victim and the shotgun was well-founded, the Court noted that both Mr McCafferty and Mr Jennings (the expert called by the defence at trial) had erred in concluding that the left barrel was choked (narrowed at the barrel end in order to concentrate the shot pattern). However, the Court added at [93]:

> In all the circumstances therefore, it does not seem to us that the undoubted error as to the choking of the left-hand barrel which Mr McCafferty made in his examination and report … casts any real doubt upon the validity of his evidence that the fatal shot could have been fired from the left-hand barrel of that gun. [It is to be noted that his evidence never went further than that] … (emphasis in original).

38. We accept that Mr Gibbs's researches show that, if Mr McCafferty was describing himself as a scientist of 25 years' standing, he seems to have been exaggerating his experience and therefore the weight to be attached to his opinions. Three points should be noted.

39. First, opinion evidence is admissible on the basis of experience as well as qualification: it is not necessary for a person to have a formal qualification to give such evidence, as noted by the Court of Appeal. It follows that it was the misstatement as to the length and nature of his experience that was, or may have been, relevant to his ability to give admissible opinion evidence.

40. Second, the criticism of Mr McCafferty's evidence as 'a non-expert scientist' had been raised as one of the issues in 2015 challenge to the CCRC, see Divisional Court (2015) at [48]. The present challenge on the basis of his lack of qualification to give expert evidence is, at least to some extent, a repetition of this criticism.

41. Third, and importantly, it is necessary to analyse how Mr McCafferty's evidence was relied on by the prosecution.

(2) The G & M shotgun

42. As the Court of Appeal noted, Mr McCafferty did not tell the jury that the G & M shotgun was the murder weapon, only that it could have been the weapon used. Mr Gibbs's reports do not go so far as to suggest that it could not.

(3) The wadding

43. Nor did Mr McCafferty say that the wadding found near the body came from Blue Rival cartridges: only that the wads were consistent with Blue Rival cartridges fired from the G & M shotgun, see [97] of the Court of Appeal judgment.

(4) Lead residue

44. The trial Judge's summing-up drew attention to the opinions of Mr McCafferty (for the prosecution) and Mr Lyne (for the defence) as to findings of lead residue. The Claimant's ground 12 in the Court of Appeal in 2002, challenged the methodology and evidence of Mr McCafferty in testing the Claimant's clothes for lead contamination. The Court of Appeal summarised the issue at [40]:

> The police had seized clothing from the appellant which Mr McCafferty tested for traces of lead residue. He stated that lead contamination occurs when a shotgun is discharged. A positive reaction was obtained from a number of items which he accepted might have been used in the appellant's work as a painter and decorator and were therefore of no probative value. However, a three-piece grey suit (Exhibit 46) and a brown donkey jacket, clear of any work stains, also gave a positive reaction for lead. The defence expert, Mr Lyne, agreed with those findings of Mr McCafferty, but said the suit could have been contaminated by entering an environment in which there was lead while wearing a coat on top which had been left open. He agreed that ordinary street petrol fumes would not have produced the reaction found by Mr McCafferty, but said contamination of the type indicated could happen if, for instance, 'You placed your leg with the trousers on it immediately behind an exhaust pipe'. He also stated that sanding off lead-based paint at work might produce a powder containing lead which would contaminate clothing worn at the time. Both experts agreed, however, that the grey suit was not a work suit.

45. The Court addressed the point at [108]:

> We have set out the state of the evidence before the jury as to lead contamination at paragraph 40 above. This ground of appeal submits that the evidence about lead contamination was unreliable because there was a form of electron microscopic testing available at the time, which was not used, which could have established whether the lead contamination found on the

> appellant's clothes contained traces of barium and antimony (supportive of a firearm as a source) or none (which would indicate an environmental source). There is a certain amount of material in papers before us which asserts this may have been the case, but it has not been the subject of any evidence called by the appellant. When cross-examined on this point Mr Pryor said that, at the time, electron microscopic testing was being developed but he did not think it had yet been sufficiently developed within the Metropolitan Police Laboratory to be in use. Whether or not that is correct, we have heard no evidence as to what such testing might or might not have demonstrated at the time or with the benefit of hindsight. It is not suggested that the evidence actually called was inadmissible or that the defence lacked any opportunity to deal with it. Nor is it suggested that the judge summarised the state of the evidence otherwise than accurately. Accordingly, this ground of appeal is not made out.

46. The issue of whether and to what extent the findings of lead on the Claimant's suit were consistent with Firearm Discharge Residue ('FDR') was considered by the Divisional Court in 2009. It is clear from the judgment of David Clarke J in Divisional Court (2009) at [28] and [31] that during the trial Mr McCafferty had distanced himself from the proposition that what he found was indicative of FDR.

47. The evidence about lead residue found on the Claimant's clothing was a central aspect of the decision of the case before the Divisional Court in 2015. The Claimant challenged the CCRC's refusal to refer the case to the Court of Appeal in the light of development in the science of detecting FDR since 2009. The Claimant deployed reports and other material from Mr Gibbs which criticised the tests carried out by Mr McCafferty and contrasted what he had done with modern, more sophisticated, techniques for testing material for FDR.

48. At [42], Holroyde J recorded that Mr Gibbs:

> … opined that there was no scientific or technical evidence which linked the shotgun to Mr Cleeland and no scientific or technical evidence which specifically linked the shotgun to the murder 'save only a tenuous association of wads of a similar nature'.

49. Subject to a point to which we will return later in this judgment, the Divisional Court (2015) accepted that the evidence against the Claimant was circumstantial, as Lane J had expressly directed the jury (s/u p.10C-E), and concluded that the finding of lead residue was admissible and capable of providing some support for the proposition that the Claimant had come into contact with a firearm, see Divisional Court (2015) at [80].

The CCRC response to the Claimant's application for a reference to the Court of Appeal

50. The Claimant applied to the CCRC on 28 September 2016. CCRC responded in an initial provisional decision on 3 February 2017 and in a second provisional decision on 6 March 2017. The final decision not to refer was contained in a letter dated 24 May 2017. It is this decision which is the subject of the present challenge.

51. The decision letter addressed the seven points advanced by the Claimant, although these can be confined to five points of substance.

52. First, the CCRC identified Mr Gibbs's evidence suggesting that Mr McCafferty was not qualified to be called as an expert witness, despite the trial judge describing him as 'an expert'; and the Claimant's contention that neither the Court of Appeal in 2002 nor the Divisional Court in 2015 had heard Mr Gibbs's evidence to the effect that Mr McCafferty was not in fact an expert.

53. The CCRC responded by pointing to a passage in the judgment of Holroyde J in Divisional Court (2015) at [82]:

> In my judgment, the Commission was entitled to conclude that the other evidence against Mr Cleeland was strong, and that even if Mr Gibbs's evidence were accepted in its entirety there is no real possibility that the Court of Appeal would quash the conviction. The Commission was entitled to regard the arguments advanced on Mr Cleeland's behalf as being, to a substantial extent, a re-presentation of points already made to, and considered by, the courts. I am not persuaded that the Commission's decision was unreasonable, still less that it was so unreasonable as to be unlawful.

54. The CCRC added:

> As stated in the previous decision letters of this and previous applications; even if it can be shown that Mr McCafferty was not qualified as Mr Gibbs suggests, the CCRC will not refer your case; not because there was not enough evidence to support the suggestion, but because the considerable prosecution case that remains against you means that there is no real possibility the Court of Appeal would quash your conviction.
>
> Further evidence from Mr Gibbs in support of his earlier point, therefore makes no difference.

55. Second, the CCRC identified the argument that evidence 'during and since conviction has undermined the other prosecution evidence, such that without the evidence of Mr McCafferty to support it' the prosecution case was substantially weaker. The Claimant had identified what were said to be weaknesses in the evidence of Mrs Roethenbaugh, Newton and the police officers who had taken the notes of the Claimant's cell confession.

56. The CCRC responded that the contradictions in the evidence of Mrs Roethenbaugh and Newton were points raised before the jury and did not amount to new points.

Consequently, without exceptional circumstances, they could not form the basis of a referral back to the Court of Appeal, and such circumstances had not been identified. The further point about what Newton was said to have admitted when visiting the Claimant in prison six months after conviction was a matter that could have been raised in the appeal two years later. The points about the reliability of the police officers had already been considered by the CCRC under reference 0061/2002.

57. Third, the Claimant pointed out that Divisional Court (2015) had referred to the G & M shotgun as being the murder weapon, which was contrary to the evidence in Mr Spencer's report and the reports of Mr Gibbs. This is a matter to which we will return below.

58. The CCRC's response was that there was strong evidence that allowed the jury and Mr Spencer to conclude that Mr Clarke had been killed with Blue Rival cartridges and that the recovered G & M shotgun was the murder weapon. That evidence included the circumstances of the acquisition of the G & M shotgun and cartridges, and the wadding found at the scene of the crime.

59. The CCRC letter also pointed out Mr Spencer's report had been considered by the Court of Appeal in 2002 following the CCRC reference. Mr Spencer's conclusion was that (a) the wadding found at the scene was not inconsistent with the Blue Rival ammunition and (b) following consideration of all the evidence, both scientific and non-scientific, Mr Clarke had been killed with Blue Rival cartridges. The Court of Appeal had formed their own view about the totality of the evidence and had dismissed the appeal. The CCRC observed that Mr Gibbs's evidence did not go so far as to say that the wadding found at the scene was inconsistent with it coming from Blue Rival cartridges. In 2015, the Divisional Court had considered whether the CCRC's decision not to refer the case, despite Mr Gibbs's evidence, and had concluded that the decision was lawful. The CCRC noted that the hearing in 2015 had been the occasion to raise doubts about Mr Spencer's reasoning.

60. Fourth, complaint was made that the CCRC's approach was at odds with the principles established by the House of Lords in *R v. Pendleton* [2002] 1 WLR 72.

61. We set out the substance of the CCRC's response on this point:

> Pursuant to the Criminal Appeal Act 1995, s 13(1)(a), the CCRC cannot make a reference to the appeal Court unless it considers 'that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made'.
>
> When the CCRC considers potentially new evidence, by necessity it adopts a predictive test to decide whether there is a real possibility that, based on that material, the Court of Appeal would conclude that the conviction was unsafe. In making this assessment, the CCRC are entitled to take account of other evidence in the case if it considers that this would impact upon the decision of the Court of Appeal.

> For the reasons set out above, the Court of Appeal are not compelled to conclude that a conviction is unsafe where certain evidence (even important evidence) is said to be unreliable. As a consequence, the CCRC are not bound to make a referral in such circumstances.
>
> Under these circumstances the CCRC considers that there is no real possibility the Court of Appeal, employing the 'jury impact' test on the basis of your submissions (whether those submissions were taken individually or cumulatively), would find that the jury might reasonably have reached a different decision in your case. The CCRC considers therefore, that there is no real possibility the Court of Appeal wold quash your conviction if it were referred on the basis of your submissions.
>
> The CCRC makes clear that the decision not to refer your case has been reached on the basis of the safety of your conviction, and not the matter of your guilt or innocence, which was for the jury alone to consider.

62. Fifth, in the light of Mr Gibbs's comments on Mr McCafferty's qualifications, the Claimant invited the CCRC 'to instruct an expert to comment on the matter.'

63. The CCRC replied that there was no real prospect of a further expert report providing material that would affect the safety of the conviction and therefore declined to instruct a further expert.

The criticism of Mr Spencer

64. Mr Spencer produced a report for the CCRC dated August 2000. The report with appendices runs to 117 pages. Pages 1 and 2 set out a summary, which includes the following, numbered for convenience:

> Having considered all the evidence in my possession, I have formed the following conclusions:
>
> - Mr Clarke was hit by two shots fired from Blue Rival ammunition loaded with 1-1/16 ounces of No.6 shot.
> - The patterns produced by the Gye & Moncrieff shotgun with Blue Rival ammunition is consistent with the nature of the injuries sustained by Mr Clarke, but other guns firing Blue Rival ammunition may also produce similar patterns.
> - If the Gye & Moncrieff shotgun was involved then the distance between the deceased and the gun was closed between shots and, hence, there was a delay between them.

- The evidence of Patricia Clarke is mostly consistent with the above two points, and where her evidence is not entirely in agreement it is because it is subjective, and she is probably mistaken (e.g. estimating distances or direction of a sound.)

65. Mr Gibbs was critical of the first bullet point. His report of 6 October 2016 at §3.9.4 contains this comment:

> For some unknown reason he completely misled the court by venturing into a circumstantial matter which was not in his gift (*sic*).

Discussion

66. Although a wholesale attack has been made on almost every aspect of Mr McCafferty's evidence, it is (at least to a certain extent and perhaps unusually) a repetition of challenges both to his findings and his competence that were made at trial. Furthermore, as the Court of Appeal found in 2002, on a proper analysis of the case, Mr McCafferty's findings in relation to the G & M shotgun was that it could have been the murder weapon, that the wadding could have come from Blue Rival cartridges and the fatal shots could have come from Blue Rival cartridges. That is not contradicted by Mr Gibbs's evidence.

67. We accept that the science of FDR analysis has developed very considerably since 1973, see for example, *R v. George (Barry)* [2007] EWCA Crim 2722. However, this aspect of the evidence was not at the forefront of the prosecution case at trial; and it was considered by the Court of Appeal and by the Divisional Court in the earlier decisions. The 2014 CCRC decision and Divisional Court (2015) specifically considered the evidence of Mr Gibbs about testing for gunshot residue and the indications that the traces of lead had an innocent explanation, see [40]-[42]. The evidence of lead residue was and remains equivocal. The decision of the Court of Appeal in *George (Barry)* (above) does not throw significant light on the issue in the present case in view of the different nature and quality of the other circumstantial evidence.

68. The Claimant also relies on a statement made by Mr McCafferty referring to a test of marks made on Blue Rival cartridges by the G & M shotgun. Although this evidence is not referred to in the summing-up, the Claimant submitted that 'it is almost certain' that no test was made. However, the Court of Appeal considered this point, at [97], and found that Mr McCafferty had in fact carried out the test. In any event, other than as a matter going to his credibility, it is difficult to see where the issue goes once it is accepted that the Blue Rival cartridges could have been the ammunition used in the shooting.

69. We turn then to Mr Gibbs's accusation that Mr Spencer misled the court in the first bullet point summarising his report. It is important to bear in mind that Mr Spencer was called to give evidence before the Court of Appeal, which described him (at [93]) as 'a most careful and impressive witness.' Sixteen years after the report and fourteen

years after the evidence that he did not hear, Mr Gibbs attacked Mr Spencer's good faith. In our view the criticism would not have been justified, even if it had been made promptly. Mr Spencer said that he had considered 'all the evidence in his possession'. The most that can be said is that the *scientific* evidence did not justify the conclusion. The scientific evidence showed that Mr Clarke was hit by No.6 shot which was consistent with Blue Rival ammunition found nearby. Having heard him give evidence the Court of Appeal were in no doubt that this was the effect of his evidence.

70. We would also note that it might be relevant to the Court's willingness to admit fresh evidence that Mr Gibbs's more recent utterances have taken on a combative and argumentative tone, which suggests that he has not maintained the detachment that the Court would expect from an expert witness. It is not for one expert witness to comment on the expertise of another expert: that is a matter for submission.

71. While we accept that developments in scientific understanding may lead to a reassessment of the safety of a conviction, a court will bear in mind what was said by the Court of Appeal in *R v. Stephen Jones* [1997] 1 Cr. App. R. 86 (Lord Bingham LCJ, Ognall and Smith JJ) in which the Court considered the admission of fresh expert evidence at p.93B-E.

> The Court has in the past accepted that section 23 may apply to expert evidence, and we would not wish to circumscribe the operation of a statutory rule enacted to protect defendants against the risk of wrongful conviction. But it seems unlikely that the section was framed with expert evidence prominently in mind. The requirement in subsection (2)(a) that the evidence should appear to be capable of belief applies more aptly to factual evidence than to expert opinion, which may or may not be acceptable or persuasive, but which is unlikely to be thought to be incapable of belief in any ordinary sense. The giving of reasonable explanation for failure to adduce the evidence before the jury again applies more aptly to factual evidence of which a party was unaware, or could not adduce, than to expert evidence, since if one expert is unavailable to testify at a trial a party would ordinarily be expected to call another unless circumstances prevented this. Expert witnesses, although inevitable varying in standing and experience, are interchangeable in a way in which factual witnesses are not. It would clearly subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury. If it is said that the only expert witness in an established field whose opinion supports a certain defence was unavailable to testify at the trial, that may be thought (save in unusual circumstances) to reflect on the acceptability of that opinion.

72. As noted above, the Claimant is critical of a passage in the Divisional Court (2015) judgment. When setting out the circumstantial case against the Claimant at [71], the judgment included: '[the Claimant] bought the shotgun and cartridges with which Mr Clarke was murdered …' That was clearly a mistake since the Court had accepted, at

[66], that 'there was no scientific or technical evidence which linked the shotgun to Mr Cleeland.' The evidence established that the death of Mr Clarke was consistent with the discharge of two Blue Rival cartridges from the G & M shotgun at close quarters. That is the way in which both the Court of Appeal and the Divisional Court approached the evidence; and it was the way in which the CCRC approached it.

73. Mr Fitzgerald QC and Mr Thomas submitted that, to the extent that the CCRC relied on the conclusions of Divisional Court (2015), it should not have done so, adding: 'This Court is, in any event, not bound by that decision since further matters have emerged since that earlier decision … [it] is not bound to follow an earlier decision that is not based on identical facts where that decision is plainly wrong.' The case relied on was *R v. Manchester Coroner, ex p. Tal* [1985] 1 QB 67 where at 78B-81D the Divisional Court (Robert Goff LJ sitting with McCullough and Mann JJ) reviewed the circumstances in which one Divisional Court might depart from the decision of another Divisional Court. The conclusion, expressed broadly, was that since both were sitting as the High Court the principle of *stare decisis* did not strictly apply, nevertheless it would only be in rare cases that it would do so.

74. In the present case, we consider that the CCRC was right to treat Divisional Court (2015) as providing the parameters for any further consideration of the case; and so far as this Court is concerned, subject to the misstatement that we have identified above, we can see no principled reason for not treating the decision as dispositive of the issues as they then appeared to the court.

75. In our view, the suggestion that the CCRC should disregard previous decisions of Divisional Courts dealing with an issue subsequently raised is unsupported by precedent or principle. The CCRC will deal with an issue on the merits, but that does not mean that they should engage in reviewing matters previously decided, save in a clear case.

The application to amend the application

76. On 2 April 2019, the Claimant issued an application to amend the claim so as to reflect the contents of a report from Mr Gibbs dated 23 January 2019, in which he concluded that the size of shot found in the body of Mr Clarke was No.7 shot whereas the Blue Rival cartridges were No.6 shot. The basis of the application was that 'this is not simply evidence of a lack of scientific connection,' but evidence that is inconsistent with the discharge from the Blue Rival cartridges found near the G & M shotgun being the cause of death.

77. The origin of Mr Gibbs's January 2019 report was a reference in Mr Spencer's August 2000 report in which he records Mr McCafferty's selection of recovered shot whose weight was consistent with No.7 shot: No. 7 shot being lighter. Mr Spencer addressed this in his report and in a letter of 31 August 2000, in which he explained that he was of the firm opinion that the weight of the shot was in fact No.6 for reasons he gave. Mr Gibbs takes issue with these reasons and asserts at §6.7 of his January 2019 report: 'the shot found in the body [of Mr Clarke] was No.7 whereas the cartridges found with the [G & M shotgun] were No.6'

78. Quite apart from the unexplained delay of over 5 years in raising the point, there is an initial objection to allowing an application to amend within 2 weeks of the hearing:

the CCRC has had no time to respond to it. That in our view is a complete answer to the point. It cannot be open to a person to challenge a CCRC decision on grounds of irrationality or illegality in circumstances where the CCRC has not been referred to the evidence in question. Accordingly, we refuse leave to amend.

79. We would, however, add that, although, a miscarriage of justice may be revealed by a small (and perhaps overlooked) piece of evidence, and although this is not an area in which a party is precluded from raising a point which could have been raised before, nevertheless we regard Mr Gibbs's approach to the present case as highly unsatisfactory. If there was substance in the point as a matter of scientific analysis, which we doubt, it could and should have been raised long ago.

Conclusion

80. In our view, the CCRC was fully entitled to rely on the decision of the Court of Appeal in 2002 and the decisions of the Divisional Court in 2009 and 2015 as setting out legitimate parameters for their consideration of the Claimant's application; and that they were also entitled to the view that in what was a circumstantial case, the evidence was such that even if Mr Gibbs's most recent evidence were accepted, there was no real possibility that the Court of Appeal would quash the conviction.

81. The CCRC was also entitled to treat the arguments advanced since 2015 as substantially reiterations of points that had already been made to and considered by the Courts.

82. In our view, the CCRC's decision refusing to refer the case to the Court of Appeal cannot be characterised as unreasonable or as constituting an unlawful decision. It was, and had been, faced with a large amount of material from Mr Gibbs to which it had responded, and its overall conclusions were both sufficient and sufficiently expressed.

83. For these reasons the application for judicial review must be dismissed.

Afterword

84. We would add one further point.

85. As noted in *R (Hunt) v. Criminal Cases Review Commission* (above) *and R (Charles) v. Criminal Cases Review Commission* (above), it is important that the Courts do not allow the CCRC to be sucked into judicial review proceedings which necessarily detract from it fulfilling its important statutory role and impact on scarce resources.

86. In the present case, permission was given at a renewed hearing, having only heard from the Claimant. In future, we would expect the CCRC to be given an opportunity to make representations at an oral renewal hearing before permission is given to bring judicial review proceedings against it.