Neutral Citation Number: [2021] EWHC 1788 (Admin)

Claim No: CO/227/2020

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 30 June 2021

**Before**:

**MR JUSTICE LAVENDER**

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**Between:**

**THE QUEEN**
**on the application of**
**PAUL ALEXANDER CLEELAND**

**Claimant**

**- and -**

**CRIMINAL CASES REVIEW COMMISSION**

**Defendant**

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The **Claimant** appeared in person.
**Sarah Clover** (instructed by the **Defendant**) for the **Defendant**

Hearing date: 6 October 2021

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# JUDGMENT

**Mr Justice Lavender:**

## (1) Introduction

1. This is my judgment on a renewed application for permission to apply for judicial review and on an application for permission to amend the statement of grounds attached to the claim form.

2. On 25 October 2019 the Defendant, the Criminal Cases Review Commission ("the Commission"), decided not to refer to the Court of Appeal the conviction of the Claimant, Paul Alexander Cleeland, on 25 June 1973 for the murder of Terrence Clarke. By a claim form issued on 22 January 2020 the Claimant applied for permission to apply for judicial review of that decision. On 13 March 2020 Garnham J refused permission to apply for judicial review. The Claimant renewed his application and, by an application notice issued on 5 August 2020, applied for permission to amend the statement of grounds attached to the claim form.

3. On 6 October 2020 I heard the renewed application for permission to apply for judicial review and the amendment application. Because the Claimant, who was representing himself, said that he had not seen the Commission's skeleton argument before the hearing, I gave the Claimant permission to make any submissions in reply in writing by 3 November 2020. At the Claimant's request, by my order of 30 October 2020 I extended that deadline to 1 December 2020 and by my order of 27 November 2020 I extended that deadline again, to 29 January 2021. In the event, the Claimant did not file any submissions in reply.

4. Instead, the Claimant filed "Supplementary Grounds" dated 14 January 2021, together with a witness statement in support, also dated 14 January 2021. Although he did not issue an application notice, by filing the Supplementary Grounds the Claimant was, in effect, applying for permission:

   (1) to amend the claim form by adding the Commission's alleged decision of on or about 12 January 2021 as a decision to be judicially reviewed; and

   (2) to amend his statement of grounds by adding the Supplementary Grounds.

5. The Commission filed a Response dated 3 February 2021 and the Claimant filed a Reply dated 15 February 2021. By my order of 22 February 2021 I refused permission to the Claimant to amend the statement of grounds or the claim form.

## (2) The Claimant's Conviction for Murder

6. On 5 November 1972 Terrence Clarke was murdered near his home in Stevenage. On 25 June 1973 the Claimant was convicted at a re-trial of Mr Clarke's murder and sentenced to life imprisonment. It is relevant to note that:

   (1) It was the Crown's case that the murder weapon was a Gye & Moncrieff shotgun which was found about 8 or 9 minutes' walk away from the scene of the murder and which a witness, Mr Sell, said that he had sold to the Claimant shortly before the murder.

(2) The Crown's evidence at the Claimant's trial included the evidence of John McCafferty, of the Metropolitan Police forensic science laboratory, who gave evidence about the Gye & Moncrieff shotgun.

(3) On 23 November 1972 the Essex Police recovered two sawn-off shotguns ("the Essex guns") from a stream near Harlow and delivered them to the Hertfordshire Police in case they had something to do with Mr Clarke's murder. The Essex guns were examined in November 1972 by a firearms expert, John Pryor. The police did not consider that the Essex guns were relevant to Mr Clarke's murder and they were not referred to at the Claimant's trial.

(4) Since he learnt of the Essex guns, the Claimant has maintained that one of them, a Western Field 12 bore pump action repeater shotgun ("the Western Field gun"), was the murder weapon. The other Essex gun was a Muller 12 bore double barrelled shotgun ("the Muller gun").

**(3) The Claimant's Efforts to Overturn his Conviction**

7. The Claimant spent 27 years in prison and was released on licence in 1999 or 2000. At all stages since 1973 the Claimant has consistently and strenuously maintained his innocence and has sought to have his conviction quashed. I will set out what I have gleaned from the papers before me and from reported decisions as to the steps which the Claimant has taken, but I doubt whether the account which I am about to give is complete.

8. In 1973 the Claimant applied to the Court of Appeal for permission to appeal against his conviction. That application was refused by the full court on 26 February 1976.

9. On five occasions between 1986 and 1996 the Claimant petitioned the Secretary of State for the Home Department for a reference to the Court of Appeal under section 17 of the Criminal Appeal Act 1968. Those petitions were all unsuccessful, as were applications for judicial review of two of the Secretary of State's decisions, made in 1991 and 1992. As part of those proceedings, judgments were given by the Divisional Court on 2 October 1991 and by Simon Brown J on 28 November 1991.

10. The Claimant sought to prosecute the civil servant who prepared a memorandum for the Secretary of State in connection with his petition submitted in March 1986. The magistrate refused to issue a summons. The Claimant applied for judicial review. That application was dismissed: *R. v Horseferry Road Magistrates' Court, ex p. Cleeland* [1992] C.O.D. 110.

11. In connection with his petitions, the Claimant applied for disclosure of various documents and applied for judicial review of the Secretary of State's refusal to disclose certain police reports. The Divisional Court dismissed that application: *R. v Secretary of State for the Home Department, ex p. Cleeland* [1996] C.L.Y. 1366.

12. Once the Criminal Appeal Act 1995 came into effect, on 20 July 1997 the Claimant applied to the Commission for his case to be referred to the Court of Appeal (Commission reference 00713/1997). On 23 October 1998 the Commission refused to refer the case, but that refusal was quashed by the Divisional Court on 21 January 2000, in an order made by consent.

13. On 18 September 2000 the Claimant sought judicial review of the Commission's decision not to require further tests, including weight analysis of shot pellets. Permission to apply for judicial review was refused on 10 October 2000.

14. The Commission obtained a report from Mr Spencer, a firearms expert, which was in part critical of Mr McCafferty. On the basis of Mr Spencer's report and its possible effect on the reliability of the evidence of Mr McCafferty, on 24 October 2000 the Commission referred the case to the Court of Appeal under section 9 of the Criminal Appeal Act 1995.

15. Mr Spencer gave evidence before the Court of Appeal, as did Mr Pryor. Mr McCafferty did not give evidence, because he was dead. Unusually, the Claimant himself was allowed to cross-examine the witnesses who gave evidence before the Court of Appeal and to make submissions to the Court of Appeal in addition to those made by his counsel. He advanced 20 grounds of appeal. On 13 February 2002 the Court of Appeal dismissed his appeal: *R v Cleeland* [2002] EWCA Crim 293 ("the 2002 judgment"). It is relevant to quote what the Court of Appeal said about the Essex guns in paragraphs 94 to 96 of the 2002 judgment:

> "94. It was Mr Cleeland's submission before us that the murder had in fact been carried out by the use of a sawn off pump-action shotgun. That submission was unsupported by any evidence, the only possible basis for such an assertion being the deposition of Mrs Clarke in which she stated that she saw a policeman pick up a single cartridge at the scene of the crime. If accurate, that might well suggest the use of a pump-action shotgun. However, there is no other evidence that a cartridge was so found; and in particular there is no entry in the exhibit register or other contemporary record of a single, or any, cartridge being found at the scene when there could have been no reason at the time for the police to seek to conceal such a discovery. It seems clear that Mr Cleeland was aware of Mrs Clarke's evidence as it was in her deposition. It does not appear from the summing-up however that the appellant suggested at trial that a pump action shotgun had been used as the murder weapon, and the appellant confirmed that to us in the course of his submissions. That assertion is now associated with his complaint under Ground 7 that the Crown failed to disclose that, in late November, the forensic science laboratory examined two other shotguns which the appellant submits were candidates for this particular shooting and which were in no way connected with him. It is apparent from the forensic science laboratory records that, on Thursday 24 November 1972, the laboratory received for examination two sawn-off shotguns which had been found by Essex Police in a stream near Harlow in Essex. Essex CID being aware of (though not concerned with) the Clarke killing, sent the guns to the Hertfordshire police in case they might have been involved in the Stevenage murder. The Hertfordshire team did not believe that to be so and the two guns were accordingly submitted to the forensic science laboratory by the Hertfordshire Constabulary by the hand of DI Ratcliffe on the 24 November for comparison with any other crimes. The two guns in question were an American Western Field 12-bore pump action repeater shotgun and a German Muller 12-bore double barrelled shotgun, both sawn-off. It was made clear to us by Mr Spencer that the act of sawing off the barrels of a shotgun would have had the effect of removing any choke that there may have been in the barrels of either.

> 95. Upon submission to the laboratory, both guns were examined by Mr Pryor, who is now senior firearms examiner in the Forensic Science Service, but was then a junior member of the laboratory staff. He gave evidence before us. In the case of the pump action shotgun, he found that the barrels were dirty and very rusty with some pitting. There was no evidence of fouling i.e. traces the product of discharge, and there were some metal fragments still to be found in the barrel. It was his opinion then and now that this demonstrated that the gun had not been fired since the barrels had been sawn off. His opinion was the same in relation to the Muller shotgun in respect of which he observed that, in both barrels, burring from the sawing off process was still evident, which burring would have been blown off if the gun had been fired since sawing off. On the instructions of the CCRC, Mr Spencer also examined the two guns and he was of the same opinion. He said that if either gun had been fired, the high probability was that any metal fragments or burring would have been swept out of the barrel as a result.
>
> 96. We accept the evidence of both these experts (indeed we have none to the contrary) and we are accordingly satisfied that neither of these two shotguns was used in the shooting of Terrence Clarke. Indeed, there is before us no evidence of any kind, or any reason to suppose, that they were connected with the shooting; let alone that the pump-action gun, rather than the G&M shotgun, fired the fatal shot. As Mr Spencer pointed out in evidence the appellant's suggestion that it was indeed the murder weapon involves three propositions: first, that the gun was cleaned after the shooting; second, that its barrels were sawn off after the shooting; and third, that it was taken from Stevenage to Harlow for disposal where it was found together with another sawn-off shotgun. We do not regard the combination of all three propositions as realistic."

16. The Claimant made 8 applications to the Commission between the dismissal of his appeal in 2002 and the commencement of the application which resulted in the decision of 25 October 2019:

(1) In 2002 the Claimant made an application to the Commission (Commission reference 00661/2002). That was refused on 31 March 2003. An application for permission to apply for judicial review was refused.

(2) The Claimant made another application in 2003 (Commission reference 00660/2003). That was refused on 1 March 2004.

(3) The Claimant made another application on 22 February 2007 (Commission reference 00229/2007). He asked that his application be given priority. The Commission refused. He sought judicial review of that refusal. On 15 August 2007 Burton J refused permission to apply for judicial review of that decision and on 18 December 2007 the Divisional Court dismissed the Claimant's renewed application for permission to apply for judicial review: *Cleeland v CCRC* [2007] EWHC 3360 (Admin). On 29 April 2008 the Commission refused the Claimant's application. He was granted permission to apply for judicial review, but on 19 February 2009 the Divisional Court refused judicial review: *Cleeland v CCRC* [2009] EWHC 474 (Admin). A subsequent application for permission to apply for judicial review of the Commission, made in 2012, was also refused.

(4) The Claimant made two applications to the Commission in 2013 (Commission references 00563/2013 and 01417/2013), one of which was refused on 27 September 2013 and the other on 22 April 2014. He sought judicial review of each decision. His application in relation to the first decision was heard on 19 November 2014: *The Queen on the application of Paul Cleeland v CCRC* [2014] EWHC 4594 (Admin). Judicial review of the second decision was refused by the Divisional Court on 9 March 2015: *The Queen (on the application of Cleeland) v CCRC* [2015] EWHC 155 (Admin).

(5) The Claimant made an application to the Commission in 2016 (Commission reference 01115/2016), which was refused on 24 May 2017. He again sought judicial review, which was refused by the Divisional Court on 10 May 2019: *The Queen on the application of Paul Cleeland v CCRC* [2019] EWHC 1175 (Admin). It is relevant to note what is said in paragraph 78 of that judgment in respect of an application by the Claimant for permission to amend the claim form so as to rely on a point which he had not previously raised:

> "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."

(6) The Claimant made another application to the Commission in 2017 (Commission reference 00588/2017). This was refused on 3 July 2018.

**(4) The Decision of 25 October 2019**

17. The Claimant's most recent application to the Commission was made on 16 May 2019 (Commission reference 00539/2019) and refused on 25 October 2019. The reasons for that refusal are set out in three documents:

(1) a Provisional Statement of Reasons dated 15 July 2019 ("the First Statement of Reasons");

(2) a Provisional Statement of Reasons dated 27 August 2019 ("the Second Statement of Reasons"); and

(3) a Final Statement of Reasons dated 25 October 2019.

18. In summary, the Commission did not consider that the Claimant's most recent application gave rise to any issue which could be investigated which would make a difference to the decision which the Commission had previously made not to refer the Claimant's case to the Court of Appeal.

19. The law which applies to an application such as the present was fully set out in the Divisional Court's 2019 judgment: [2019] EWHC 1175 (Admin). I gratefully accept what was said on that occasion and I will not lengthen this judgment by repeating it.

**(5) The Renewed Application for Permission to Apply for Judicial Review**

20. The statement of grounds attached to the claim form listed four grounds for seeking judicial review. A fifth was set out in the Claimant's witness statement dated 15

January 2020. It is convenient to adopt the numbering of those grounds proposed in the acknowledgment of service and used by Garnham J.

***(5)(a) Ground 2***

21. It is also convenient to begin with ground 2, which is in the following terms:

> "The Defendant has failed to take any account of the misinformation given to the Court of Appeal in 2002 that distorted the issue as to whether two shotguns found at the time of the murder in Essex were in fact the guns used in the murder."

22. It appears from Mr Cleeland's witness statement that ground 2 refers to two matters:

(1) It is stated in paragraph 95 of the Court of Appeal's 2002 judgment that Mr Spencer examined the Essex guns, but Mr Spencer has confirmed that he did not. The Claimant asserts that Mr Spencer must, when giving evidence before the Court of Appeal, have made the false claim that he had examined the Essex guns.

(2) Mr Pryor's evidence before the Court of Appeal, as recorded in paragraph 95 of the 2002 judgment, was that he had examined the Essex guns in November 1972 and he said, inter alia, that there was evidence that they had not been fired since their barrels were sawn off, namely metal fragments in the barrel of the Western Field gun and burring in the barrels of the Muller gun. This is consistent with a statement which Mr Pryor made on 9 August 1979, but the Claimant relies on the fact that Mr Pryor did not mention the metal fragments or the burring in a short statement which he made on 30 November 1972. The Claimant contends that this shows that Mr Pryor did not in truth see metal fragments or burring when he examined the Essex guns and that his evidence to that effect was false.

*(5)(a)(i) Ground 2: Relevant Extracts from the Statements of Reasons*

23. The Commission dealt with these and other matters relating to the firearms evidence at some length in its Statements of Reasons. By reference to its earlier decision dated 22 April 2014, the Commission said as follows in paragraphs 32 and 33 of the First Statement of Reasons:

> "32. … We took the view that there appeared to be strong evidence at trial that linked you with the Gye and Moncrieff shotgun. This included:
>
> - Evidence that the Gye and Moncrieff shotgun was identified by a witness as one which had been sold to you on 4 November 1972, supported in material respects by other witnesses;
> - Evidence of Mr Graham that you had asked him to buy a box of shotgun cartridges on 4 November 1972, which was confirmed by the evidence of Mr Newton;
> - Further evidence of Mr Graham that he bought a box of 25 Blue Rival Cartridges, using money given to him by you, and that he had given these cartridges to you.

33. Further, there were a number of circumstantial features linking the Gye and Moncrieff shotgun to the murder where it appeared an inference could safely be drawn. This included:

- The handstock of the gun and 23 Blue Rival brand cartridges were recovered from a garden. The remainder of the shotgun was found in bushes nearby on the same day. These locations are within 10 minute walk of the murder scene. Two spent Blue Rival cartridges were found in the breach of the shotgun.
- Examination of the gun revealed a strong smell of burned powder and showed that both barrels were fouled indicating that both barrels had been fired since it was last cleaned.
- The shotgun was test fired. Comparison of the firing marks on the test fired cartridges with the marks on the spent cartridges, found in the breach, were in agreement.
- Wadding recovered by the police from the scene of the murder was distinctively coloured red, green and white. It was found to be indistinguishable from wadding used in the manufacture of Blue Rival cartridges.
- Mr Graham gave evidence that he bought Blue Rival cartridges for you. His evidence was supported by Mr Cowling from Hobby Shop, to the effect that a box of cartridges was purchased. Mr Newton gave evidence that on the day before the murder you asked him to look after a box of cartridges. He recalled that "Blue" was written on the box. The number of unused and spent cartridges found amounts to 25; the number contained in a complete box of cartridges."

24. The Commission added the following in paragraphs 34 to 37 of the First Statement of Reasons:

"34. The CCRC considers that any further expert evidence supporting the proposition that the Gye and Moncrieff shotgun was not the murder weapon will have to be weighed against this evidence. We take the view that any such scientific evidence, at its highest, would not be sufficiently determinative when taking account of all other factors, including the opinion of Mr Spencer on this issue, described above.

35. Further when taken with the other evidence, from multiple sources, the CCRC takes the view that, if the jury had accepted this evidence, the prosecution had presented a highly incriminating case against you. This included:

- Evidence that you had a motive to murder Mr Clarke;
- Your knowledge of Mr Clarke's movements on the night of the shooting;
- Evidence that you had been out and returned to your house on the night of the shooting;

- The evidence of Mr Newton that at about 11pm on 4 November 1972 you had come to his home (when you asked him to look at a box of cartridges) that was in contradiction to your alibi evidence that you had been at home from 9pm;
- Evidence that Mr Graham, who had purchased the cartridges, was for a time in custody at the same police station as you. Police officers gave evidence of overheard cell conversations between the two of you in course of which you made highly incriminating remarks;
- Evidence of your reaction when you were told by the police of the finding of cartridges in a shotgun near the scene of the shooting and of the account given by Mr Graham to the effect that he had bought cartridges for you;
- Evidence of the finding of lead residue on certain items of your clothing not inconsistent with the recent discharge of a gun;
- Evidence that a Wrigley's chewing gum wrapper was found at the scene of the shooting and further evidence that you had been given similar gum by your wife when she visited you at the police station.

36. Any scientific evidence that the Gye and Moncrieff shotgun was not the murder weapon would also need to be weighed against this evidence.

37. Taking all factors into account the CCRC does not consider that any such scientific evidence would be of sufficient force to disrupt the strong matrix of evidence in this case. In these circumstances we conclude that this issue is incapable of impacting on the safety of your conviction. Further inquiry into this matter would not be necessary or proportionate."

25. Against that background, the Commission said as follows in paragraphs 38 to 41 of its First Statement of Reasons about the suggestion that Mr Spencer had falsely claimed to have examined the Essex guns:

"38. The CCRC notes that Mr Spencer's report does not indicate that he had examined the 'other guns' or that the CCRC had instructed him to do so. He did however comment on the observations made in Mr Pryor's statement (the forensic scientist who examined these exhibits).

39. In an email, dated 26 June 2019, following a query by CCRC, Mr Spencer checked his examination notes and confirms that he did not examine the other gun exhibits. He did recall on first reading the Judgment that something stated was incorrect. He believes the remarks in the Judgment that he had examined the other guns could be what he noted to be incorrect.

40. In light of the above it is the CCRC's view that there is insufficient basis for considering that Mr Spencer had knowingly misled the Court on this issue. In any event the CCRC does not consider that the forensic evidence supports the hypothesis that either of the 'other guns' were candidates for the murder weapon in this case. As such, this issue does not detract from the evidence supporting that the Gye and Moncrieff shotgun was the murder weapon; your link to this shotgun; and the other evidence in the case against you.

41. The CCRC does not therefore consider that further inquiry into this matter is justified. There is no real possibility that this will impact on the safety of your conviction."

26. The Claimant was critical of this and the Commission responded to his criticism in paragraphs 16 and 17 of the Second Statement of Reasons, as follows:

"16. In relation to your position that Mr Spencer had mislead the Court into believing that he had physically examined the 'other guns', you suggest that the CCRC, in its conclusions on this matter, detailed in the first provisional decision, has altered the Court of Appeal Judgment.

17. The CCRC does not accept that it has altered the Court of Appeal Judgment. Having considered your additional points on this matter we have not altered our position, detailed at paragraphs 38 to 41 of the first provisional decision."

27. The Commission also said as follows in its Final Statement of Reasons:

"We consider that it is clear from Mr Spencer's report, dated 4 August 2000, that he did not examine the 'other guns' but was basing his conclusions on the observations made by Mr Pryor. Further, in light of Mr Spencer's letter, dated 26 June 2019, detailed at paragraph 39 of our first provisional decision, dated 15 July 2019, we do not consider that the comments made in the Court of Appeal Judgment provide a sufficient basis for concluding that Mr Spencer gave evidence at your appeal to the effect that he had examined the 'other guns'."

28. As for the suggestion that Mr Pryor gave false evidence, the Commission said as follows in paragraphs 14 and 15 of its Second Statement of Reasons:

"14. You say that Mr Pryor's failure to detail burring and metal fragments on the 'other guns' in his statement of 30 November 1972 is indicative that he and Mr Spencer mislead the Court of Appeal in bad faith when giving expert opinion on whether these guns could have been used in the murder of Mr Clarke. You also highlight that Assistant Chief Constable (ACC) Boothby would also have been aware of this absence of detail in the 1972 statement.

15. The CCRC considers that the Court of Appeal would regard your reasoning on this issue to be wholly unpersuasive. We can find no basis for considering that any absence of detail in Mr Pryor's statements is indicative of bad faith on the part of Mr Pryor, Mr Spencer or ACC Boothby; or that the Court of Appeal were deliberately misled on the evidence in relation to the 'other guns'. Further we note that, had you considered it relevant, it was open to you to raise this matter at your second appeal."

29. The Commission added the following in its Final Statement of Reasons:

"In relation to the 'other guns', we do not consider that the Court of Appeal would be persuaded by the significance that you place on the additional detail contained within Mr Pryor's statement of 9 August 1979. We do not consider

> that the Court would regard Mr Pryor's two statements to be inconsistent. It was however your opportunity to test the evidence of Mr Pryor and Mr Spencer, and to make the arguments that you now make in this regard at your appeal in 2002."

30. Finally, in relation to the Essex guns, the Commission said as follows in its Final Statement of Reasons:

> "We have nevertheless considered whether, at its highest, the issue of the 'other guns' could now sustain a reference to the Court of Appeal. We conclude that, even if the Court's stance at your appeal, as detailed in its Judgment, could not now be relied upon, we do not consider that the evidence relating to the 'other guns', detracts from the evidence supporting that the Gye and Moncrieff shotgun was the murder weapon; your link to that shotgun; and the other evidence in the case against you, detailed at paragraphs 32 to 35 of our first provisional decision. This is also taking account of Mr Pryor's two statements and Mr Spencer's report."

*(5)(a)(ii) Ground 2: Decision*

31. In refusing permission to apply for judicial review, Garnham J said as follows in relation to Ground 2:

> "Ground 2 was properly dealt with in the CCRC's provisional and final decision, as explained in the AoS. Disagreement with the CCRC's conclusions is not a ground of challenge."

32. I entirely agree with Garnham J. The passages which I have quoted from the Statements of Reasons demonstrate that the Commission had carefully considered the points made by the Claimant, but had concluded that the Court of Appeal would not consider that they affected the safety of his conviction. Indeed, it would be surprising if the Commission had reached any different conclusion. The Claimant disagrees with the Commission, but, as Garnham J said, that does not give rise to a ground for seeking judicial review. The Claimant has not, by ground 2, identified any arguable error of law on the part of the Commission.

***(5)(b) Ground 1***

33. Ground 1 is in the following terms:

> "The Defendant has failed to take any account of the breaches of the duty of disclosure and Common Law duty to the Court of Appeal in 2002 of participants in my criminal case."

34. It appears from paragraph 16 of the Claimant's witness statement that the alleged breaches of the duty of disclosure consisted of the alleged failure by Mr Spencer to tell the Court of Appeal of the contents of his own report.

35. Garnham J said as follows in relation to ground 1 (and ground 3):

> "Ground (sic) 1 and 3 are new. They were not advanced during the CCRC's review. The CCRC decision cannot be irrational if the points had not been put to the CCRC for them to address."

36. The Claimant did not identify to me, either in written submissions or at the hearing, any document in which he had raised with the Commission, before the Commission made its decision, the allegations which form the basis for ground 1. It follows that ground 1 has no prospect of success, for the reasons given by the Divisional Court in paragraph 78 of its 2019 judgment.

37. In addition, I note that the factual premise asserted for ground 1 appears to be unsustainable. Mr Spencer's report was the reason, and the only reason, why the Commission referred the Claimant's case to the Court of Appeal in 2000. The suggestion that the Commission gave the Court of Appeal only parts of his report is difficult to credit. His report is referred to at several points in the 2002 judgment, with no suggestion that the Court of Appeal had only received parts of the report.

38. Moreover, the Claimant cross-examined Mr Spencer before the Court of Appeal. By then, he had been protesting his innocence for years. The proposition that the Claimant allowed Mr Spencer to conceal from the Court of Appeal aspects of his report which the Claimant regarded as favourable to his case is also difficult to credit.

***(5)(c) Ground 3***

39. Ground 3 is as follows:

> "The Defendant has failed to take any account of their failure to inform the Court of Appeal in 2002 that at the time of the hearing there was an on-going investigation into Mr McCafferty, the prosecution firearms expert at trial by the Forensic Science Service. Nor were they informed of the result of the investigation."

40. As has already been stated, Garnham J refused permission to apply for judicial review on this ground on the basis that it had not been raised before the Commission. Undeterred by that decision, the Claimant renewed his application for permission to apply for judicial review. Yet the Claimant has not identified any document in which he invited the Commission to make a decision on the grounds set out in ground 3.

41. What the Claimant did was to invite the Commission to investigate all cases in which Mr McCafferty had given similar evidence. This request was contained in his solicitor's letter dated 29 May 2019. Attached to that letter were copies of fax messages dated 23 April and 9 May 2001 from someone in the Forensic Science Service who stated that he had been asked to investigate Mr McCafferty's findings. The Claimant was therefore aware that an investigation into Mr McCafferty's findings was commenced by the Forensic Science Service in 2001, but at no stage did he submit to the Commission that his case should be referred to the Court of Appeal by reason of the non-disclosure of that investigation.

42. As with ground 1, ground 3 has no prospect of success, for the reasons given by the Divisional Court in paragraph 78 of its 2019 judgment.

***(5)(d) Ground 4***

43. Ground 4 is in the following terms:

> "The Defendant failed to take any account of the Note of Mr Fitzgerald that the fresh evidence adduced merits reference back to the Court of Appeal as it would make a difference to the safety of the Claimant's conviction."

44. It appears from the Claimant's witness statement that this ground refers to a Note of Advice dated 13 December 2019 by Edward Fitzgerald QC. That note post-dates the Commission's decision. It is not arguable that the Commission committed an error of law when it made its decision on 25 October 2019 because it failed to have regard to a document which was not even created until over 6 weeks later. Ground 4 has no prospect of success.

45. In any event, a note by counsel is not evidence. The evidence referred to in Mr Fitzgerald's note was that which formed the subject of grounds 2 and 3. That has been dealt with in the context of those grounds.

***(5)(e) Ground 5***

46. Ground 5 is a ground which was not included in the statement of grounds attached to the claim form. It is a ground advanced in paragraph 19 of the Claimant's witness statement, which is in the following terms:

> "I refer to my claim that Mr Spencer had falsified records to establish that he had carried out examination while at the police headquarters in Hertfordshire regarding pellets removed from the body of Terry Clarke cannot be dealt with at this stage because the CCRC refuse to make available the video recording made at the time of the alleged examination. They now say they have not got the video recording. That is a deliberate lie because they know that Spencer has all the video recordings taken at the time and all the CCRC has to do is request them. The video tapes belong to the CCRC and not Mr Spencer. Mr Spencer was instructed and paid by the CCRC, and therefore the CCRC failure to supply the video tapes is a further example of their failure to properly investigate my case, which would result in a reference back to the Court of Appeal."

47. The alleged significance of the video recording is that the Claimant contends that Mr Spencer lied when he said as follows in his report, in relation to exhibit RS 103:

> "This item comprised of fourteen fired and impact damaged pieces of lead shot, together with a large blood clot and fine mouldy yellow debris. I selected the 13 least damaged pellets and found that their weight was consistent with English No. 7 shot.
>
> These shot are damaged from impact and many of them are no longer complete. It is probable that they are actually No. 6 shot. They are not intact No. 7 shot."

48. The Claimant cross-examined Mr Spencer before the Court of Appeal. That was his opportunity to suggest to Mr Spencer that he had lied. The Claimant was able to make that suggestion then because his basis for alleging that Mr Spencer lied is that Mr Spencer did not weigh the shot in his presence.

*(5)(e)(i) Ground 5: Relevant Extracts from the Statements of Reasons*

49. Nevertheless, the Commission considered the Claimant's complaint. The Commission dealt with this issue in paragraphs 14 to 37 of its First Statement of Reasons. I have already quoted paragraphs 32 to 37. Then the Commission said as follows in paragraphs 5 to 11 of the Second Statement of Reasons:

> "5. You assert that you did not leave prior to the examination of the RS103 pellets. It remains your position that the examination of the pellets did not take place. You say that Mr Spencer's examination was video recorded by a police officer. The only time that you indicated that you might leave was after Mr Spencer was going to work on the shotgun, after initially being unable to get it to operate. You say you did in fact remain at this point upon agreement that all his work would be video recorded.
>
> 6. You suggest that the CCRC has fabricated the extracts of the CCRC's internal typed examination notes provided to your representative on 31 July 2019. You say that the test firing was complete by 6pm on 1 June 2000 and that D/S Crawley escorted you, Felix Robinson, Helen Barton and Mr Spencer from the premises after this. You suggest that the CCRC should now produce the following:
>
> - The video of all the examinations carried out by Mr Spencer;
> - All the original CCRC notes, taken by Felix Robinson during the examination of 1 and 2 June 2000;
> - Copies of all entries made by Hertfordshire Constabulary detailing who entered the premises and what time on 1 and 2 June 2002.
>
> 7. Having considered your additional points on this matter we have not altered our position, detailed at paragraphs 14 to 37 of the first provisional decision. In stating this we make the following additional observations.
>
> 8. If you considered that your absence during Mr Spencer's examination of the RS103 pellets was relevant to the safety of your conviction it was open to you to raise this matter directly with the Court at your second appeal.
>
> 9. In a letter to the CCRC, dated 26 July 2019, Mr Spencer makes the following remarks on this issue:
>
> *"I understand that Mr Cleeland's lawyers have queried why Mr Cleeland was not present when I examined the lead shot. The answer is simple: Mr Cleeland absented himself. He was present during my examination of the exhibits which started at 16:00hrs on 1 June 2000 until 17.30hrs that day. I recall quite clearly that at 17.30hrs, Mr Cleeland stood up and expressed his dissatisfaction with the proceedings, and left. This is a neutral description of his conduct, but it would not be unfair to describe his conduct as an outburst followed by him storming off in a huff.*
>
> *My examination notes record that Mr Cleeland was present at 10.00hrs on 1 June 2000 while I examined the shotgun RS/104A and the fore-end RS/105. He was also present when I started my examination of RS/105 (box containing Blue Rival cartridges) and he was still there at 17.00hrs when I examined RS/104B (two fired Blue Rival cartridges) which I*

*completed at 17.30hrs. At this point Mr Cleeland stood up, said his piece and left. Up to 17.30, the parties present were:*

- *myself*
- *my erstwhile colleague Andrew Ridley*
- *Det Sgt Crawley, Herts police*
- *Felix Robinson, CCRC*
- *Helen Barton, CCRC*
- *Paul Cleeland.*

*My notes for RS/108 (shotgun wads from beneath Terence Clarke's the Jaguar) started at 17:40 and in the box for 'Present' I wrote "not Mr Cleeland" – recording the fact that he had left. I worked my way through the remaining material"*

10. The CCRC has located the CCRC typed notes of Mr Spencer's examination of the exhibits on 1 and 2 June 2000. These notes do not support your recollection of events but do support Mr Spencer's recollections; the information recorded in his examination notes; and the information recorded in his report (see paragraphs 15 to 26 of the first provisional decision for further details). The following quotes from the typed CCRC notes are pertinent to this issue:

*"Notes of examination of exhibits by Jonathan Spencer on 1 June 2000. Notes taken by: Felix Robinson"*

*"**9.55am***

*The following people were present for the examination of the exhibits listed below: Mr Cleeland, JS, AR, IC, HB and FR."*

*"**5.00pm***

*RS104B*

*Two spent Blue Rival cartridges recovered from the gun.*

*JS spent some time comparing the markings on the two spent cartridges from RS104B with cartridges in RS105.*

*PC complained at the time taken doing unnecessary examinations.*

***He said that it was not disputed that the spent cartridges came from the gun.***

***PC was encouraged to remain for the rest of the examination of the gun and cartridges but left at 5.30pm approx."***

***"RS12 – pellets recovered from the floor of the recovery room***

*This exhibit is 10 pellets. JS weighed them = 15.9*

*JS took 2 for elemental analysis"*

***"RS103 – pellets from Clarke's body in a large blood clot***

*JS weighed 13 of the 14 as one was not a whole pellet. Total weight = 16.3*

*None taken for analysis as foul."*

*Examination of the exhibits finished at about 9.00pm."*

11. The above quotes have already been disclosed to you and are an accurate record of extracts taken from the CCRC typed notes described above. The document in question is an internal CCRC document and as such the whole document will not be disclosed to you. This is in circumstances where this document does not fall for disclosure under R v Hickey and the above extracts are sufficient to support our reasoning on this issue."

50. The Commission concluded as follows in paragraph 13 of the Second Statement of Reasons:

> "The CCRC is satisfied that it has undertaken reasonable and proportionate inquiry to establish that, contrary to your account, the examination and weighing of the RS 103 pellets by Mr Spencer took place on 1 June 2000 after you had opted to leave. Having reached this conclusion the CCRC has decided not to undertake any further inquiry into this matter. As such, we will not be seeking to establish if there exists a video recording of Mr Spencer's examination of the RS 103 pellets, or copies of records detailing who entered the premises at Hertfordshire Constabulary on 1 and 2 June 2002, and at what time."

51. The Commission maintained this position in the Final Statement of Reasons.

*(5)(e)(ii) Ground 5: Decision*

52. Garnham J said as follows in relation to this ground:

> "It is for the CCRC to decide what lines of enquiry to pursue. In fact, the provisional and final decisions adequately explain the CCRC's approach to the video exhibit."

53. I agree. Indeed, the Claimant has identified no arguable basis for saying that Garnham J was wrong to refuse permission on ground 5.

**(6) The Application for Permission to Amend the Statement of Grounds**

54. By his application issued on 5 August 2020 the Claimant sought to amend his statement of grounds so as to rely on a transcript of the evidence given by Mr Pryor before the Court of Appeal on 15 November 2001.

55. The transcript of Mr Pryor's cross-examination includes the following:

> "595. Q. What you are saying now is, what you are telling Boothby this gun hadn't been fired since it was since it was cut down. Now you're saying?
>
> 596. A. That was my opinion, yes.
>
> 597. Q. Now you are saying it is possible; it could have been?
>
> 598. A. Yes it's possible.
>
> 599. Q. Could have been?

601. A. I say it was possible but it was my opinion that it hadn't been."

"605. Q. You're telling the Court now the, it could have been used. Is that correct?

606. A. My opinion was that it had not been fired since it was shortened.

607. Q. But you can now say –

608. A. I can't exclude the possibility that it had been.

609. Q. That it had been.

610. A. I can't exclude the possibility that it had been."

56. The transcript of Mr Pryor's re-examination includes the following:

"847. Q. Just help me on two matters arising from the very questions you have been asked. You were asked and agreed that it was a possibility that the pump action shotgun had been fired notwithstanding metal fragments. You remember that?

848. A. A possibility I can't exclude sir, yes.

849. Q. Can you help us as to the absence of fouling in the barrellings of pump action shotgun and what, if anything, that tells you as to the fact that that gun having been fired?

850. A. That certainly reinforces my opinion that it had not been fired since it was shortened.

851. Q. Could you just spell out why the absence of any fouling confirms you, in our opinion that it hadn't been fired since it was sawn-off?

852. A. When a gun is fired fouling is deposited in the barrel, and will remain there until it is physically removed by cleaning or.

853. Q. Yes?

854. MR JUSTICE WRIGHT: Could it be not be removed, my recollection from my Army career gives me a view about this. Could the fouling from a cartridge be removed simply by soaking?

855. THE WITNESS: Yes certainly these guns were immersed in water, it is a mechanical deposit, that's just sitting in the barrel, so certainly the passage of water could shift it."

57. The Claimant had the opportunity in the course of the hearing before the Court of Appeal to make submissions to that court as to the alleged significance of this evidence given by Mr Pryor. The Claimant complains that the Court of Appeal did not refer in its 2002 judgment to Mr Pryor's acceptance that he could not exclude the possibility that the Western Field gun had been fired after the barrel had been sawn off. Indeed, he asserts that, by not referring to that part of Mr Pryor's evidence, the Court of Appeal judges acted corruptly and perverted the course of justice. Given that he was present at the Court of Appeal hearing, it is unclear why the Claimant has waited so long to raise this point.

58. However, what matters for present purposes is that the Claimant did not obtain this transcript until some time after Garnham J had dismissed his application for permission to apply for judicial review. The Claimant did not provide this transcript to the Commission before it made its decision of 25 October 2019. It follows that the transcript is not relevant to that decision and cannot form the basis for an argument that the Commission erred in law in making that decision. The proposed new ground for seeking judicial review has no prospect of success.

**(7) Conclusion**

59. For the reasons given in this judgment, I dismiss both the Claimant's renewed application for permission to apply for judicial review and his application for permission to amend the statement of grounds attached to the claim form.

60. I will hear the parties' submissions on the question whether the applications were totally without merit. The significance of that question is that, if a party persists in making applications which are totally without merit, it is open to the court to make an extended civil restraint order, pursuant to Practice Direction 3C. I note in that context that the Divisional Court said as follows in paragraph 85 of its 2019 judgment:

> "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."

61. Finally, I apologise for the time taken to produce this judgment, which is primarily due to the exceptional demands on my time as a Presiding Judge during the pandemic.