



Neutral Citation Number: [2019] EWHC 2889 (Admin)

Case No: CO/2487/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/10/19

Before :

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE SWEENEY

THE QUEEN ON THE APPLICATION OF
ROBERT DAVID EKAIREB

Claimant

-and-

CRIMINAL CASES REVIEW COMMISSION

Defendant

Phillippa Kaufmann QC and Mark McDonald (instructed by Swain & Co Solicitors)
for the Claimant

The Defendant neither appearing nor being represented

Hearing date: 29 October 2019

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. On 19 December 2013, at the Central Criminal Court before His Honour Judge Nicholas Cooke QC and a jury, the Claimant Robert David Ekaireb was convicted of the murder of his wife, Li Hua Cao also known as Lisa Ekaireb (“Lisa”), on or about 23 October 2006. On 7 January 2014, he was sentenced to imprisonment for life with a minimum tariff of 22 years.
2. He appealed against conviction. Although several grounds of appeal were initially advanced, by the time of the hearing before the Court of Appeal (Criminal Division) only one remained extant, namely that the conduct of his Leading Counsel at trial (Michael Wolkind QC), whom the Claimant dismissed following delivery of his closing speech, was incompetent to a degree that rendered the conviction unsafe. On 16 December 2015, the appeal was refused ([2015] EWCA Crim 1936). Although the court considered that some of the criticism of Counsel was well-founded, on the entirety of the evidence, it concluded that the verdict was not unsafe.
3. On 30 June 2017, the Claimant made an application to the Defendant (“the CCRC”) for remittal of his case to the Court of Appeal on the basis of new medical evidence regarding his mental health, notably a diagnosis of Asperger’s Syndrome and the effects of that condition on his evidence and presentation at trial. On 18 October 2018, the CCRC issued a provisional decision refusing the application but inviting any further representations; and, on 2 April 2019, after consideration of further submissions and evidence, it issued a final decision on the application not to refer the case to the Court of Appeal.
4. In this claim, the Claimant seeks to challenge that decision. On 1 August 2019, Sir Duncan Ouseley sitting as a Judge of the High Court, refused permission to proceed with the claim on the papers. Phillippa Kaufmann QC and Mark McDonald of Counsel on behalf of the Claimant now renew that application.

The Background Facts

5. The Claimant was a wealthy jeweller and property developer who lived in North London.
6. Lisa was a Chinese national, who had gone to Ireland with her brother in 2003 to learn English. She had stayed on, working as a waitress. The Claimant met her in November 2005 in a Dublin lap dancing club where she worked. She soon moved to London, where she moved in with the Claimant. They married in China in July 2006, going through a second marriage ceremony in London on 4 October 2006 by when Lisa was pregnant. They made their home at Flat 9, Pavilion Court, Mount Vernon Estate, Hampstead, which the Claimant owned together with a number of other properties close by.
7. Lisa went missing overnight on 15 August 2006, which the Claimant reported to the police, referring to a text message from her suggesting she might endanger her own life. When the police found Lisa, she said that she was scared of the Claimant; but,

following repeated calls and texts from the Claimant, she agreed to be collected by him and taken home.

8. She went missing again in October 2006. On this occasion, the Claimant did not contact the police; but, in February 2007, Lisa's brother (who lived in Denmark) contacted the police to say that neither he nor any other member of her family had heard from her since she had telephoned him on 23 October 2006. A police enquiry was commenced, with which the Claimant cooperated giving four interviews. He told the police that his wife had left in mid-November 2006 as she had done on previous occasions. She had not told him where she was going. He said he thought she had returned to lap dancing in Ireland. In any event, by December 2007 the police had concluded that Lisa was "a free spirit... used to travelling... [and] had many short-term relationships". The investigation was no longer actively pursued.
9. However, her family not having heard from Lisa in the meantime, a full murder investigation began in February 2012, with the Claimant as the main suspect. The Claimant voluntarily attended an interview, and answered questions under caution. He was charged with Lisa's murder on 7 June 2012.

The Trial

10. Lisa's body has never been found. There was no relevant forensic evidence: none as to any place or cause of death, none at the Claimant's properties or in his vehicles, none at all. CCTV recordings on the Mount Vernon Estate were only kept for 14 days, and had long since gone. The Crown was thus unable to make any case as to precisely how or when Lisa was killed. Its case against the Claimant was based entirely on circumstantial evidence.
11. The circumstantial evidence relied upon by the prosecution, and the Claimant's response to it, was set out in detail in the Court of Appeal judgment, as follows:

"The case for the prosecution

12. The case for the prosecution was based on circumstantial evidence. Many witnesses were called, including [Lisa's] brother and two sisters, those who had known her in Ireland, members of the Chinese community in London, those who dealt with her in relation to her pregnancy and its possible termination, private investigators, those who worked on the Mount Vernon Estate, those who had let Flat 9 Pavilion Court after 2006, those who conducted the missing person inquiries in 2007 and 2012....

13. In terms of seeking to prove [Lisa's] death the prosecution relied generally upon:

- i) [Lisa's] lack of contact with her family and friends after speaking to her brother on 23 October 2006. That was out of character. Her brother's evidence was that they were very close and in contact by phone and text.

- ii) Her landline, mobile telephone, e-mail account and bank accounts had not been used after October 2006.
- iii) Her failure to attend appointments relating to her pregnancy.
- iv) The fact that all enquiries seeking to establish proof that she was still alive came to nothing.
- v) The failure of the [Claimant] to make any enquires about her or the child which she was carrying.
- vi) Lies told by the [Claimant].

14. The prosecution relied upon specific evidence relating to the period before her last telephone call to her brother on 23 October 2006.

- i) The [Claimant] had a ‘nasty temper’. He was said to be controlling and disapproving about his wife’s past. She had told police in the past that she was afraid of him and that he had assaulted her in August 2006, though she subsequently retracted the allegation.
- ii) He was said to be a controlling man who restricted her access to money and to other people. Her brother’s evidence was that there had been a change after the wedding as he would not allow her to work and she felt she had no freedom and no friends. The evidence of her sister... was to the same effect; she was afraid of him; she was unhappy and wanted to return to China.
- iii) They had a loud argument in China in July 2006, which resulted in bruising to her arm and scratches to his chest. The argument was overheard by [Lisa’s] sister..., and was said to be about her desire to leave possessions the [Claimant] had bought her, at her family home in China. Her evidence was that the police had been called, but the case was dropped after it was agreed that monthly payments would be made to her parents.
- iv) The [Claimant] was obsessed by her lap dancing past and whether she had continued lap dancing after she became his girlfriend. In late August 2006 he hired a private investigator and in October 2006 contacted polygraph companies.
- v) There was evidence of a previous report to police of [Lisa] going missing. The [Claimant] had called police on 15 August 2006 and referred to a text message which suggested she was considering suicide. When police

made contact with the wife she told police that she was scared of the [Claimant]. The [Claimant] repeatedly called and texted; she did later agree to be picked up by him and taken home. In contrast in October 2006 he made no effort to telephone her and did not contact the police.

15. The prosecution relied on the following evidence of matters that had occurred on 23 October 2006 as pointing to the killing having occurred then or thereabouts:

i) At 20:00 on 23 October 2006, [Lisa] spoken to her brother. About 3 hours later, a telephone call was made from 9 Pavilion Court to the [Claimant's] mobile telephone. At 23:07, the [Claimant's] key fob was activated allowing access to the car park. At 23:44 and 23:58 the [Claimant] telephoned his parents.

ii) The [Claimant] went out in the early hours of 24 October to a nightclub in London's West End having telephoned the manager of the nightclub at 01:08 from 9 Pavilion Court. A parking ticket was issued to the [Claimant's] father's car at 03:15, near to the nightclub.

iii) The [Claimant] accepted that he was the last person to see her.

iv) The inherent implausibility of the [Claimant's] account of her leaving Flat 9 on the Mount Vernon Estate on a night in October 2006 with her packed bags and no one having heard from her after that time.

16. The prosecution then relied on events after 23 October 2006 as confirming the appellant had killed her:

i) After that night the [Claimant] went to live with his parents and never used the flat again.

ii) He sent text messages pretending to be his wife and asking for the contact details of her former roommate.

iii) He sent a series of text messages to his previous girlfriend; the prosecution suggested he was trying to rekindle the relationship.

iv) There had been 'unusual key fob activity' showing repeated access from one of the car parks to Flat 9 on 8 November 2006 between 21:45 and 00:04.

v) There was a sighting of the [Claimant] being driven by his father from Flat 9 by one of the security porters in a ‘zombified’ state possibly on the same date.

vi) On 17 November 2006 a midwife telephoned and said that [Lisa] had not attended for a scan. The [Claimant] said that he was not sure why this was and that he would ask her to telephone later that evening.

v) A series of works were undertaken on Flat 9 prior to it being rented out on 21 December 2006. These included replacing the original carpets with new carpets of the same colour, the cleaning of the marble floors and a new partition between the bedroom and living area, from which the inference might have been drawn that he was anxious to remove incriminating traces.

vi) [Lisa’s] wife’s wedding ring, purchased as part of a matching set, and other possessions were recovered from a storage unit being rented by the [Claimant] and his father in June 2012. The [Claimant] had previously told police that his wife had taken all of her possessions with her when she left.

The defence case

17. The defence case was that [Lisa] was not necessarily dead and, if she were, the [Claimant] was not responsible for her death. His case was that on 23 October 2006, she had told him that she was leaving him because her family needed her. She packed her bags and left the flat. He never saw her again. She was unhappy in her marriage and bored by his life-style in London. He gave evidence to that effect at the trial.

18. In supporting that case, and responding to the prosecution case he relied on the following:

i) [Lisa] had quickly become unhappy in the marriage, bored in London and had not wanted the baby. She left him on 23 October 2006 for those reasons.

ii) She had not been as close to her family as the prosecution evidence suggested. Her parents had divorced when she was young and she lived with an aunt for 7-8 years. She had never lived with her family for any sustained period.

iii) She resented her brother who lived in Denmark because he did not send money home to her parents as she did.

iv) In August 2006, she had been reported missing. She had telephoned in response to a call from the police, but said she did not want her whereabouts disclosed as she was frightened of her boyfriend. This information had been passed on to the [Claimant].

v) On 15 August 2006 she had sent him a text message saying:

‘I hope you can get good life with your money you are a bad boy in the world – I do not need money I am still can get good life after few year I will show you.’

vi) She had withdrawn £1,800 from her Lloyds account on 10 October 2006. If she wanted to disappear and not be traced she would not use the known accounts after this as it would allow her to be traced.

vii) She had spoken of terminating the pregnancy. She had attended an initial consultation with the British Pregnancy Advisory Service, but did not attend on 19 September 2006 for a scheduled termination. At the time of her disappearance she was 19 weeks’ pregnant and was therefore approaching the time limit for a legal termination.

viii) In August 2006 after she had left the [Claimant], she had told... a prosecution witness who helped Chinese people find work, that she would be prepared to work as an escort to make money.

viii) She had no links with the UK other than her marriage to the [Claimant] and therefore it was likely she would have gone to China or Ireland.

19. As to the prosecution’s circumstantial evidence against him relating to matters before 23 October 2006, the [Claimant’s] case was that:

i) Although he had a temper, he had not been violent towards her. He accepted that there had been an altercation in the street on 28 August 2006, but he did not assault her. She made a formal withdrawal of the statement she had given to police, stating: ‘My husband Robert ... has never been violent towards me.’

ii) He did not restrict her, beyond restricting (a) her cooking because his Jewish faith involved restriction on his diet, and (b) her working, because she was pregnant and he did not want her to work.

iii) They argued in China because she wanted to give away gifts that were sentimental. She had scratched him and he had restrained her by the wrists.

iv) He had only hired a private investigator to establish whether she was still lap dancing as she had said that she was not.

v) They had argued over the pregnancy, as he had wanted her to have the baby.

20. In respect of the evidence of events after 23 October 2006, the appellant maintained:

i) He had telephoned his parents on 23 October as he was upset that she had left him.

ii) There was no record of anything unusual in the security log at the Mount Vernon estate on the night of 23 October 2006.

iii) He had decided to move out of Flat 9 prior to the disappearance as he and his wife were moving into a different flat in Heathview Court in any event, and he had already started to furnish the new home in September.

iv) He wanted to let Flat 9 for a commercial rent. The carpets, cleaning and modifications were undertaken in furtherance of renting out the flat. The carpet changing was negotiated by his father and was a £1,500 investment which made sense since the flat could be rented for £3,000 per month, professional cleaning is standard and a partition was erected as that was a term of the lease with an incoming tenant. The evidence of a letting agent was to the effect that the new tenants wanted modifications.

v) The attempts to contact Ireland and [Lisa's] friends in late October represented an indirect attempt to trace her by finding out the whereabouts of previous flat mates.

vi) If he had been trying to lay a false trail by pretending to be her, he would not have used his own phone

vii) He had contacted his ex-girlfriend in November 2006 as a 'shoulder to cry on'.

viii) The key fob activity of 8 November 2006 was him moving personal belongings out of the flat.

ix) He admitted that he had not been frank with the midwife. This was due to embarrassment at being left by his pregnant wife and not knowing where she was.

x) As for the wedding ring, it was found along with his own in the suitcase because neither of them regularly wore them and they were put in the suitcase in their presentation boxes after the UK marriage on 4 October 2006. The suitcases would have been placed in storage at some point in 2008. His suggestion in the 2012 interview that she had taken the ring with her, would have been an assumption, and the mistake therefore owed to a lapse of memory due to the passing of time rather than a lie.

xi) He had not contacted police after his wife's disappearance because she had been angry on previous occasions when he had involved the police. He believed not that she was missing but that she had left him as she had done before.

xii) He had been depressed after his wife left and did not report her missing because to him she was not missing, but had left of her own free will.

xiii) Although he had been identified as the last person to see his wife on 23 October 2006, no one else would necessarily remember something as mundane as a person leaving the estate where they lived on foot."

12. At the time of the trial, it was known that the Claimant had been diagnosed some years previously as suffering from chronic Obsessive Compulsive Disorder ("OCD") and depression; but there was no evidence – and certainly no medical evidence – put before the jury as to his mental condition, other than a reference by the Claimant himself during his own evidence that he suffered from OCD.
13. The jury unanimously found the Claimant guilty of murder. In refusing the Claimant's appeal, as I have indicated, the Court of Appeal found Mr Wolkind's closing speech was ill-judged, inappropriate and poorly structured; but it did not reach the level of incompetence that called into question the fairness of the trial or the safety of the jury verdict. Concluding, the court said (at [54]):

"... [W]e are satisfied that the sole ground on which [the appeal] is advanced fails. We have considered the entirety of the evidence and see no reason to doubt the safety of the conviction. There were very telling points against the [Claimant] such as the inherent unlikelihood of [Lisa] leaving the flat on an October night with a suitcase given the location of the flat in Hampstead, the failure of the [Claimant] to make inquiries about his wife though she was bearing his child, the refurbishment of the flat and the finding of the ring."

The Application to the CCRC

14. The Claimant's application for a referral to the Court of Appeal under section 9 of the Criminal Appeal Act 1995, received by the CCRC on 30 June 2017, was based on new medical evidence that the Claimant has Asperger's Syndrome within the broader category of Autistic Spectrum Disorder ("ASD"). The nature of the condition is such that he would have been suffering from it in 2006. The evidence at the time of the application comprised:
- i) A report by Dr MEC Alcock, a Consultant Forensic Psychiatrist, dated 30 April 2017.
 - ii) Reports by Professor Susan Young, a Registered Clinical and Forensic Psychologist, dated 11 November 2017 and 6 February 2018
 - iii) A report by Professor Penny Cooper on the participation of the Claimant at trial, dated 20 December 2017.
15. The Claimant submitted that this fresh evidence went to the core of the prosecution case at trial, and there was a real possibility that the conviction would not be upheld as it was unsafe if the CCRC were to refer the matter to the Court of Appeal. In particular, it was submitted that:
- i) The defence erred in not having the Claimant psychiatrically assessed prior to trial, which would have disclosed that he suffered from Asperger's Syndrome; and consequently in failing to put before the jury evidence as to his true mental health and the effect that his condition might have upon his evidence and presentation. In the event, no psychiatric and psychological evidence as to the Claimant's mental health was put before the jury even as to his OCD, which prevented the jury from putting the prosecution evidence into its proper context. That in any event gave a misleading impression of the Claimant, and his evidence. As a result, the jury were told that the Claimant was "odd" and "not normal" – and the jury would have seen that his behaviour was unusual – which, in the absence of evidence to explain his behaviour and presentation, went unanswered and unexplained. Indeed, the Claimant's own Leading Counsel made light of his mental illness before the jury, which compounded the impression.
 - ii) As a result of his now-diagnosed Asperger's Syndrome, the Claimant was vulnerable at the time of his trial, in particular when he gave evidence. The defence erred in failing to have special measures put in place, including an intermediary who would have ensured that there was appropriate control over cross examination. As a result, the Claimant was denied a fair trial.
 - iii) The prosecution relied on inconsistencies between his police interviews, which were five years apart. In the light of the fresh medical evidence, the Claimant's police interviews (which took place without an appropriate adult present) should have been excluded under section 78 of the Police and Criminal Evidence Act 1984.

The Statutory Test

16. The test for a referral which the CCRC must apply is well-established and uncontroversial. By section 9(1) of the Criminal Appeal Act 1995, the CCRC may refer a conviction to the Court of Appeal at any time, if the conditions of section 13(1) are met. Under that section, where an appeal to the Court of Appeal has already failed, the power to refer arises if (so far as relevant to this application) the CCRC “consider that there is a real possibility that the... conviction... would not be upheld were the reference to be made... because of an argument, or evidence, not raised in the proceedings which led to it...”. In R v Criminal Cases Review Commission ex parte Pearson [2000] 1 Cr App R 141 at page 149F-G, this court (Lord Bingham LCJ and Ognall J) explained the “real possibility test” in section 13 as follows:

“The [CCRC] must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld”.

17. Where the application depends upon fresh evidence, the CCRC must have in mind the provisions of section 23 of the Criminal Appeal Act 1968 which governs the reception of fresh evidence on an appeal, which requires the Court of Appeal to have regard to (amongst other things) whether it appears that the evidence may afford a ground for allowing the appeal. In Pearson, it was thus said (at page 150C-D):

“In a conviction case depending on fresh evidence, the [CCRC] 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?”

18. As this court (Simon LJ and Farbey J) indicated in the recent case of R (Cleeland) v Criminal Cases Review Commission [2019] EWHC 1175 (Admin) at [20]:

“Lord Bingham’s double question... 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.”

Before us today, Ms Kaufmann properly emphasised that the CCRC must have regard to that observation when performing its function of considering whether to refer a case to the Court of Appeal.

19. Ms Kaufmann accepts that the CCRC in this case posed the correct questions that it was required to address at [32] of its report (paragraph 48 of the Statement of Facts

and Grounds). However, she submits that its response to those questions was irrational and thus unlawful (paragraph 49).

20. The hurdle for such a submission to be successful is high. Whether to refer a case to the Court of Appeal requires an assessment or exercise of judgment in respect of predictive questions as to what the Court of Appeal might do if a reference were made. It is well-established that the CCRC enjoys a wide margin of appreciation in exercising that power, and this court will only interfere if the CCRC's conclusion is legal perverse or irrational under public law principles.
21. However, Ms Kaufmann did not flinch from her task: she submits that the CCRC's conclusion not to refer was indeed irrational in that sense.

The Grounds of Challenge

22. Foremost, Ms Kaufmann submits that the CCRC's findings in relation to the relevance of the new evidence to key issues at trial were irrational. In particular, the CCRC erred in two fundamental respects.
23. First, it erred in proceeding on the basis that the Claimant's presentation was not a significant issue in the trial. The CCRC accepted that, on the basis of such cases as R v Mulindwa [2017] EWCA Crim 416; [2017] 2 Cr App R 10 especially at [34] and [36], expert evidence on presentation can be admissible if it properly goes to the issue of a witness's credibility; and the Claimant's credibility was a central issue at trial. The Crown's case was based upon purely circumstantial evidence, built brick-upon-brick. For his part, the Claimant gave an explanation for almost all of the pieces of circumstantial evidence relied upon, each explanation on its face innocent. Each of the three experts whose evidence is now available identifies difficulties in social communication and interaction features that are common with people who suffer from ASD – and features that are peculiar to the presentation of people suffering from ASD such as poorly modulated eye contact, reduced or exaggerated facial expression and gestures and difficulty engaging in conversation by (e.g.) talking excessively or giving minimal responses. Referring to objective data (such as those discussed in Maras et al: Mock Juror Perceptions of Credibility and Culpability in an Autistic Defendant; Journal of Autism and Developmental Disorders (2018), to which Professor Copper refers in her supplemental report dated 11 November 2018), it was submitted that the unusual presentation of those who suffer from ASD might be mistakenly construed as indicating evasiveness or even dishonesty, without appropriate, medical explanation as to typical presentations by those who suffer from ASD. The Claimant's presentation was apparently a matter of concern to his own legal team at trial; but they took no steps to address it from a medical point of view. In any event, Ms Kaufmann submits that the CCRC's rejection of the significance of this expert evidence on how those with ASD (and notably, of course, the Claimant) present, on the basis that there is no evidence on the transcript of any adverse effect of presentation (where it would not in any event appear) and no point as to presentation was raised by the Claimant's own legal team at the time, was irrational.
24. However, in my view, this complaint does not fairly reflect the CCRC report as a whole. The report clearly acknowledged that the Claimant's credibility was "a central issue in this case" (paragraph 179), and that the new medical evidence was relevant to the Claimant's presentation at trial. The CCRC of course had the evidence of

Professor Cooper (including the reference to Maras et al) before it. There is no reason to believe that the CCRC did not take that evidence properly into account. It accepted both that expert evidence might have assisted the jury in understanding the Claimant's presentation whilst giving evidence (paragraph 224), and that he would most likely have qualified for special measures including an intermediary and giving evidence by livelink (paragraph 223).

25. But, in the context of the question that the CCRC had to pose itself (i.e. whether there was a real possibility that the conviction would not be upheld on a reference to the Court of Appeal), the CCRC went on to consider the extent to which there was evidence of specific examples of unfairness that arose as a result of the absence of this new medical evidence, e.g. examples of inherent unfairness as a result of the nature of the cross-examination to which he was subject, or evasiveness on the part of the Claimant in giving his answers. Having considered that evidence, notably in the transcripts, it found no such examples. I do not accept that the CCRC was wrong to proceed as it did. It took into account, as it was entitled to do, that it was the job of the trial judge to deal with specific communication issues as part and parcel of the trial process – and no complaint is made about the manner in which he did so.
26. In my view, in preparing its final report, the CCRC clearly had in mind all of the presentation issues raised by the new expert evidence, and made its own assessment of adverse impact on the trial that such issues may have made; before concluding, on the basis of all the available evidence, that the impact of the new medical evidence on both the credibility and presentation of the Claimant at trial was not such that there was a real possibility that the Court of Appeal would overturn the conviction. Ms Kaufmann submitted that that was a conclusion to which, on the evidence, the CCRC could not properly draw: but, to the contrary, in my view that was a conclusion, based on the judgment or assessment of the CCRC, to which it was fully entitled to come. It is not arguably irrational.
27. Second (and relatedly), Ms Kaufmann submits that the CCRC also erred fundamentally in proceeding on the basis that there was a significant amount of evidence upon which the new medical evidence would have had no bearing. She used as an example the “telling matters” referred to by the Court of Appeal in [54] of its judgment (quoted at paragraph 13 above) as matters which reinforced its view that the conviction was safe, namely the inherent unlikelihood of Lisa leaving the flat on an October night with a suitcase as she did, the Claimant's failure to make inquiries about her though she was bearing his child, the refurbishment of the flat and the finding of Lisa's ring. As I have described, the CCRC (at paragraph 176) accepted that possible innocent explanations of those “telling matters” had been proffered by the Claimant; and so, Ms Kaufmann submits, the question of whether the jury accepted those explanations by the Claimant depended vitally upon their assessment of his credibility. The CCRC's finding that the jury assessment of these matters would have been materially unaffected by the new evidence is (she submits) simply an irrational conclusion; or, to hang the same substantive point on another public law peg, by taking into account the Court of Appeal view of these factual matters without the benefit of the new medical evidence which undermined them, was to take into account an immaterial consideration. In any event, she submitted that it is not possible rationally to conclude (as the CCRC did) that there is no real possibility that the new evidence might have affected the jury decision to convict.

28. However, it seems to me that this second ground of challenge is merely a subset of the first: it too concerns the possible impact of the fresh evidence on the credibility and presentation of the Claimant, but with special focus on the matters which the Court of Appeal considered were particularly potent in favour of the prosecution at trial. The response is the same: in my view, the CCRC was entitled to conclude that the fresh evidence about the Claimant's mental health would not have had a material effect on the conclusions with regard to the Claimant's credibility to which the jury must have come in convicting him. The CCRC took into account the alternative explanations offered by the Claimant in this context; and it concluded (at paragraph 176) that, even if the new evidence were in full deployment, given the strength of the circumstantial case against the Claimant, it would not have such a bearing to raise a real possibility that the Court of Appeal might not uphold the conviction. That, again, was a conclusion to which the CCRC was entitled to come on the evidence. It was not arguably irrational.
29. Ms Kaufmann made incidental submissions concerning observations made in the CCRC report (at paragraph 204 of the report and following) to the effect that at the very least it is arguable that the "Halperin therapy notes" would be admitted on a retrial in which the Claimant's mental health played a more central part. A word of explanation is required. Dr Judith Halperin is a clinical psychologist to whom the Claimant was referred for cognitive behaviour therapy, and who saw the Claimant for therapy sessions between 2002 and 2011. Her notes for the clinical sessions were provided to the police, and served on the Claimant's defence team, prior to trial. The notes for the session on 26 September 2006 – a month before Lisa disappeared – records the Claimant telling her that he was "totally preoccupied with [Lisa]". He had thoughts of stabbing her; and could not categorically say that he would not harm her. He had had violent fantasies of stabbing children and teachers as a child, and now had new fantasies most mornings, seeing himself as being violent. The trial judge excluded this evidence as having been obtained unlawfully and on the basis that it was disproportionately prejudicial to the Claimant; but the CCRC indicated that one possible reason for the defence team not focusing on the Claimant's medical health at trial was that it might have resulted in the trial judge reconsidering the admissibility of this evidence (paragraph 122) and it may be regarded as admissible in any retrial (paragraph 208).
30. However, when the CCRC report is read fairly and as a whole, none of this is determinative of its view as to what the Court of Appeal might do. Paragraph 208 makes it quite clear that the possible admission of the Halperin therapy notes – potentially very damaging for the Claimant – merely reinforced the CCRC's view, already concluded, that there was no real possibility of the Court of Appeal overturning the conviction.
31. As her second ground of challenge – although again intertwined with the first – Ms Kaufman focused on the Claimant's need for special measures as a result of his Asperger's Syndrome. Dr Alcock's report said that special measures ought to have been put in place at trial to protect the Claimant as a vulnerable defendant: and, Ms Kaufmann submits, not to have such measures in place inevitably led to the Claimant's trial being unfair and his conviction being unsafe.
32. The CCRC report deals with this issue at paragraphs 222-230. It accepted that it is most likely that, had the new medical evidence been available at trial, the Claimant

would have qualified for special measures including an intermediary, livelink and the other measures referred to in Professor Cooper's report (see paragraph 223).

33. However, the CCRC reminded itself that, whilst in an appropriate case an intermediary may well improve the trial process, that is far from saying that, wherever that process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be available and the trial will be unfair if he is not (see R v Cox [2012] EWCA Crim 549 at [29]). The same is true of other special measures. Having considered the evidence (including of course the transcript), the CCRC concluded that no unfairness was evident (paragraph 228) and, taking all of the evidence into account, the absence of the measures set out by Professor Cooper did not impact on the safety of the verdict to the extent that there is a real possibility that the conviction is unsafe. Again, that was an assessment or exercise of judgment by the CCRC which is not arguably impeachable.
34. Those were the matters pursued in the judicial review, the Claimant not contending that the CCRC dealt unlawfully with other matters raised in his application, such as his interviews.

Conclusion

35. The CCRC report was lengthy and well-considered. It took into account all of the evidence, including the evidence and submissions made after the provisional report had been sent to the Claimant. It accepted most of the new medical evidence – almost all – but came to a view on the effects of that evidence on the possible safety of the conviction different from that put forward on behalf of the Claimant. However, such disagreement does not make the CCRC's view irrational or unlawful.
36. For the reasons I have given, despite the substantial efforts of Ms Kaufmann, I do not consider that the CCRC report is irrational in any of the ways submitted on behalf of the Claimant: I do not consider any strand of the challenge is arguable.
37. Subject to my Lord, Sweeney J, I would consequently refuse this application.

Mr Justice Sweeney :

38. I agree.