

CO/4197/2008
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 5th November 2008

B e f o r e:

MR JUSTICE WYN WILLIAMS

Between:

THE QUEEN ON THE APPLICATION OF ERICA DUGGAN

Claimant

v

ATTORNEY GENERAL

Defendant

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(Official Shorthand Writers to the Court)

Ms D Rose QC and Mr J Hyam (instructed by Messrs Leigh Day & Co) appeared on behalf of the **Claimant**

Ms C Ivimy (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

PROCEEDINGS

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1. MS ROSE: My Lord, I appear with my learned friend Mr Hyam for the claimant and my learned friend Ms Ivimy appears for the Attorney General. I saw that your Lordship was not sitting this morning and wondered if that meant you have had an opportunity to --
2. MR JUSTICE WYN WILLIAMS: I was sitting. The case that was behind you was to be heard before you, so that is why the change in arrangements. So what I have read is the skeleton arguments prepared by both sides but not very much more than that and I have read, or at least I have read the relevant part of, Ferrante.
3. MS ROSE: Thank you. That is helpful.
4. As your Lordship will have seen, this is an application for permission to apply for judicial review of a decision made by the Attorney General in February of this year refusing consent to an application being made to the High Court for permission to reopen an inquest and it concerns the death of Jeremiah Duggan, a 22 year old British citizen who was killed just outside Wiesbaden in 2004. The application is brought by his mother, Ms Erica Duggan, who is here, also with Mr Duggan's father and grandmother.
5. The Attorney General's conclusion is in the second of the file of the documents that your Lordship has at page 613 and this is a letter of 6th February 2008 responding to the application made on 8th May 2007. So your Lordship can see that it took some nine months for the Attorney General to make this decision:

"The Attorney General has now carefully considered your application and supporting documents. alongside documents received from the German authorities and details of previous inquests. In accordance with section 30 of the Coroners Act 1988, the Attorney General is obliged to consider whether, by reason of fraud, the irregularity of proceedings, insufficiency of inquiry, discovery of new facts or evidence or otherwise..."

And it is the last two that are the relevant factors here:

"... it is necessary or desirable in the interests of justice that another inquest should be held.

Having carefully considered all of the papers in this case, she has concluded there is no reasonable prospect that the High Court would order a fresh inquest, having particular regard to the nature and purpose of an inquest in accordance with rules 36 and 42 of the Coroners Rules. Accordingly she has refused consent."

6. That is the decision letter and it is the submission of the claimant that that conclusion cannot rationally be sustained in the light of the new evidence that was submitted to the Attorney General. To put the matter in a nutshell, the inquest in this case proceeded on an assumption which at that time was shared by the Coroner, by those who gave evidence and indeed by Mr Duggan's family, that he had died as a result of head

injuries sustained when he hit one car and was run over by a second car in the road outside Wiesbaden and that hypothesis was not seriously examined or questioned at any stage during the inquest. However, subsequent evidence obtained by Mrs Duggan casts serious doubt on that hypothesis and suggests both that the damage to the cars and the injuries to Mr Duggan are in fact inconsistent with his death being the result of a road accident.

7. Your Lordship can see that the original decision of the Attorney General here is almost entirely devoid of reasoning. The only matter that is specifically referred to here is rules 36 and 42 of the Coroners Rules 1984. That is the only specific matter which it is said that the Attorney General has had regard. One of the oddities of that case is that we, having queried what on earth is the relevance of those rules in relation to this decision, reliance on those rules has been quietly abandoned by the Attorney General. So in fact the only reason that appears in the original decision letter apparently is no longer being maintained.
8. Now, following that letter a pre-action protocol letter was sent to the Attorney General. That is at page 614, going down to 618, and the response to the pre-action protocol letter is at page 619 and -- sorry, I beg your pardon, it is 621 -- and at page 621 first of all there is a reference to the legal framework, section 13 as set out, and some case law. It is said that the Attorney General's decision is not amenable to judicial review and then reasons at page 623. The reason for the Attorney General deciding not to grant her authority for an application under section 13 was that she concluded there was no reasonable prospect that the High Court would order a fresh inquest:

"The Attorney General therefore applied the correct test as approved in ex p Ferrante namely whether there is a reasonable prospect that the High Court would conclude that it is necessary or desirable in the interests of justice that a fresh inquest be held.

The fact that new evidence is provided in support of an application pursuant to section 13 ... does not mean the Attorney General's authority must automatically be granted. In applying the test referred to above, the Attorney General will carefully consider new evidence, its weight in all the circumstances and its potential impact together with the evidence that was given at the original inquest."

9. So again, no material reasons given at all in response to the pre-action protocol letter. What then happens is that judicial review proceedings are issued and lengthy summary grounds at that stage are provided by the defendant and your Lordship has the summary grounds in file 1 of the two files prepared for the hearing at tab 2. The summary grounds start at page 27 and go all the way down to page 40 and what we now see, starting at page 35, is the heading "The decision of the Attorney General was not irrational" and there is then a detailed analysis of what it is said here are matters to which the Attorney General had regard in reaching her decision and your Lordship sees that at paragraph 26:

"In reaching this conclusion the Attorney General had regard in particular

to the following facts and matters."

10. Now, we make two submissions about this which I shall develop. The first is that we submit it is highly unsatisfactory that the Attorney General here has made a decision that was materially unreasoned, declined to expand at all on that reasoning in the response to the pre-action protocol letter, which is, of course, the right place for a decision-maker to expand on reasons if they have not been given fully before, and then suddenly we have a fully fledged case developed for the first time in summary grounds, not supported by a witness statement or of course any disclosure at this stage. So one of our submissions will be that a good reason for granting permission in this case is that a court will regard with caution late submitted reasons, particularly reasons submitted after proceedings for judicial review have already commenced, and what we would expect to see, following the grant of permission in this case, is a careful witness statement from the Attorney General verifying that these factors were taken into account at the time the decision was taken and with disclosure of the underlying documentation. So that is the first point.
11. The second point is even more fundamental, which is that we submit that the reasons that are set out here do not stand up to analysis and that in fact the fuller exposition of what are now said to be the Attorney General's reasons bears out our central contention of irrationality and of the failure to take into account relevant considerations.
12. MR JUSTICE WYN WILLIAMS: Let us assume that then for the moment, because, as you will expect, I am very troubled by the impact of Ferrante. In this sense I can well understand that you might say, and no doubt will say, that you have a pretty good prospect of persuading someone at some stage that this all should be looked at again. But am I not bound, and is not anybody at my level bound to follow, Ferrante and, if that is the true state of affairs, am I really authorised to grant you permission in the expectation, which may or may not come about, that a higher court will become interested in this point?
13. MS ROSE: My Lord, in my submission Ferrante certainly is not binding upon this court. Ferrante is a decision only of the High Court.
14. MR JUSTICE WYN WILLIAMS: Well, but it is more than that, is it not, in the sense that it is an analysis of the law --
15. MS ROSE: But, my Lord, the matter goes further because Ferrante was considered by the Court of Appeal and I do not know if your Lordship has a transcript of the decision of the Court of Appeal.
16. MR JUSTICE WYN WILLIAMS: All I have is -- I mean, I do not know if I have the transcript, but I think the respondent's skeleton or defendant's skeleton told me that the Court of Appeal declined to decide the point, because they dealt with the facts effectively.
17. MS ROSE: Well, it goes a little further than that, my Lord, and I think my learned friend has a copy of Ferrante in the Court of Appeal. **(handed)** The first point to make

about Ferrante, of course, is it is 1995, which is a long time ago in terms of development of judicial review jurisdiction, but we can see how it was Sir Thomas Bingham, as he then was, who was the Master of the Rolls, dealt with the question of jurisdiction at page 8:

"On behalf of the appellant, it was argued that the incoming time for judicial review has overtaken this older authority. We are here concerned with a statutory power, not a derogative power. The time has come when the court will be bound to hold a public officer in this position, exercising public powers, is susceptible to control by the courts."

Then.

"A judgment into that issue, clearly a very important one, in great detail, included the authorities who are in favour of the Attorney General's argument."

Then he says:

"We in this court have not heard argument on this issue, because it appeared to us to be unnecessary to resolve it for the purposes of resolving this appeal. For the purposes of giving judgment on the issues which do arise, I shall assume in favour of the appellant that the Attorney General's decision to grant or withhold authority is subject to judicial review. But I wish to make it plain that in making that assumption I should not now or hereafter be taken as expressing any view one way or the other on what is clearly an extremely complex question."

18. So in my submission there is no binding authority which would preclude the Administrative Court from taking the view that decisions under section 13 are reviewable. There is, at most, persuasive old authority, Ferrante at first instance, with the significant health warning attached that the Court of Appeal regarded the issue as a complex one and clearly indicated that it was not making a decision one way or the other, and in my submission in those circumstances it would plainly be inappropriate for permission to be refused on the basis of the immunity argument if your Lordship were persuaded that our points on the facts are reasonably arguable, because what is clear is that the immunity argument, as the Master of the Rolls said in Ferrante, is a very complex question which requires to be fully developed and, of course, that was said as long ago as 1995. There is now more recent authority of the Court of Appeal and of the House of Lords which bears on this question.
19. MR JUSTICE WYN WILLIAMS: And I am sure you are right about that in a general sense, but nothing is specifically considered in Ferrante, I think.
20. MS ROSE: No. Well, there is no decision concerned with section 13 of the Coroners Act. It is right to say that there is another decision in 1995 which concerns the Attorney General's powers in other contexts but there is no decision that is directly concerned with the Coroners Act.

21. MR JUSTICE WYN WILLIAMS: Is there any decision of a higher court dealing with the Attorney General's powers which has, at least by inference, considered Ferrante?
22. MS ROSE: There is one decision which is at tab 6 of the authority's bundle, which is the decision in Taylor.
23. MR JUSTICE WYN WILLIAMS: Yes.
24. MS ROSE: And your Lordship can see from the first page, this is Stuart-Smith LJ, again 1995, addressing the important question whether, and if so in what circumstances, decisions of the Attorney General are amenable to judicial review and the decisions were in relation to consent for contempt of court proceedings being brought and there is consideration of Ferrante in that judgment, it is at page 12, and then at page 14 it is said that "the authorities laid down the rules in relation to the Attorney General point to his unique constitutional position" and then at page 15 between the two hole punches, Popplewell J's decision in ex parte Ferrante. He says he agrees with it, adopts the nine propositions, the case went to the Court of Appeal, that court did not consider the issue of jurisdiction:

"I do not consider there is any distinction in principle between the statutory in the two cases."

25. So that is binding authority in relation to the contempt of court power.
26. MR JUSTICE WYN WILLIAMS: And pretty persuasive generally, for me sitting here.
27. MS ROSE: My Lord, I, of course, agree that it is strongly persuasive and if nothing had changed since 1995 I would be facing an uphill struggle but the landscape of judicial review has changed beyond recognition since 1995. If I can just give your Lordship an example that is also in the authorities bundle, the case of Abbasi, that is at tab 9. This is also a decision of the Court of Appeal. The argument that was being made in Abbasi was that a decision of the Foreign Secretary not to make representations to the United States government concerning the detention of a British citizen in Guantanamo Bay was judicially reviewable and so your Lordship can immediately see that the area that it was being suggested was subject to judicial review in Abbasi was an area that classically would have been regarded on authorities such as the GCHQ case as being within a forbidden zone for judicial review, because it dealt with diplomatic relations with a foreign state. But the Court of Appeal did not approach the matter in that way and if we go to -- I am afraid there are no page numbers, but it is paragraph 68 -- there is the heading, "Is the conduct of the Secretary of State judiciable" and the submission there that she found the Foreign Secretary owed Mr Abbasi a duty to respond positively to his and his mother's request for diplomatic assistance and various comments made about the Convention and then at paragraph 81:

"The first consideration is the development of the law of judicial review in relation (i) to the doctrine of legitimate expectation and (ii) to the invasion of areas previously immune from review, such as the exercise of the prerogative."

And then he deals with legitimate expectation and then at paragraph 83 he refers to the GCHQ case and the fact that there were certain no go areas and then that the controlling factor in considering whether a particular exercise of power is subject to review is not its source but its subject matter. Then at 85:

"Those extracts indicate that the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case."

And, my Lord, if we then go back to the Taylor case, your Lordship can see the submission that it does not necessarily follow from the fact that the Court of Appeal has held that a decision in relation to giving consent to prosecutions for contempt of court is immune has any bearing on the exercise of the power in relation to its particular statutory power, because you have to look at subject matter and suitability in the particular case. That is illustrated by the subsequent case of Everett and there is a citation from that case. Then he cites Ahmed and Patel then considers the questions of diplomatic protection and then at paragraph 99 "What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold", and then at paragraph 106:

"We would summarise our views as to what the authorities establish as follows:

It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative.

Despite extensive citation of authority there is nothing which supports the imposition of an enforceable duty to protect the citizen...

However the Foreign Office has discretion whether to exercise the right, which it undoubtedly has, to protect British citizens. It has indicated in the ways explained what a British citizen may expect of it. The expectations are limited and the discretion is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation; but the court cannot enter the forbidden areas, including decisions affecting foreign policy."

28. MR JUSTICE WYN WILLIAMS: All right.
29. MS ROSE: So your Lordship can see from that that there is in the modern Court of Appeal quite a significantly different approach from that which was taken by the Court of Appeal in Taylor in 1995 and your Lordship can then see an application of that approach in circumstances, obviously very different from this, but which we would say are far less suitable for judicial review than this and that is the Cornerhouse case, the case concerning the Saudi arms inquiry, and your Lordship has that at tab 12 of the bundle and, as your Lordship will recall, the issue in that case was whether the Director

of the Serious Fraud Office, acting under the supervision of the Attorney General, had acted unlawfully in stopping the investigation into criminal offences of international bribery; so manifestly a decision being taken as guardian of the public interest in relation to a criminal investigation and yet it was accepted by everybody in that case that the decision was justiciable and your Lordship can see this at page 580. This is the speech of Lord Bingham:

"It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General."

So that you can see the superintendence of the Attorney General:

"There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator..."

30. So, again, the decision of the House of Lords is that there was a very broad discretion but it was accepted that the decision was not immune from judicial review and, if one looks at the decision in this case as a matter of first principle and says, well, is the subject matter of this exercise of discretion appropriate for judicial review, in our submission the answer is plainly yes, because what the Attorney General is asked to do under section 13 is to give consent to an application being made to the High Court so that the High Court can be asked to make an order for a fresh inquest. The Attorney General therefore is manifestly not acting in a judicial or quasi-judicial capacity, which seems to be the reasoning underlining the authorities that were considered in Ferrante, because the judicial act is going to be undertaken by the High Court, not by the Attorney General. All that the Attorney General is being asked to do is to act, as it were, as a sift or filter of vexatious applications.
31. MR JUSTICE WYN WILLIAMS: All right. Let us park the law for a minute. Let me hear what the Attorney General's representative has to say about whether or not there is a knock out blow on the facts.
32. MS IVIMY: On the facts.
33. MR JUSTICE WYN WILLIAMS: I mean, the law is very interesting, I am not sure what I am supposed to do with that, but is this a suitable case for at least the starting of a process which might lead to an appeal on principles? So it may not be if the facts are wholly against the claimant.

34. MS IVIMY: Indeed. My Lord, clearly our position is that the facts are against this case being a suitable one to go forward to test the difficult point of law which you have identified. If I could -- I am sorry, do you think I can just ask for a glass of water?
35. MR JUSTICE WYN WILLIAMS: Of course. It is a very good idea.
36. MS IVIMY: My Lord, as you will be aware, there are essentially two substantive challenges to the Attorney General's decision in this case. One is that her decision was irrational and the other was that she failed to give reasons which she was obliged in law to give.
37. If I deal first with the irrationality question. Before turning to the substance of the matter, there is one point I would like to make about the test which is to be applied under section 13 of the 1988 Act. The claimant in her statement of facts and grounds and in her skeleton has suggested that the relevant test is whether there is a reasonable prospect of satisfying the High Court that by reason of insufficiency of the inquiry, the discovery of new facts or evidence or otherwise, there is a real possibility of a different outcome at a fresh inquest and accordingly that another inquest should be held, and she says that that test is in effect indistinguishable from the test that is applied on an application for permission for judicial review. It is a reasonable prospect of success test and she cites Popplewell J at first instance in the Ferrante case.
38. Just a short point to make on this, my Lord, because you will have seen from the decision letter which you have already been shown that in fact the Attorney General did direct her mind in that way and did decide that there was no reasonable prospect of the High Court ordering a fresh inquest in this case. So there is no challenge that she applied a wrong legal test. It is a pure irrationality challenge which we are dealing with. Nevertheless, if there is just one short point I can make on it, because we say that it is relevant to the approach of the court overall, and that is that the Court of Appeal in Ferrante in fact expressly rejected a submission that the test to be applied by the Attorney General was the same as the test to be applied on a judicial review application. If your Lordship would just turn it up, at page 9 of the transcript which you have, you will see how Sir Thomas Bingham, as he then was, dealt with the matter, picking it up just below B:

"The Attorney General has in applying his mind to the exercise of authority first to review the grounds which were advanced for inviting him to do so. He has also to consider that was necessary or desirable in the interests of justice. It is quite clear that the Attorney General is in no sense the judge of whether condition 13(1)(b) is satisfied - that is a question for the High court - but he does have to decide whether he should give his authority for an application to be made and in my judgment it is clear that in making that decision he is entitled to have regard to the prospects of success."

And then he goes on to suggest that where the Attorney General decides there are no reasonable prospects of success, that would be a good ground for withholding authority. Then, just above B:

"On behalf of the appellant, Mr Gordon has argued that the jurisdiction under section 13(1) has now become so close to the judicial review jurisdiction that the test ought to be the same and that the Attorney General has erred in law in applying a different test. To that, Mr Richards for the Attorney General points out it is open to the Attorney General to apply to the court for an order himself [et cetera]."

And then Sir Thomas Bingham concludes:

"It seems to me to be the purest judicial legislation to attempt to read into section 13(1) any specific test. The question that one should ask oneself is whether it can plausibly be said that the Attorney General has erred in law by applying the test he did. To my mind the answer to that question is plainly no."

39. So this is not a case --

"I question whether there is any practical significance in the difference between the way that he has expressed the test and the way that Mr Gordon suggests that he should have expressed it, but in my judgment the test that he has in fact expressed and apparently applied is a perfectly acceptable one."

40. So, my Lord, the short point we make on that is that this is not a case where there is a hard-edged approach which has to be adopted by the Attorney General. The approach of this court is simply, if the decision is amenable to judicial review, simply to ask whether he has applied a test which is wrong in law or not and the lack of that hard-edged type of test to apply and the lack of it in section 13 is something which we say is an indicator that this is a question which is very much for the Attorney General, it is an exercise of discretion in the public interest and it is one which this court should be very slow to interfere with, particularly on a challenge which is based on an allegation of irrationality.

41. As we have seen, Sir Thomas Bingham suggested that the starting point of the Attorney is to look at the application which is made to her and, my Lord, if I can just invite you to turn up in volume 1, at page 281, this is behind tab J, this is the memorial which was sent to the Attorney General, which asked her to give her fiat to go to the High Court and at -- if one turns the page, page 282, you can see there what was being put to the Attorney, the central premise: (a) a failure to pursue available lines of inquiry at the inquest and the existence now of new evidence means that a new inquest is necessary or desirable in the interests of justice. Of course, now, the suggestion that there was a failure to pursue available lines of inquiry at the inquest is not one which is now pursued; (b) the inquest was not full, frank and fearless. Had it been so, then much of the evidence could have been put before the Coroner. Well, that is also not an allegation now pursued. It is a curious allegation to make that the evidence now available could have been put before the Coroner, given that it was obtained after the inquest was completed, and (c) upon a review of the evidence now available, a verdict of unlawful killing should be returned in the case of Jeremiah Duggan. In the

alternative, a new narrative verdict explicitly discounting suicide should be recorded. That is curious also, because I do not know whether your Lordship has had a chance to look at the Coroner's summing-up and his narrative verdict.

42. MR JUSTICE WYN WILLIAMS: No. I mean, I obviously was told by one or both of your skeletons what the narrative verdict was, but I have not --
43. MS IVIMY: In the course of his summary, which immediately precedes the narrative verdict, the Coroner explicitly discounts suicide as a possible decision in his case. The contention that a verdict of unlawful killing should now be returned at a fresh inquest is also not one which is now pursued. It is put a little more subtly now but we ask you just to bear in mind the challenge which was being made to the Attorney General in which she was considering when she reached her decision. One can see that it is quite broad here.
44. Turning to the claim now made, and we have it in the statement of facts and grounds, and if I can just draw your attention to page 20 in volume 1, irrationality -- grounds of view, irrationality:

"The claimant's case is that the Attorney General's decision to refuse consent to an application under section 13 was irrational and/or perverse. In particular, the claimant emphasises..."

And then she sets out a number of factors:

"A key factor for the High Court is whether or not there is a possibility, as opposed to a probability, of a different outcome. A further factor, if a fresh inquest is not held, is whether justice will not have been done and not seen to be done."

Then she refers to the six substantial pieces of new evidence and she says:

"In particular, it is reasonable to suppose that if the Coroner were to accept the evidence of the claimant's forensic experts, the conclusion of the inquest might be that Jeremiah did not die in consequence of the road traffic accident, as stated in the narrative verdict."

And then 4:

"Moreover, having regard to the fundamental purpose of an inquest, namely to determine the cause of death, to allay rumours or suspicions and to draw attention to the existence of circumstances which, if unremedied, might lead to further deaths..."

And then one can see at page 21, and this is the point Ms Rose highlighted in opening to you, at (v), halfway down the paragraph:

"The real issue to which the new evidence is relevant is (b) how, when and where the deceased came by his death. The new evidence suggests it

was not in the manner described by the coroner nor at the place described by the Coroner nor at the time described by the Coroner in the verdict."

45. So the basis now on which it is said the Attorney General should have granted her permission is that there is, as I understand it, a real possibility here that the Coroner would have reached a different verdict; at least, even if he had reached a narrative verdict again --
46. MR JUSTICE WYN WILLIAMS: It would be a different narrative.
47. MS IVIMY: -- it would have been in a different form, indeed, and if one can turn then to what the possibilities are, and coming back to the facts of the matter, the Coroner concluded that this was a death from a traffic collision. It may be that the precise sequence of events, how Mr Duggan was hit, from what direction, at what speed et cetera, could be debated but the essential conclusion that the death was caused by collision, we say, is one which is not reasonably likely to be overturned at any fresh inquest.
48. The alternative conclusion which the claimant contends the Coroner might reach is that this was not a traffic collision but that the killing took place -- it was a killing, that it took place somewhere else, that the body was placed at the scene and an accident staged. That is what it said, there is a real possibility this new inquest might conclude, and as to that the Attorney General took the simple view that that was not reasonably in prospect. Such a verdict was -- such a scenario was inherently unlikely. It was contradicted by the evidence which was before the Coroner and the new evidence relied on could not properly lead the Coroner to reach any different conclusion and, looking at the matter rather more broadly, and the interests of justice broadly, leaving aside the possibility of a different verdict, one asks what is the purpose of the inquest, could it allay suspicions or rumours about the involvement of the LaRouche organisation and its members with Mr Duggan in the time leading up to his death and we say there is no reasonable prospect of those rumours being allayed and nor could it lead to any further investigation or conduct any further investigation of a kind which could possibly lay those rumours to rest. So there was no wider public interest in this further inquest, given the unlikelihood of the reaching of a different verdict in the way that the claimant suggested might happen.
49. We say that in these circumstances the Attorney General's decision that she should not grant her fiat and that there was no reasonable prospect that the High Court would order a fresh inquest is unassailable.
50. My Lord, I am conscious that this is a permission hearing, but in essence to make good my submission --
51. MR JUSTICE WYN WILLIAMS: Well, I am conscious --
52. MS IVIMY: -- I need to take you to the evidence. The fact that it may take me a little bit of time --

53. MR JUSTICE WYN WILLIAMS: Well, I am not unduly concerned about that, for this reason, that I have formed a clear view that the legal point is one that ultimately will go somewhere one day, of that I have no doubt, so what I need to consider in truth is whether this is the right case on the facts and, that being so, I need as much help as possible.
54. MS IVIMY: Well, I am grateful for that indication and if you will bear with me going a little slowly then. If I could start with the possibility of a different --
55. MS ROSE: My Lord, I am sorry to intervene, but I do have some concerns about the way the hearing is developing, because I obviously have not been given any opportunity to open the facts and the facts are the crucial part of our case and, if your Lordship is in any sense seriously considering not granting permission on the facts, I submit I have a right to be heard first on the facts.
56. MR JUSTICE WYN WILLIAMS: Well, I think that is probably right and I apologise for the way that it unfolded, but it is a consequence of you persuading me I should forget about the law, Ms Rose.
57. MS ROSE: But, my Lord, the consequence of me persuading you that you should forget about the law is that, with respect, I would be heard on the facts.
58. MR JUSTICE WYN WILLIAMS: Of course, I agree, but that is why we are doing it slightly out of order and of course you must go first, now that I think I have made it plain that I would not refuse permission just because of the law, but I would if I thought it appropriate on the facts.
59. MS IVIMY: My Lord, I understand that point. My suggestion is simply that, since the claimant has put forward a very full argument and has set out all her evidence to show why she says there is possibility of a different outcome if at any future inquest, in a sense it makes more sense for me simply to show you the other evidence and the basis of our decision as to why --
60. MR JUSTICE WYN WILLIAMS: I do not want to be bogged down about how we approach this, because I usually do say to the respondent or defendant can you knock out the case on the facts and they either gracefully say no or attempt so to do and that is what you are attempting to do. I do not mind how many goes both of you have, quite frankly, on the facts, provided you --
61. MS ROSE: If there is going to be arguments on the facts I would submit I ought to have the opportunity to open the case.
62. MR JUSTICE WYN WILLIAMS: All right. Well, I cannot deny Ms Rose that, so I am not going to.
63. MS ROSE: Thank you. I am grateful.

64. I would like to start, if I may, with the legal framework, which is section 13 of the Coroners Act, which your Lordship has at tab 1 of the authorities bundle and we have looked at the text of section 13:

"This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner either—

...

where an inquest has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that another inquest should be held."

So that is the test for the High Court on authority being given by the Attorney General and the implications of the application of that test from the perspective of the Attorney General were considered in a case called Sutovic, which is at tab 10 of the authorities bundles, and this is a case in which the High Court was considering an application under section 13 and it therefore considered the approach that the High Court ought to take under section 13 of the Coroners Act. It was a case in which the claimant's son had died in his flat in Belgrade in Serbia and it was said he had died of a morphine overdose and his mother was seeking to reopen the inquest into his death on the basis of newly obtained expert evidence. If we go to page 11, there is the heading "Application under section 13 of the Coroners Act".

65. MR JUSTICE WYN WILLIAMS: Yes.

66. MS ROSE: Paragraph 54:

"The power contained in section 13(1)(b) stated in very broad terms. The necessity or desirability of another inquest may arise by reason of one of the listed matters 'or otherwise'.

I should say, before I go any further, by the way, this is a Divisional Court decision, Moses LJ and Beatson J:

"Notwithstanding the width of the statutory words, its exercise by courts shows that the factors of central importance are an assessment of the *possibility* (as opposed to the probability) of a different verdict..."

So that is the first point: from the perspective of the court -- not the Attorney General, the court is only the filter mechanism -- from the perspective of the court the possibility of a different verdict:

"... the number of shortcomings in the original inquest, and the need to investigate matters raised by new evidence which had not been investigated at the inquest..."

So we stress that: the need to investigate matters raised by new evidence which had not been investigated at the inquest. We then see at paragraph 55:

"In cases in which the court is satisfied that a different verdict is not possible or doubts that it would be, the fact that the deceased died in custody may be 'a compelling additional factor'..."

Obviously that does not apply here, and then:

"For the reasons we have given in relation to the claim for judicial review, we reject the submission that in the light of the information available at the time of the inquest the Coroner's inquiry was insufficient. Our concern has been with the impact of the evidence which has been produced since the inquest."

And then it is said that the Belgrade investigation was inadequate. Then there is discussion of the expert evidence in considerable detail and the conclusion is at paragraph 93:

"Whilst we have had harsh comments to make about some of the expert evidence which seems merely to have raised, unfairly, the claimant's expectations, there remains a substantial disagreement as to that which is shown by the photographs. Doctors Milosavljevic and Gavalas observed the signs of violence."

It was their opinion that the deceased in that case had been beaten before his death:

"Doctor Shepherd and Professor Redmond explain those signs as being because of lividity. It is not for this court to resolve those differences. Although, as was observed in *Re Kelly* 'the court must make some assessment of the value of the proposed fresh evidence' ... 'in many cases it will be quite impossible for the reviewing court to form any sensible view upon whether the new evidence creates a probability or only a possibility that a different verdict would be arrived at upon a fresh inquisition'. In this case it is important to recall that, apart from a reference in the claimant's evidence, as noted by the Coroner, to swelling of the nose in one of the photographs of the deceased, at the time of the first inquest no comment whatever was made on the appearance in the photographs or the presence of blood at the scene of death."

So significant points appear from that paragraph: first, that in that case there was actually a conflict of evidence. There were some experts who were saying that there was evidence of violence before death and other experts who said that those particular physical signs have an innocent explanation. Our case, as I should show your Lordship, is *a fortiori* that: there is no evidence to contradict the expert evidence that has been put forward by Mrs Duggan in this case in relation to the nature of the injuries, the marks on cars and so forth. No evidence that contradicts that.

67. The second point that is important about this paragraph is that it is acknowledged here that it will often be impossible for the reviewing court, and I stress court, to review or assess the quality of the evidence and here we are talking about the Attorney General assessing the quality of the evidence and, as I shall show your Lordship, what has effectively happened here is that the Attorney General has dismissed the evidence and decided it carries no weight, in some cases because of misunderstandings about the extent of expertise of the witnesses, in other cases because she simply has not understood their conclusions, but in all cases, without the benefit of any evidence to the contrary or, of course, any oral evidence or cross-examining of those experts. We submit that in principle that was the wrong approach.
68. Then the final point that is stressed by the court here is that, at the time of the first inquest, no comment whatever was made on the appearance of the photograph on the presence of blood at the scene at death and I will show your Lordship that there is a close parallel there with that happened at this inquest, because this inquest proceeded on the footing that everybody assumed this was a road traffic accident. Nobody even considered the possibility that these injuries had not been inflicted by motor vehicles. There was no discussion of it, no evidence relating to it, no consideration of the evidence in the photographs that in fact points in that direction. The matter simply was not investigated at all.
69. Then, going over the page, paragraph 95:

"Whilst, on the state of the evidence at present, any other verdict than an open verdict may seem unlikely, we are persuaded ..."

I should say, an open verdict had originally been recorded in this case:

"... we are persuaded that in the light of the evidence which has emerged since the coroner's verdict, a fresh inquest should be ordered. It is clear that while whether new evidence will possibly lead to a different verdict is often critical and sometimes decisive ... it is not inevitably conclusive..."

For they say it is not an Article 2 case. Then at paragraph 97:

"... the coroner did record some circumstances under paragraph 3 and in particular that there was no evidence as to the exact circumstances surrounding the death. But it appears that there is evidence of at least some of the circumstances surrounding the death. Those circumstances have never been fully investigated and indeed could not be investigated, since that evidence had not yet emerged, at the time of the original verdict ..."

And they say that includes the Serbian Ministry of Interior Affairs report, reports of Drs Milosavljevic and Gavalas as to the appearance of the deceased, and the presence of blood at the scene:

"If, after examination of the circumstances at a fresh inquest, it emerges

that the deceased had been treated with violence at the time of his death, even if that only leads to another open verdict, that seems to us to be a conclusion very different from that which had already been reached. Even absent the requirements of Article 2 of the Convention, the function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires. In the case of an open verdict the circumstances recorded under paragraph 3 may be of particular importance. The evidence which has now emerged may cast a very different light upon the circumstances of Petar Sutovic's death. In those circumstances we would allow the application under Section 13 and order a fresh inquest before a different coroner."

70. Now, my Lord, we submit that our case is a much, much stronger case than the case of Sutovic and Sutovic is a case in which the Attorney General gave consent, an application was made to the High Court and the High Court, in spite of all its reservations about this evidence, ordered a fresh inquest for the reasons your Lordship sees and we submit that, in the light of that decision, it is going to be very difficult for the Attorney General to persuade the Administrative Court that her decision not even to refer the matter to the High Court was rational, still less do we submit it is possible for it to be concluded that there is no arguable case that the conclusion was irrational.
71. That then brings me to the nature of the evidence.
72. MR JUSTICE WYN WILLIAMS: Yes.
73. MS ROSE: And, first of all, there is the question of the evidence that was before the inquest itself and we have summarised this in our skeleton argument at paragraphs 8 and 9. There was evidence from Mrs Duggan -- page 4 of our skeleton argument -- there was evidence from Ms Duggan, evidence from Maya Villeneuve, who was the girlfriend of Mr Duggan and from a detective inspector. I should say that there was also oral evidence from Robert Hawthorne. It is recorded here as an accident report but he in fact gave oral evidence. There was then a German police accident report, the post mortem report of Dr Shove and, crucially, Dr Shove was not called to give evidence and was not cross-examined, and a toxicology report by Susan Paterson.
74. MR JUSTICE WYN WILLIAMS: Was the police accident report much like a British accident report, which at least can sometimes contain not just cryptic details but statements, where relevant?
75. MS ROSE: The accident report itself is in the bundle. It is in bundle 1. This is the report of somebody called Mr Burg. It starts at page 404 and it is a fairly lengthy narrative by the German investigator, police accident investigator. (pause) I am rightly corrected by Mrs Duggan: he was not connected with the police. He was an independent accident reconstructionist.
76. Now, significant points about this report. No witness statements were taken from the drivers at any stage. There has never been a witness statement from the driver of either of the cars which is supposed to have hit Mr Duggan.

77. MR JUSTICE WYN WILLIAMS: Is there even a written summary of what they might have said or relayed to someone?
78. MS ROSE: There was a summary by a police officer of what he said they said to him at the time of the accident but there has never been any statement by any eye witness of this accident.
79. The second point is that Mr Burg at a later date -- this is not apparent from his report -- but at a later date informed Mrs Duggan that he believed that the cars had been moved before he arrived at the scene and, as your Lordship will see if you read this report, much of it discusses the positioning of the cars and the body and his hypotheses about the course of events, but those conclusions are severely undermined by the fact that the cars had been moved. That is the accident report. I will return to the detail of the evidence in some more detail later, but the crucial point first of all about the evidence at the inquest was that there had been a post mortem in the United Kingdom by a Dr Shove and the post mortem report is at page 446. Now, I am going to return to the detail of this report later, because the evidence that we have from a pathologist indicates that the injuries that are recorded by Mr Shove in this report are not consistent with a person having been hit or run over by a motor vehicle, they are consistent with a beating. But the significance for these purposes is that Dr Shove did not give oral evidence at the inquest. After the inquest, Mrs Duggan, deeply concerned by the surrounding circumstances of this event, went to see Dr Shove --
80. MR JUSTICE WYN WILLIAMS: So sorry. The only thing that was before the Coroner was this one page, is that it?
81. MS ROSE: That is correct. That is the only post mortem evidence that was before the Coroner. She went to see Dr Shove and her account of their meeting is at page 337 of the bundle, paragraph 234. This is crucial, because it is this that really is the first trigger for the family, that alerts them to the fact that all may not have been as it seemed in terms of it being a road traffic accident. "I remained concerned about aspects of the post mortem", paragraph 234 of her witness statement:

"He wrote to Dr Dolman [he is the Coroner, my Lord] who gave me permission to contact Dr Shove, the pathologist who performed the post mortem. I went to see Dr Shove at his office address, which appeared to be his home. I had a list of questions for him I had come to deliver. I asked Dr Shove to sign for the letter I had come to deliver to him but he refused and asked me what I wanted. I gave him a copy of his post mortem report, asked him if he done it. He looked at the signature and said he had. I said 'looking at this report, can you tell me how my son died?' Dr Shove read the report and acknowledged he had signed it. He said, 'yes, I wrote this report'. He said, 'Looking at this report again, I can tell you that your son was severely beaten around the head. He could not have survived this degree of injuries.' I asked him how he knew that Jeremiah had been beaten around the head as opposed to being hit by a car or run over by a car. He replied that the kind of severe commuted fractures to the head could only be sustained as a result of a beating. I

asked him how he did not know that he was not hit by a car, smashed windows or run over by a car. He replied, 'If he had been hit by a car I would have seen glass. If he had been run over I would have seen tyre marks and noted them in my report.'

Dr Shove looked surprised when I told him it was a traffic accident and said 'Was it a traffic accident? I did not know that'. He said he was never asked by Dr Dolman to give an opinion on how my son sustained the injuries. He said he was not asked at the inquest. It was the first time anyone had raised the possibility that Jeremiah did not die in a road traffic accident. This information affected me profoundly."

82. Now, my Lord, in my submission, if that was the only evidence in this case, if that was the only matter which had occurred, subsequent to the inquest, it would be sufficient to require the reopening of this inquest, because it indicates that the pathologist that conducted the post mortem, who was not asked to attend the inquest and was not asked for his opinion on the cause of death, in fact has the view that this death could not have been caused by being struck or run over by a motor vehicle.
83. Now, my Lord, it is a striking fact that the Attorney General has at no stage addressed this question at all. As your Lordship has already seen, the only reasons that have ever been given by the Attorney General are those that were contained in the summary grounds and which are then reiterated in slightly fuller form in the skeleton argument and if we can now turn to the Attorney General's skeleton argument and I invite your Lordship to turn that up.
84. MR JUSTICE WYN WILLIAMS: Yes.
85. MS ROSE: The heading "The decision of the Attorney General was not irrational" is at page 5.
86. MS IVIMY: I am sorry to interrupt my friend but, just so you are not misled my Lord, I wondered if my friend was going to take you to the letter from the Coroner which deals with this point, at page 348 of volume 1.
87. MR JUSTICE WYN WILLIAMS: 34, sorry.
88. MS IVIMY: 348. If one looks at the final paragraph on that page, this is a letter from the Coroner to Mrs Duggan and you can see he deals with the post mortem in examination and his comment on her assertion as to what Dr Shove had told her.
89. MS ROSE: My Lord, I am grateful to my learned friend. Of course, this is not a matter that has ever been relied on by the Attorney General but if my learned friend wishes to rely upon it now, the submission on it is --
90. MR JUSTICE WYN WILLIAMS: Well, before you start, I mean, I obviously have experience which is a bit more general than coroners inquest. It is commonly the case that pathologists do more than simply say that it is a fracture to the nose. They often give proper opinion evidence about that how that might have occurred.

91. MS ROSE: Indeed, my Lord, and that was precisely the submission I was going to make to your Lordship.
92. MR JUSTICE WYN WILLIAMS: I got something right anyway.
93. MS ROSE: The response of the Coroner does not answer the point, which is here was an experienced pathologist saying spontaneously on seeing the report your son was beaten to death.
94. MS IVIMY: This is the point where I object, because this letter says clearly that Dr Shove's position, as he explained it to the Coroner, was that he never mentioned your theory, that is Mrs Duggan's theory, about your son being beaten about the head. I certainly take the point my Lord has made, that pathologists can go on to give further evidence. I am just saying that it is not proper for my friend to present as a fact something that Dr Shove has said when it is in issue.
95. MR JUSTICE WYN WILLIAMS: Right.
96. MS ROSE: My Lord, with great respect to my learned friend, that perhaps indicates why we need a further inquest in this case.
97. MR JUSTICE WYN WILLIAMS: I think what I can say about this point is uncontroversial: there is evidence from your client, Ms Rose, as to what the Coroner says. There is --
98. MS ROSE: No, my Lord, not the Coroner, the pathologist.
99. MR JUSTICE WYN WILLIAMS: The pathologist says. There is evidence which contradicts that.
100. MS ROSE: No, my Lord, it does not contradict it, with respect.
101. MR JUSTICE WYN WILLIAMS: Well, according to the defendant.
102. MS ROSE: But if one looks at page 348, what is said is the post mortem report was to provide me with a cause of death. As a pathologist was in no position to comment on matters beyond his findings, for example putting road traffic accident on his cause of death, he was in no position to comment on matters beyond his considerable expertise. Never mentioned your theory about your son being beaten around his head. Now, it is quite true that he did not in this report mention a theory about the son being beaten around the head but there is no suggestion here from the Coroner that the Coroner is purporting to tell Mrs Duggan what Dr Shove told her in their private meeting, which of course this Coroner was not present at and would not have been in a position to comment on.
103. So there is no suggestion that the Coroner is referring to that episode at all.
104. MR JUSTICE WYN WILLIAMS: Is there in any of these papers a direct statement from Dr Shove --

105. MS ROSE: There is not.

106. MR JUSTICE WYN WILLIAMS: -- about what occurred? Right.

107. MS ROSE: There is not and your Lordship will see that there is a second witness statement from Mrs Duggan, this is in volume 2. It is at page 625. At paragraph 3 she summarises her conversation.

108. MR JUSTICE WYN WILLIAMS: Yes.

109. MS ROSE: And then at paragraph 4:

"I understand my solicitors have attempted to contact Dr Shove. To date I understand my solicitors have received no response."

and, as far as I am aware, that remains the position.

Now, my Lord, I was moving on to the point that this question of what Dr Shove's opinion was is not something which the Attorney General appears to have taken into account at all in making her decision and we submit this is plainly a failure to take account of a relevant consideration which vitiates the decision. If your Lordship looks at paragraph 16 of the skeleton argument of the defendant:

"In reaching this conclusion the Attorney General had regard in particular to the following facts and matters..."

So this is the place in which the Attorney General purports to tell the court definitively what matters she took into account in reaching her decision and we then have a number of matters set out. I am going to take your Lordship through them in some detail and in particular at paragraph 3 there are criticisms made of the various new experts. There are comments on the narrative verdict and so on and then at paragraph 17:

"Taking all these matters in particular into account, the Attorney General took the view that there was no real possibility..."

And so forth. So in my submission the Attorney General plainly failed to take into account the question of what Dr Shove would say, or might say, if he were called to give evidence at a fresh inquest and, since he was the pathologist who examined the body, in our submission that is plainly important evidence. So that is the first point.

The second point is that, having seen Dr Shove and been given the information by him that alerted Mrs Duggan to the possibility that her son was not killed by a motorcar, she instructed a number of experts and the conclusions of those experts are summarised in our skeleton argument between paragraphs 12 and 22 and I invite your Lordship to read them but I do not intend to go through them all in detail now, but to draw out the key points. Essentially, we submit that there are four factual points that emerge from these expert reports, none of which has been the subject of any investigation at the inquest so far.

The first is that the photographs of the scene do not show any biological traces at all on either

of the vehicles which is said to have hit Mr Duggan. There were two vehicles, a Peugeot and a Golf. It is said that he struck the Golf and was then -- sorry, struck the Peugeot and was then run over by the Golf. That is what is said to have occurred. No blood, skin, hair, clothing or any other biological residues on either vehicle, so that the first point and your Lordship sees a number of references --

110. MR JUSTICE WYN WILLIAMS: I am sorry, as shown on photograph --

111. MS ROSE: As shown on the photographs and can I hand your Lordship --

112. MR JUSTICE WYN WILLIAMS: Or as confirmed independently?

113. MS ROSE: There is independent confirmation in the German accident report. If your Lordship goes to page 410, this is Mr Burg's accident report that we looked at a moment ago. Page 104, the bottom of the page:

"Presumably the pedestrian was hit by the Peugeot on his upper body on one arm. There was presumably no impact involving his head. Upon inspecting the car, no hair, blood or other deposits could be found which could be attributed to the impact of the head."

And this is Mr Burg, who actually inspected the vehicles, not just relying on photographic evidence. Now, Mr Burg then goes on to make various comments about the Golf but he does not identify any residues, any biological residues, on the Golf either. He does not comment on it but he does not identify the presence of any such residues on the Golf, which is said to have run over Mr Duggan's head.

114. My Lord, if I can just hand up, this is a better copy of the photographs you will see, and your Lordship will be able to see multiple photographs of the cars, none of which show any signs of blood or any other kind of biological residue. So that is the first point.

115. The second point --

116. MR JUSTICE WYN WILLIAMS: I mean, I have only just flicked through them but I would be very surprised if any of these photographs were taken with a view to establishing that. So it is not surprising that the photographs do not show them, if you see what I mean.

117. MS ROSE: Well, except, my Lord, that we have close ups of the wheels of the Golf, for example. If your Lordship goes to page 29, there is a close up of one of the wheels of the Golf. My Lord, it is said by the German accident report that Mr Duggan's head could not have struck the Peugeot because there were no residues on the Peugeot and the hypothesis of the German report is therefore that his head was run over by this vehicle, by this Golf, and your Lordship here has a close up of the wheels with no sign of blood of the wheels at all.

118. MR JUSTICE WYN WILLIAMS: Yes. I am trespassing into things that I should not be.

119. MS ROSE: Absolutely, the areas of judgment. Exactly. So that is the first point, no biological residue. The second point is that the damage to the Peugeot is not consistent with that vehicle having been struck by a human body but is consistent with deliberate damage being inflicted on the car by a blunt instrument such as a crow bar and in particular that the photographs show repeated impacts on the windscreen and that there is a sharp indent in the side door which the experts testify is not consistent with an impact from a human body. Can I show your Lordship the extracts from the report on this topic. First of all, there is Mr Tuve. Mr Tuve's report is at page 245, volume 1. He is an expert in tool and form marks.

120. Now, the Attorney General, with all due respect, does not seem to have understood what an expert in tool and form marks was when she made her decision and she explains it further in his second report, which is in volume 2 at page 644. So can I ask your Lordship to have both of these references open. He says "the term tool and form marks is a term taken from the field of criminalistic forensic science, is used" -- I should say this is a translation from the German:

"... is used to categorise different marks in to one specific area, marks which have been produced by impression into or pressure onto the trace carrier, or by separating material from the trace carrier. The objective of the analysis is to identify or exclude the cause of a trace. When producing a report, several criteria were used. Criterion is suitable and the following characteristics are given..."

He discusses that. Then, over the page at 645:

"Based on the submitted documentation of this particular case, it was neither possible to absolutely identify the course of events nor the trace, origin, trace carrier in contact. It could be proven there are considerable contradictions on the assumption that the suicide alleged by the authority was as a result of the car accident, which also holds true for the marks on the cars and the marks which can be seen on the photographs."

Then he says:

"The submitted photographic recorded marks are of only limited suitability for identifying the contradictions during the evaluation. The inevitably corresponding trace complexes which occur in a collision, ie trace complexes between the cars, the road and the clothing of the victim, as well as the topography of the trace/trace carrier, each on its own merit, led to the evaluation that a collision was highly improbable. After I completed and submitted my expertise [I think he means my expert report] to the client, I was provided with the original negatives from the traffic accident investigation. The evaluation of the photographically secured marks confirmed the selection of the criteria I applied in my expert evidence. Taking all the information into account, the statements made in my expert evidence dated 19th September become even more precise, namely it is not possible that the relevant marks on the Peugeot

have been cause by a human body."

121. MS ROSE: So that is his conclusion, which is in fact more emphatic than the conclusion in his original report, because --
122. MR JUSTICE WYN WILLIAMS: Yes. I mean, obviously this post dates the decision, does it not?
123. MS ROSE: My Lord, I am going to come to that point and it relates, of course, to the failure to give any reasons for the decision.
124. MR JUSTICE WYN WILLIAMS: And I am making a statement of fact. How strongly did he put it originally?
125. MS ROSE: We will look at it in his original report. Description of the marks on the Peugeot, it is at page 248. He describes the marks on the Peugeot, then he refers to Mr Burg's point about the lack of biological traces, then he describes the marks on the golf and then his summary: marks are not cross related, head injuries cannot be matched to the damage to the right hand side of the Peugeot. If the pedestrian had collided with the right hand side of the car, kinetic energy would have impelled him to fall to the right. If the Peugeot approached the pedestrian in the left hand lane, one would have expected the front of the body to be in the centre of the two lanes. He was actually found by the central reservation. Said to have be run over by the right hand side of the Golf at this place. Assuming this course of events, the later would have been pointing towards the right hand lane. Clearly no marks of being run over on the trouser legs. No drag marks attributable to movement from the right hand side of the left hand lane to the left hand edge of the carriage were observed on the road surface and on the frontage of the body. No adhesions of blood or hair found on the Golf. These would necessarily have been detectable if the deceased had collided with or been run over by a car. This would have caused severe head injuries as alleged. What caused the head injuries therefore remains an open question. Mud coloured stains and adhesions on the Peugeot, Golf and clothing. Not normal grey road dust. All three objects can be the sign of a single cause or group, conclude they come from a common location and then he says "considerable reservations as to the assessment of the accident event" and that further details can be explained orally. So that is what Mr Tuve said.
126. MR JUSTICE WYN WILLIAMS: Right.
127. MS ROSE: There was also the evidence on this point of Mr Merston, which is page 161. Paragraph 1.9, he says:

"Firstly, I will comment on the damage to the Peugeot, starting with the windscreen. This damage is consistent with the windscreen being struck with a long solid object, such as a baseball bat or similar object. On close examination of the damage can be seen the striation marks at the point of impact travel in one direction upwards and away from the passenger side windscreen pillar. Had a head or similar shaped object struck the windscreen, I would have expected a more even distribution of striation

marks travelling around the main point of impact, not in one direction as in this case.

Damage to the front passenger door, due to the severity to the crease in the door and side window, is also consistent with it being struck with a solid object as previously mentioned rather than a person. Add to this there is a quantity of glass on the driver's seat, which I would not expect to be there had the driver been sitting on the seat at the time of the alleged accident."

So that is Mr Merston's evidence.

128. MR JUSTICE WYN WILLIAMS: And what is that based on?

129. MS ROSE: That is based on the photographs.

130. MR JUSTICE WYN WILLIAMS: So the photographs that I have here?

131. MS ROSE: Yes, there are some other photographs, but those --

132. MR JUSTICE WYN WILLIAMS: Essentially those, right.

133. MS ROSE: Then there is Mr Canning at 224. He is the photographic expert and at page 234 he deals with the damage to the Peugeot:

"How could a dent to the front door broken right hand wing mirror, disintegrated right hand passenger window, two impact points on the right hand side of the windscreen, flattened window strips and linea marks around the beam pillar all be caused simultaneously by the impact of one body against the side of the Peugeot. In my opinion it is unusual to have this number of significant impact points, very pointed acute dent to the right front door. In my experience I have never seen a dent this shape caused by a human body. Right hand front window is broken..."

And so forth, and then:

"The right hand part of the windscreen has two clearly separate areas of impact, larger rounded area near the A post, a smaller, more concentrated area of impact damage to the right of this as one view of the photograph."

so there were two impact points on the windscreen.

134. MR JUSTICE WYN WILLIAMS: Right.

135. MS ROSE: Then Mr Bayle at page 158:

"The red/brown Peugeot had considerable damage.

The windscreen had been hit several times with an instrument, possibly a crow bar or something similar. No evidence of any fibres, hairs, blood or

skin on the broken glass.

The offside driver's door had been hit with probably the same instrument ... The dent in the side of the door was too sharp and pointed and therefore could not have been made by the human body."

136. So, my Lord, in summary your Lordship can see from a number of the experts the same conclusion that the damage to the Peugeot is not consistent with it being hit by a human body and is consistent with it being struck with a blunt instrument. So that is the second point.
137. The third point is that the injuries to Mr Duggan are not consistent with him having been struck by a car or run over by a car. In particular, there are no tyre marks anywhere on his body or clothing, no injuries that can be matched with the damage to the Peugeot. There is the fact recorded by Dr Shove that he swallowed and inhaled significant quantities of blood and the conclusion that is drawn from that is that he did not die instantly, as he would have done had he been run over by a car, but that his death was the result of repeated impacts to the head and the presence of defensive injuries and on this point we have the report of a pathologist, this is Mr Milosavljevic and it starts at page 257, and he based his report essentially on the photographs and on the post mortem report of Dr Shove. If your Lordship goes to page 265 he begins his conclusion.
138. MR JUSTICE WYN WILLIAMS: And when you say photographs, do you mean the ones I have or were there photographs of the body at post mortem and that sort of thing?
139. MS ROSE: There were two photographs of the body taken at the morgue in Germany. There were no photographs of the post mortem in the United Kingdom.
140. So then, going to page 266, at paragraph 5 he summarises the findings of Dr Shove that are contained in the report and at paragraph 7:

"In the report of the performed autopsy, Dr Shove has established abundant quantity of fresh blood in all respiration tracts, as well as numerous bruises of the surface of both lungs. Such a finding is pathonemonic, ie indicates directly the aspiration, inhaling, of a large quantity of blood in both lungs to the level of alveoli and is most probably the direct consequence of hemorrhage from the hurt blood vessels around the fracture of bones of basis of the skull and bones of the face. It also indicates the fact that the death of Jeremiah Duggan was not instant, which should be expected from an injury of head made by overrunning..."

He means running over. Again, this is translated:

"But that late Duggan lived for some time, few minutes, ie that injury of the head did not arise at once overrunning by motor vehicle but by multiple action of some other mechanical force. This claim is more corroborated by the fact also from the autopsy report by Dr Shove that in

the stomach of the victim there was also found an abundant quantity of blood, which is the consequence of swallowing the blood, which had merged from hurt blood vessels around the fracture of the bones, the basis of the skull, the bones of the face, round towards the mouth and respiratory organs.

Also in the above mentioned autopsy report, Dr Shove has found the presence of numerous contusions on both hands and on the back side of both forearms. The shape, volume, localisation and symmetric pattern of these injuries on both arms clearly indicate their defensive character ... these injuries have been inflicted most probably by multiple actions of the blunt side of a mechanical tool (fists, feet with shoes on, and similar object) brandished onto the surface of both hands and hand sizes of both forearms ... at the moment, when those parts of the body were in an elevated position in the level of the head aiming to protect it from action of the above mentioned blunt side of a mechanical tool brandished."

141. Then he gives his opinion. At paragraph 1, he makes the point that there had not been done forensic post mortem examination. Now, this is something that the Attorney General seeks to rely on and I shall come back to it when I look at her reasons. Then he refers at paragraph 4 to the lack of biological traces. Then he makes the point at page 268 paragraph 5 that normally, if somebody is run over, this is the bit in bold:

"The overrun region presents the characteristic bruising matching the patterns of the pneumatic [meaning the tyre] that overrun the body, which has a great significance and determination of the kind of the tyre, ie of the motor vehicle that passed over the body. The mechanism of occurrence of bruising matching the pneumatic pattern is shown in the picture number 4, in which there can be seen too that on the upper side of the back, neck and head of late Jeremiah Duggan there were no such injuries. On the contrary, on the back side of the upper third of the back, neck and nape there cannot even be seen any injuries. Such a finding excludes any possibility that the injuries on the head of late Jeremiah Duggan occurred by overrunning of a motor vehicle."

He then points out that you would expect that there would be burns and there were also no indications of any burns. Then he refers at paragraph 6 to the lack of biological traces at the scene, the deep aspiration of blood, the swallowing of blood, the characteristic defensive injuries and concludes that it was not a running over incident.

142. So that is the third point, that the injuries to Mr Duggan are not consistent with him being run over and, of course, we rely not only on the report from this pathologist but also on the comments made by Dr Shove to Mrs Duggan.
143. MR JUSTICE WYN WILLIAMS: Yes.
144. MS ROSE: The fourth point is the presence of a wet sandy substance on the shoes and jeans of Mr Duggan and also on the wheels and sides of the cars which are said to have

hit him, in copious quantities, in circumstances in which there was no such sand anywhere on the road and the suggestion is made by a number of the experts that this suggests the possibility that Mr Duggan and these cars were together somewhere else at the point where they were found. Now, easiest to show your Lordship this by looking at some of these pictures. If your Lordship goes to page 21, on the colour photographs you can see the sand on the shoes and jeans.

145. MR JUSTICE WYN WILLIAMS: Yes.
146. MS ROSE: And you can see that the sand is copiously over the bottom of the trainers and that, if he had been running for any period of time after running through the sand, either it would have been trodden deeper into the treads or it would have come off the trainers but instead it is sitting loosely on the trainers. You can see it even more clearly at page 20.
147. MR JUSTICE WYN WILLIAMS: Right.
148. MS ROSE: The loosely adhering sand on the bottoms of the trainers.
149. MR JUSTICE WYN WILLIAMS: What about the car?
150. MS ROSE: And, if we look, there are a number of photographs of the cars. You can see it on the wheels at page 34 and at 31. Page 30, you can see it on the bottom of the Golf. You can see it on the Peugeot at page 26, on the sides of the car.
151. So, my Lord, we submit that in the light of that evidence, which goes far beyond, we submit, the evidence that was available in the Sutovic case that your Lordship looked at today, plainly the only rational response of the Attorney General would have been to give consent so that the matter could then be examined by the High Court so that the High Court could decide whether this matter ought to go back for a fresh inquiry. Can I now then turn to the reasons given by the Attorney General --
152. MR JUSTICE WYN WILLIAMS: Well, I am not sure that that will take us anywhere with it, because, if you are right arguably about these other points, so be it, and that is obviously for Ms Ivimy to address. If you are not right, will reasons actually get you anywhere?
153. MS ROSE: Well, I do not refer here, my Lord, to the lack of reasons. What I do want to look at is the reasons that are now being sustained, because in my submission --
154. MR JUSTICE WYN WILLIAMS: Well, I mean, in broad terms you say they do not answer your points that you just elucidated.
155. MS ROSE: I do say that but I go further, my Lord, I just want to very briefly --
156. MR JUSTICE WYN WILLIAMS: You do not need to go further and I am conscious that your opponent must have a fair crack of the whip as well. That is all.
157. MS ROSE: Can I just very, very briefly --

158. MR JUSTICE WYN WILLIAMS: I would be surprised if you had not told me your best point by now, Ms Rose.
159. MS ROSE: Well, can I briefly address the defendant's key points at paragraph 16 and 17 of the skeleton argument?
160. MR JUSTICE WYN WILLIAMS: Yes.
161. MS ROSE: If we just go to her skeleton argument. Paragraph 16(1), the first thing she says is that the submission that Jeremiah had been killed and then his body placed on a main road and a traffic accident staged is inherently incredible. Now, in my submission that takes one nowhere, because the official account, as it were, of the death of Jeremiah Duggan, with respect, is inherently incredible, because what has been said by the German investigation is that Mr Duggan, who was a perfectly normal, happy 22 year old with a girlfriend, a successful student, without any explanation, less than a hour after he had spoken to his mother in a state of clear terror, ran over five kilometres at dawn, with a full bladder, as appears from the autopsy report, and threw himself in front of two cars and we submit that that scenario is in itself so incredible that inherent incredibility gets my learned friend nowhere.
162. There second point is it is said to be contradicted by the evidence before the Coroner. In my submission, there is no evidence before the Coroner which contradicts this evidence, for the very good reason that it was assumed by everybody at the date of this inquest that the only game in town was road traffic accident. Can I just show your Lordship one important reference on this point. It is in the transcript of the inquest. It is at page 103. This was the evidence of Mr Hawthorne, who was a British road traffic accident investigator and the Coroner said to him:
- "In summary, what is your view of what appeared to have happened? I don't think there is any doubt in anyone's mind that Mr Duggan came in contact with two vehicles."
- and Mr Hawthorne replies, "That is correct".
163. So there is simply no investigation of that question at all. It is taken as read as is put as a leading question to the witness, because nobody thinks that there is any issue about it. The next point that is made by my learned friend is, it is said, that the contradicting evidence is the report of the German traffic accident expert. In my submission, there is nothing in that report which contradicts any of material I have shown to your Lordship. These points are simply not addressed in that report. Indeed, as your Lordship has seen, that report expressly acknowledges the absence of biological traces on the Peugeot. There is nothing that contradicts any of this material. Then the concurring evidence of Mr Hawthorne, the UK traffic accident expert.
164. Now, one of the oddities of the stance taken by the Attorney General is that she relies repeatedly in the skeleton argument on the evidence that was given by Mr Hawthorne and says, well, Mr Hawthorne did not think there was any problem. But then she discounts the evidence of the six other experts and says their evidence cannot be given

any weight because they did not visit the scene and they were working from photographs and from the documents on file. But, my Lord, so was Mr Hawthorne, and he says so in terms in his expert report. So the question is what is the basis on which the Attorney General concludes that there is no possibility that the views of the six experts, looking at this material, would be trumped by the views of Mr Hawthorne, who was not even addressing this question, and the reference for your Lordship's note is page 426, paragraph 2.1. He says:

"I have not been to the accident site. My only knowledge of it has been gleaned from the papers supplied."

165. Then it is said that the material is contradicted by the fact that the authorities found the body on the road before rigamortis had set in and with an open head injury. Now, my Lord, that is a very troubling thing for the Attorney General to have relied upon because she did not, as far as we know, commission any expert evidence about what the significance would have been of rigamortis setting in or not setting in. The Attorney General, with great respect to her, is not in a position to make an expert assessment of the significance of rigamortis. The one thing we do know about this death is that well under an hour before his body was found Mr Duggan was on the phone to his mother and in my submission there is no significance at all to be attached to the absence of rigamortis because rigamortis in general does not set in for some three hours after death and yet this is specifically relied on by the Attorney General, we say wholly inappropriately, as a reason for refusing consent.
166. Then it is said that the new evidence does not include any new primary evidence not considered by the Coroner, no new statements from witnesses and no new forensic evidence. Well, I have shown your Lordship the evidence and we submit that is not correct. There is new forensic evidence.
167. Then it is said this is opinion evidence based solely on photographs of the scene and existing reports, inherently of limited evidential value, to which the obvious report is that applies to Mr Hawthorne too. Then there are evaluations of the expertise of the experts. It is said that Mr Bayle is primarily a fingerprint expert and forensic ridgeologist. Forensic scene examination is only a subsidiary area of expertise.
168. MS IVIMY: My Lord, I am sorry to interrupt but I do see the time. This is all written down. I am sure Ms Rose would like to take you through it and make what points she can but I must have a chance to reply.
169. MR JUSTICE WYN WILLIAMS: Of course, and you will.
170. MS ROSE: So, my Lord, simply untrue. Mr Bayle has, in a second report produced in response to this, given details of his extensive expertise as a forensic scene examiner. But what is significant about this --
171. MR JUSTICE WYN WILLIAMS: Well, I mean, I think you can stop now, in this sense, that I am sure you have presented your case in sufficient detail for me to grasp it and, if points arise, you can reply obviously, so I think that probably is enough.

172. MS ROSE: May I make one point on paragraph 17, because this is of some significance, because at paragraph 17 it is said:

"Taking all these matters in particular in account, the Attorney General took the view there was no real possibility of establishing at a fresh inquest that Jeremiah did not die in the traffic accident but was killed in advance and placed at the scene."

173. In my submission that is the wrong question, because the question was not simply is there a real prospect of the Coroner making a positive finding that Mr Duggan was killed elsewhere and placed at the scene. The question is whether there is a possibility that the current narrative verdict would be changed and your Lordship has seen that the current narrative verdict states that he died after being hit by two motor vehicles and, if in fact there is a lack of clarity about how he died, that narrative needs to be changed. So we submit this indicates that the Attorney General was applying the wrong test when she took our decision.

174. Just one final point that I will make before I tire your patience terminally, is that it is suggested by the Attorney General that there is no public interest in this, that it is futile, what difference does it make, and there is the obvious point that, from the perspective of the family it makes all the difference in the world and I do not need to elaborate on that. But, even more importantly, my Lord, the position is that there are pending proceedings in the German Republic that the position that has been taken by the German authorities to date is that there is no need to reopen this matter because the result of the full investigation by the British authorities was that this was a road traffic accident. So, my Lord, in that situation we submit there is clearly a wider public interest.

175. MR JUSTICE WYN WILLIAMS: Yes.

176. MS IVIMY: My Lord, can I start with the evidence which was before the Coroner?

177. MR JUSTICE WYN WILLIAMS: Yes.

178. MS IVIMY: I think the claimant has not -- although you have seen the accident report of Mr Burg, the claimant has not provided in the papers the police reports which were prepared at the time by the police authorities. However, at least extracts from them -- they were before the inquest and at least extracts from them were read out by the Coroner and so, if I can take you -- that is why I take you from the Coroner's -- the transcript of the Coroner's hearing rather than to the document itself.

179. If one starts at page 94, perhaps 93, one can see here that the Coroner is referring to a police report produced by the German police and is reading it out and this first report is a report made by the criminal investigation officer and, if one turns to page 94, you can see that he explains what has happened. He starts by explaining that the officers of the fourth station were informed on 27th March at about 6.00am by the operation centre about an accident with a pedestrian who had fled the scene. So that is a separate

accident. It is said that it involved Mr Duggan. For the moment, I will not go into that, but they go on to say:

"While they were still taking down details of this accident, they were informed of a second accident which was in the immediate vicinity of the scene and at the scene of the accident. There a pedestrian had jumped out in front of a car and afterwards died. Despite the arrival of uniformed officer, the officers arrived at the location of the first accident at about 6.10am and then drove on to the second accident location. Arrival of criminal investigation police officers. I was informed of the matter at about 6.45am. As the local K10 officer on call, I went straight the scene of the incident accident, which I reached at about 7.10am. PKA Focker, at present attached to K10, was already at the scene."

It talks about the arrival of the doctor. The emergency doctor certificated Duggan dead at 6.35am. It talks about the actions taken and then sets out, under the heading "Time of discovery", some of the circumstances of the first accident and then, turning the page, page 95, he records his understanding of what happened from what the witnesses, that is to say the drivers of the car, said.

180. Now, it has been said by Mrs Rose that there are no witness statements. Certainly no witness statements have ever been seen. Whether that is in fact true that none were ever taken is open to question:

"When this accident was being recorded, it was stated that the deceased Duggan, a pedestrian, suddenly went on to the road whereas the two vehicles involved in the accident were approaching. One vehicle swerved from the right hand lane into the left hand lane but Duggan leapt into the car so that a collision could not be avoided. The windscreen and passenger door window of the first vehicle, witness Langer, shattered. In addition, the passenger door itself was dented. The second vehicle, driving behind, witness Lember, was damaged at the front as it was impossible to avoid running the person over.

On my arrival at the scene of the accident, Duggan's body was lying in the left hand lane of the Berliner Strasse going in the direction of the town centre. The body was lying about 23 metres past the actual point of impact, at which traces of abrasions from shoes and breaking could be seen.

About 27 metres in front of the body were a blue Golf, registration ... which had run Duggan over. About 20 metres in front of that vehicle were a red Peugeot, registration number ... which had had the collision with the deceased. Both drivers were no longer at the scene. The officers from the force station had the vehicle keys."

And then he refers to instructing Jolgen Burg, that is the independent traffic accident expert, whose report you have seen, and he refers then to, at 7.55, pictures of the scene

being taken and you have seen those in front of you. Then it says, and this is the Coroner, I take it, reading out, not from the report, but it says:

"The description of the person who found the body and the other witnesses and addresses are given."

Now, I assume that is a reference to the names and witnesses and addresses being given in the police report. It is quite striking in this case that, although we have a great deal of opinion evidence, we have nothing from the claimant by way of further investigation of what the actual drivers of these vehicles had to say about the matter and there is particularly no evidence at all that has been advanced to suggest that these drivers were anything other than ordinary commuters, that is to say that they were involved with the LaRouche organisation or had any previous dealings with Mr Duggan. So no evidence of that kind whatsoever.

181. Turning a few pages forward, page 101, this is a report of, as I understand it, one of the police officers who was first on the scene and he describes -- sorry, if you turn back to 100, you can see the start of the report, and he describes in some detail the first accident and then he goes on to describe what he understood to have occurred in the second accident and he says, towards the bottom of the page:

"At 6.14am, the situation at the scene there referred to, someone is said to have deliberately jumped into moving traffic. Previously, a similar accident had occurred with a pedestrian who ran away along the B445 towards the town centre. A few metres before the junction of the Berliner Strasse with the B445 going towards Wiesbaden town centre a pedestrian was lying on the left hand lane with his head towards the central crash barrier. Number 02..."

That is a reference, my Lord, to the driver of one of the cars:

"... and another person were kneeling by him. Number 3 [that is the driver of the other car] was sitting in her car which, like the car 02, was stationary in the left hand lane about 30 to 34 metres beyond the pedestrian in the direction of Wiesbaden town centre. The undersigned went to the pedestrian and ordered the emergency doctor's car as a matter of urgency. The undersigned could not detect any breathing by the injured person. There was no pulse to be felt. The traffic was now stopped by the undersigned by the implementation of traffic accident measures."

And, again, it refers to the death being confirmed.

182. The doctor who attended the scene and who was there, we can see, very promptly, as were the authorities, he did produce a short report. It is in your second bundle at page 527. I take this -- these are a number of extracts from reports which the claimant has provided. They appear to be in no particular order but one can see, and certainly page 527 looks like it is an extract from a larger report, I do not know, but one can see

"manner and time of death" on page 527, opinion of doctor, and it gives his name and address, not a natural death, cause of death open, cranio-cerebral trauma following traffic accident. Time of death, certified 6.35am, and 528 we can see "from own observations" at the cross just by the first punch hole, "evidence of non-natural death, traffic accident, open cranio cerebral trauma":

"From the examination carefully carried out by me on the unclothed body,
I hereby certify the death and the details given above."

So that was a German doctor's view, having seen this body and attended it in the immediate aftermath of this accident.

183. I should perhaps just deal -- I will come back to that point. If I can make just five points on the evidence, which does not appear to be disputed, the first is this: that Mr Duggan was alive at 5.24, when he spoke to his mother on the telephone. There is a query whether he was in fact alive immediately before the accident and was the person involved in the accident beforehand. Certainly there seems to be evidence of that but I leave that for the moment. The second point is that his body was found 40 minutes after he spoke to his mother or thereabouts. It was not found, my Lord, in the middle of the night in a dark lane. This was not a hit and run. It was found in the outside lane of a main dual carriageway going into the centre of Wiesbaden at about 6 o'clock in the morning.
184. As I have said, it was not a hit and run. The two cars involved in the apparent accident were still there. The drivers remained at the scene, their names and addresses were recorded, and it is apparent that they spoke to the police, query whether they also gave signed statements.
185. MS ROSE: My Lord, we know they do not give signed statements because it is actually in the bundle and my learned friend should be fully aware of this point. It is page 363 --
186. MS IVIMY: Well, my Lord, I am not sure that this is a matter of detail which is going to assist you.
187. MR JUSTICE WYN WILLIAMS: Anyway --
188. MS ROSE: No, but just for correctness--
189. MR JUSTICE WYN WILLIAMS: Hang on.
190. MS ROSE: It is at page 361 of the bundle.
191. MR JUSTICE WYN WILLIAMS: Fair enough. We will proceed on the basis, in this case, that they gave some information. Whether they did it in writing or not at the moment does not seem to me to be the crux of it.
192. MS IVIMY: Indeed. The drivers were there, my Lord. They were in their cars. They spoke to the police. They told them what had happened and, as I have already

indicated, there is no evidence at all to suggest that these drivers had any connection with the LaRouche organisation, any connection with Mr Duggan or any motive for taking part in the elaborate scenario which my friend has outlined to you occurred.

193. The fourth point is that it is clear that the authorities, the police, the accident investigator and the doctor, all attended very promptly and the fifth is that the police, the doctor and the independent expert accident investigator themselves found nothing odd about the scene to suggest to them that this was not a traffic accident, as it appeared, and nor did the English investigator, traffic expert, who reviewed Mr Burg's report.
194. If I can take you, perhaps, just to one photograph at page -- forgive me -- page 33. Now, I accept that this photograph was taken a hour or so later, so it is probably a little lighter. One sees the road we are talking about. You see the body in the road, that is covered with a white sheet. You can see that there is a slip road coming on just to the right of the road there and you can see that there is a large building immediately beside it.
195. MR JUSTICE WYN WILLIAMS: Yes.
196. MS IVIMY: I just ask you to pause for a minute, because we have seen this alarming opinion evidence as to what happened and consider the basic position and we asked you to consider the inherent likelihood of someone, in the short period we know is in issue between the telephone call and the discovery of the body, inflicting massive head injuries to Mr Duggan, because there is no doubt that he had massive head injuries, transporting him to a main road, and we see the road there in the photograph, placing him in the outside lane of that road -- which is a fast road, it is a type of Autobahn where the speed limit is a hundred kilometres or so an hour -- inflicting damage to the cars, scattering debris on the roadway, creating skid marks and all of that without attracting the attention of any other drivers on either carriageway, or indeed creating a further accident, and in such a convincing manner as to dupe the medical and police authorities who were immediately on the scene into believing it was an accident.
197. This is not a case such as was in issue in Sutovic, where the death had occurred in a flat, where no-one was any the wiser as to what had happened immediately prior to his death or could have been. This is apparently a murder committed in the most extraordinary manner and in the most extraordinary circumstances and we say, with respect, that it is proper to take a step back and to consider that basic position before one gets then into the analysis of the opinion evidence.
198. In my submission, one would need some really cogent evidence to displace what is the logical conclusion from these very sad events, which is that in some form or other Mr Duggan died on that road because he was struck by a vehicle and we say that the evidence which is relied on to displace that theory and to present a theory of murder in advance and placing on the scene is simply not sufficiently cogent to get past this basic problem of inherent incredibility.

199. My friend took you to Sutovic and suggested that this case was an *a fortiori* case and in that case the new evidence, the new opinion evidence, had led the High Court itself to order a fresh inquest. My Lord, I do not know whether I need to trouble you with this but Sutovic was a case which was entirely different in its circumstances. As I have indicated, it was a death in a flat, the question whether it was from a drug overdose, whether he had in fact been beaten up and the death was caused by that, and the new evidence in issue was primarily forensic evidence. They found blood on the walls of the flat. There was also a question mark because a report prepared by the authorities had not been disclosed by the next of kin to any of the experts who gave evidence at the inquest and as a result their evidence had all been given on a false basis as to what had occurred. So it is not very surprising, in those circumstances, that you see the High Court ordering a fresh inquest. That is not this case and this case is certain not a *fortiori* that case.
200. If I turn then -- my Lord, there are many points one could make about these expert reports and, with respect to Ms Rose, when she says that we have given our reasons compendiously as to all the reasons why the Attorney General decided not to order an inquest, that is not fair to the Attorney General. She has attempted to set out the broad thrust of her thinking but inevitably she read these documents carefully and she took them into account. I am not sure one could say much more than that. But if I could just take you briefly --
201. MR JUSTICE WYN WILLIAMS: Well, as I see, it essentially, she essentially -- yes, essentially rejected them as reasonably possible explanations of events leading to death.
202. MS IVIMY: Yes.
203. MR JUSTICE WYN WILLIAMS: And the question for me is whether she was entitled to do that, arguably.
204. MS IVIMY: Indeed, and given that she has, as we have indicated, in essence a broad discretion in deciding what is in the public interest and in assessing evidence of this kind and uses her experience in dealing with these matters in making that assessment.
205. If I could perhaps just take you, because some criticisms have been made of the Attorney and it is said that she did not properly understand the evidence or that she cast aspersions on the qualifications of those who were giving the expert evidence without justification. Could I just take you, and it is not appropriate now, as I say, for me to go through all these reports in detail, although many points can be made on them, but just to start with that of Mr Bayle, which is at tab -- the first one we have at tab C. Criticism is made that the Attorney General referred to his primary expertise being as a fingerprint expert and --
206. MR JUSTICE WYN WILLIAMS: Well, before we get to the expert, it is, I think a point that would worry, in inverted commas, any judge that there is apparently evidence from the pathologist who did examine the deceased, and when I say evidence from him, evidence said to be from him is a better way of putting it, which is, if acceptable, flatly

contradictory to the narrative, is it not? In other words, the conversation with Dr Shove. Now, what I am supposed to do with that?

207. MS IVIMY: Well, can I show you first of all how that issue -- because Ms Rose has majored on that point. Can I show you first of all how that issue was first presented to the Attorney, because she read to you a witness statement which has been made by Mrs Duggan for the purpose of these proceedings --
208. MR JUSTICE WYN WILLIAMS: I follow that, yes.
209. MS IVIMY: And if one looks at the memorial --
210. MS ROSE: My Lord, that is not correct. The witness statement that I read to your Lordship was submitted with the memorial.
211. MR JUSTICE WYN WILLIAMS: I do not think so. The one that I --
212. MS ROSE: Yes.
213. MS IVIMY: I am sorry. If that is correct, that is my mistake. I was looking at it --
214. MS ROSE: At page 337.
215. MR JUSTICE WYN WILLIAMS: Hold on. Yes, that, but there was a subsequent witness statement --
216. MS ROSE: Yes, but, my Lord, the detailed account of the conversation.
217. MR JUSTICE WYN WILLIAMS: Yes, I follow that.
218. MS IVIMY: Yes, I am sorry. The witness statement which was read out was a later one, for the purposes of this hearing --
219. MR JUSTICE WYN WILLIAMS: The substance, according to Ms Rose, is within the memorial.
220. MS IVIMY: -- and what I was going to show you is how it appeared before the Attorney and one can see that in the covering submission. There is reference, it is fair to say, that, if one looks at page 303, after dealing with all of the expert evidence and what it is said it reveals --
221. MR JUSTICE WYN WILLIAMS: Sorry, 303?
222. MS IVIMY: 303, so paragraph 38. This is the memorial to the Attorney:

"In addition to these conclusions [and that is referring back to the expert evidence] it should be noted that the Coroner's pathologist, Dr Shove, did not give evidence at the inquest."

I should say that that is in circumstances where Mrs Duggan was represented by

counsel, so it was not through any default on the part of the Coroner. He certainly could have been called, had that been asked for:

"So no questions were ever asked of him as to what his post mortem meant. In subsequent discussions with Mrs Duggan, Dr Shove agreed that Jeremiah was not killed in a road traffic accident, although he declined to sign a written statement to this effect."

223. So that is the extent, if you like, of the submission being made and one naturally has to be quite sceptical of suggestions of that kind and if one were to go back and read through the entire witness statement, which Mrs Duggan provided in support of this application -- my Lord, of course I do not invite you to do that now, but it is many pages long and it makes many allegations of various kinds and many complaints about what has gone on. This is not an issue which was, as Ms Rose has done, put to the forefront at the outset and it is not an issue on which we have any evidence to support the suggestion that that is indeed -- any reliable evidence to support the suggestion that that is indeed Dr Shove's view. He has declined to sign a statement which gives that view.
224. MR JUSTICE WYN WILLIAMS: Well, I accept that the passage you have shown me in the actual memorial is, you know, a couple of lines in paragraph 38 but am I right in thinking that the appendices to the memorial, as it suggests, accompanied it and it is from that which Ms Rose was reading primarily at page 337, where there is a pretty full description -- well, a completely full description, as far as I can make out, of what is supposed to have been said. Now, I repeat, when the English, or British, as he may be, pathologist who actually carried out the medical examination which precedes the inquest is said to have said this, and unless I am going to be proceed on the basis that the claimant is -- what, making it up, mistaken or whatever?
225. MS IVIMY: Certainly. We are not saying that she is lying, but there is certainly a great deal of scope for misunderstanding and if one reads the whole of this statement that comes across --
226. MR JUSTICE WYN WILLIAMS: But is that not precisely the reason why it should be sorted out?
227. MS IVIMY: Well, with respect, my Lord, one has to come -- I keep coming back -- that is not a matter which needs a fresh inquest to sort out what was said after the event by the pathologist to Mrs Duggan. I keep coming back to the central point, which is that what Mrs Duggan is seeking to achieve is to persuade an inquest that this was not a traffic accident at all. Now, it may well be that there can be debate about the mechanism --
228. MR JUSTICE WYN WILLIAMS: Sorry to cut across you, but if -- I keep repeating this: if the pathologist really is of the view that "the severe commuted fractures to the head could only be sustained as a result of a beating", if that really is his view, is that not central to what the dispute is about?

229. MS IVIMY: Well, one has to say, if that really is his view --
230. MR JUSTICE WYN WILLIAMS: Well, and the only evidence I have of it --
231. MS IVIMY: And we have very, very slight evidence for it, with respect, particularly in circumstances where Dr Shove has been invited, invited -- if that were his view and he has been invited to set it down, one would, with respect, expect him to have done so. He must have been concerned about it and he has expressly declined to give any statement to that effect and I do, with respect, come back to the basic point, which is the nature of the circumstances.
232. MR JUSTICE WYN WILLIAMS: Well, I follow that as well.
233. MS IVIMY: And what one has to posit, in order to get to the position where what happened is that Mr Duggan was killed in advance and placed at the scene --
234. MR JUSTICE WYN WILLIAMS: I follow the force of that.
235. MS IVIMY: If I could take you to the actual only concrete evidence which is relied upon in support of that contention, and take you to it briefly. I was going to take you to Mr Bayle's report and the first comment I would make, and it is a problem with all of these reports, is that we do not have the letter of instruction, so we are not quite sure what is being told to these experts and what the basis is on which they are advising. In this case, as well, although it is apparent that Mr Bayle had the photographs, it is not at all apparent what other documents he had, whether he had the German police reports et cetera, and the account of the immediate aftermath of the accident, which one would have thought is quite significant, and then, if one turns to the final page, page 158, the first point is that he asserts that the blue Volkswagen Golf car showed no evidence of hitting Mr Duggan. Although there was damage to the front bumper, there were no fibres, hairs, blood or skin or any other evidence to prove that this car was involved in an accident. We do start from the point that he is looking at photographs and such certainty is surprising to see from an expert on this matter and, in any event, if one goes to Dr Burg's report, one can see that he says in terms that there were no particle fibres on the Peugeot windscreen consistent with a head having hit it and he concludes therefore that the head did not hit the windscreen. But he does say that there are traces on the underside of the Golf. So this assertion that there was no evidence of this kind is simply not correct and it is a surprising one to see an expert making on the type of evidence he was considering and then one goes on:

"The red/brown Peugeot had considerable damage.

The windscreen had been hit several times with an instrument, possibly a crow bar or something similar."

236. Well, that has to be speculation. Where do we get the crow bar from? Where is there any evidence that that is what is going on in the middle of this busy road at 6 o'clock in the morning on the way to Wiesbaden. If one goes down, the photographs show that Mr Duggan and the two cars were together in another place, possibly a builder's yard. Well, with respect, to extrapolate from what look from photographs to be sandy

deposits of a similar kind on both Mr Duggan and the cars to the firm conclusion that they were together in another place, possibly in a builder's yard, is one which we say is clearly not a proper conclusion for an expert of this type to be reaching. Further down, he says, in the middle between the two punch holes:

"There were many unanswered questions about this incident which need to be investigated thoroughly. This is a theme of some of the expert reports."

237. Well, that may be the case, but that investigation is not something which this coroner is able to do. The primary evidence on which these issues could finally be put to rest is no longer available. Further speculation of this type at a Coroner's hearing is not going to assist to determine what happened and is not going to assist to allay suspicion and rumour and then one comes down to the bottom: "I firmly believe", despite this conclusion that everything needs to be investigated thoroughly, "I firmly believe that this incident was stage managed and Mr Duggan met his death somewhere else and the body dumped in its position in the road". Well, we say that is an extraordinarily conclusion to reach from the very thin evidence he has from the photographs and, in particular, it gives no consideration at all of how this scenario fits with the evidence he has seen. Where is the evidence that this body was placed at the scene. Where is the evidence that one might expect to see of perhaps blood in the cars or something, something to show that this is what happened. There is no evidence of that kind at all. I find this conclusion very troubling from an expert and it is something which Mrs Duggan relies on heavily.
238. I can take you to -- and that is why the Attorney says that this expert evidence is not evidence which she has found sufficiently convincing to displace the evidence which was before the Coroner, albeit second-hand, of what those who attended the scene actually sought. I can take you through the other --
239. MR JUSTICE WYN WILLIAMS: Well, I mean, you have done it in writing, have you not?
240. MS IVIMY: Well, to an extent, yes. Perhaps I could just highlight one thing. We have these three reports from the English, as I understand it, experts and one sees repeated through them this misunderstanding that they suggest there was a total lack of physical evidence on the scene, which is clearly inconsistent with what the accident report has reported, and it feeds through into their reason and their hypothesising. Then one has the three reports from Mr Tuve; the doctor, Dr Kopetz; and the forensic medicine expert Milosavljevic. It is perhaps significant -- one sees Mr Tuve also making this point about the lack of biological evidence, without having any real basis for making that assertion in the total absence of biological evidence and then one sees in Dr Milosavljevic's report that she picks that up -- she? The expert picks that up and she sets out the reports of Mr Tuve and Dr Kopetz and then says "on the basis of the above stated facts I found analysing this difficult". It is very troubling, when one sees experts building on other experts building on second hand evidence in the first place in this way and reaching some quite remarking conclusions on the basis of it and, in fact, if one looks finally at the conclusion of this expert, at page 269, one can see at paragraph 7:

"... the presence of an abundant quantity of blood mixed with brain tissue in the region under the head and the upper half of the body of the late Jeremiah Duggan noted in point 9 of the conclusions. Considering the fact of absolute lack of any other biological traces on the scene of described traffic accident..."

Well, that we know is not correct:

"... indicates the possibility that the complete event connected with occurrence of deadly injury of the head and death of late Jeremiah Duggan had happened most probably exactly on the scene where his body was found by the police and the ambulance service doctor and photographed during the investigation."

Well, we say at least this expert is recognising that, where one has a body in the road with an open head injury, one has to think a little bit about how it got there and he has concluded that it got there because that was the scene of death. Well, that may well be right, but it entirely contradicts what was said by the other experts relied upon by the claimant in suggesting that what has happened was this was a killing in advance and a body placed at the scene.

241. I simply come back to the point that the Attorney General reasonably took the view that this was not the type of evidence which in reality was going to advance matters as compared with the evidence which had already been quite carefully looked at by the Coroner and for that reason she refused her fiat. I am not sure I can --
242. MR JUSTICE WYN WILLIAMS: No, that is very helpful.
243. MS IVIMY: -- really explain it much better than that.
244. I should perhaps emphasise as well, when one considers the wider issues, that the possibility of the involvement of the LaRouche organisation and the death of Mr Duggan was considered by the Coroner and he heard some quite extensive evidence about that organisation and he took into account the very troubling events which led up to this death so it is not as if that aspect of the matter has not received the attention of the corner so far. It is only this question of whether this was a killing in advance and a placing at the scene which has not been examined and, as I have indicated to you, the Attorney took the view that that aspect of the matter was not properly something which should be referred to the High Court to consider a further inquest. My Lord, there is then the question of reasons. I do not know --
245. MR JUSTICE WYN WILLIAMS: Well, I think I am more and more of the view that this in truth is about whether the Attorney General was arguably irrational.
246. MS IVIMY: Indeed.
247. MR JUSTICE WYN WILLIAMS: That is what I have to consider.

248. MS IVIMY: Can I just indicate to you that the case law on this, in particular the case of Ferrante, which you have seen, in the Court of Appeal, and also the case of Taylor, which you were taken to the amenability issue, deals with the giving of reasons and expressly endorses reasons being given for a decision of this -- not -- in Ferrante the same type but in Taylor it is a slightly different type, with the same sort of reasons being given by the Attorney and says that those are indeed proper reasons.
249. MR JUSTICE WYN WILLIAMS: Effectively I have applied the statutory test.
250. MS IVIMY: Indeed.
251. MR JUSTICE WYN WILLIAMS: Right, thank you.
252. Right. What do you want to say, Ms Rose?
253. MS ROSE: My Lord, can I just address quickly the point about the reasons, because in fact in my submission that is not quite what Ferrante in the Court of Appeal says in relation to --
254. MR JUSTICE WYN WILLIAMS: Well, I do not think you persuade me on reasons unless you persuade me on rationality. I really do not.
255. MS ROSE: Can I ask your Lordship where you are on rationality at this point?
256. MR JUSTICE WYN WILLIAMS: Pondering.
257. MS ROSE: Well, in that case, let me turn to the question of rationality. The first points that we relied on --
258. MR JUSTICE WYN WILLIAMS: I mean, the truth is that when I have -- and I am not trying to be obsequious to you, but when I have very detailed and good submissions about something like this, one tends to become of mind set which is more suitable to deciding the case, as opposed to applying the test which I have to apply. Maybe that is the answer.
259. MS ROSE: It may be the answer, my Lord, and we submit that whatever this case is, it is not a case that should be --
260. MR JUSTICE WYN WILLIAMS: I think it is the answer, Ms Rose. I think it is the answer.
261. I think I should simply say I consider that there are formidable legal difficulties which face the claimant in her quest to succeed in a judicial review. They relate not just to the susceptibility of this decision to judicial review but are inherent in any rationality challenge of this type. But I have been persuaded that there are sufficiently unusual features about this case that it would be wrong to refuse permission.
262. MS ROSE: My Lord, we do ask for expedition.

263. MR JUSTICE WYN WILLIAMS: And what does that mean in this court, Ms Rose?
264. MS ROSE: It is a depressing thought but, my Lord, the position is --
265. MR JUSTICE WYN WILLIAMS: Well, I will certainly say there should be expedition but, given the pressures on this court, I mean expedition still means you have to take your turn.
266. MS ROSE: There is one further point I would like to raise and that is this: the only decision that the Attorney General was being asked to make was to give permission so that the question of whether there should be an inquest could be referred to the High Court. Now, in the light of your Lordship's decision to grant permission, I would publicly ask that the Attorney General give serious thought to whether or not permission should not simply be granted because otherwise there is a risk of public money being wasted and that we end up with a full hearing of the judicial review of the question whether permission should have been granted and then, if we win that, another full hearing in front of the High Court to decide whether a fresh inquest ought to be granted, with accompanied delay, and I do just invite the Attorney General to think in the public interest whether it might not be preferable for her to grant her consent so that we could simply have a hearing in the High Court as soon as possible on the substantive question of whether there should be a fresh inquest.
267. MR JUSTICE WYN WILLIAMS: Well, I fully understand why you said that but, for reasons which I think will be obvious, not least related to the complex legal issues in this case and whether or not it is desirable that they be heard and argued about, I say nothing one way or the other about what she should do. For your clients, that does not mean anything.
268. MS ROSE: My Lord, I was not suggesting that this court can make any order. I simply put down a marker --
269. MR JUSTICE WYN WILLIAMS: No, you are inviting me you to give you some support and I am declining.
270. MS IVIMY: My Lord, I am grateful. All I can say is, of course, the Attorney will give this case her very careful consideration.
271. MR JUSTICE WYN WILLIAMS: Of course she will. It is not for me to tell the Attorney General what to do, unless I am compelled to if I hear the substantive.
272. All right, and the automatic order is costs in the case, insofar as it is relevant. But I say that formally so that nobody is in any doubt. Thank you all very much.