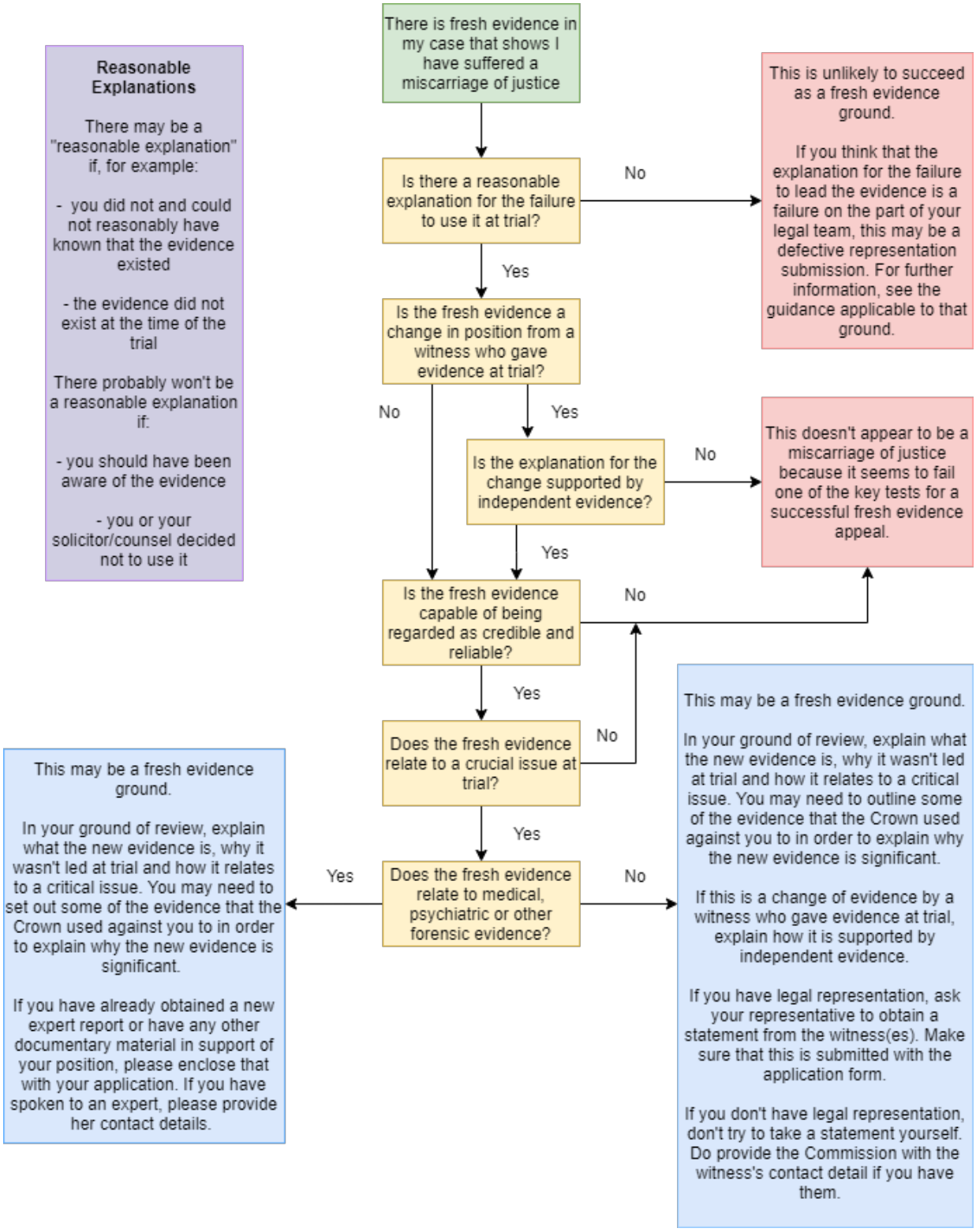
Submission Guidance:

Fresh Evidence

This paper is intended to provide guidance for those thinking of applying to the Commission on the basis that new evidence has come to light. It summarises the Commission's understanding of the law. For a fuller explanation, see the Commission's more detailed position paper.

Fresh Evidence – in Brief

- "Fresh evidence" means evidence that did not come out at trial.
    - "Fresh evidence" is wider than just new factual material. It may, for example, include opinions from experts who were not heard at the trial.
- In order for it be admissible, there must be a reasonable explanation for the failure to lead the evidence at trial.
    - Lawyers' failure to gather or use evidence at trial is not a reasonable explanation.
- In order to be a miscarriage of justice, the fresh evidence must be:
    - Capable of being regarded as credible and reliable; and
    - Material to a critical issue at the trial.
- There are further requirements if the fresh evidence is a change of position from a witness who gave evidence at trial.


There is fresh evidence in my case that shows I have suffered a miscarriage of justice
Is there a reasonable explanation for the failure to use it at trial?
No
This is unlikely to succeed as a fresh evidence ground.
If you think that the explanation for the failure to lead the evidence is a failure on the part of your legal team, this may be a defective representation submission. For further information, see the guidance applicable to that ground.
Yes
Is the fresh evidence a change in position from a witness who gave evidence at trial?
No
Yes
Is the explanation for the change supported by independent evidence?
No
This doesn't appear to be a miscarriage of justice because it seems to fail one of the key tests for a successful fresh evidence appeal.
Yes
Is the fresh evidence capable of being regarded as credible and reliable?
No
Yes
Does the fresh evidence relate to a crucial issue at trial?
No
Yes
Does the fresh evidence relate to medical, psychiatric or other forensic evidence?
Yes
No
Reasonable Explanations
There may be a "reasonable explanation" if, for example:
- you did not and could not reasonably have known that the evidence existed
- the evidence did not exist at the time of the trial
There probably won't be a reasonable explanation if:
- you should have been aware of the evidence
- you or your solicitor/counsel decided not to use it
This may be a fresh evidence ground.
In your ground of review, explain what the new evidence is, why it wasn't led at trial and how it relates to a critical issue. You may need to set out some of the evidence that the Crown used against you to in order to explain why the new evidence is significant.
If you have already obtained a new expert report or have any other documentary material in support of your position, please enclose that with your application. If you have spoken to an expert, please provide her contact details.
This may be a fresh evidence ground.
In your ground of review, explain what the new evidence is, why it wasn't led at trial and how it relates to a critical issue. You may need to outline some of the evidence that the Crown used against you to in order to explain why the new evidence is significant.
If this is a change of evidence by a witness who gave evidence at trial, explain how it is supported by independent evidence.
If you have legal representation, ask your representative to obtain a statement from the witness(es). Make sure that this is submitted with the application form.
If you don't have legal representation, don't try to take a statement yourself. Do provide the Commission with the witness's contact detail if you have them.

Position Paper:

Fresh Evidence

This paper sets out the Commission's approach when dealing with this area of law.

Introduction

1. The Criminal Appeal (Scotland) Act 1926 introduced a power for the High Court of Justiciary to allow an appeal on the basis of new evidence that was not heard at the original trial. An appeal on this ground would succeed only where the court was satisfied that had the jury heard the additional evidence they would have been bound to acquit and that a verdict in the absence of the additional evidence amounted to a miscarriage of justice[1]. The court rarely used this power. Following the Sutherland Committee report[2], sections 106(3) (for solemn procedure) and 175(5) (for summary procedure) of the Criminal Procedure (Scotland) Act 1995 were amended to allow appeals on the basis of the existence and significance of evidence not heard at the original proceedings. This removed the requirement for "additional" evidence, thus for the first time permitting, under certain limited circumstances, appeals based upon a change in the position of a witness.

2. Fresh evidence is a common ground of review in applications to the Commission. It is also a common ground of referral to the High Court. In the period 2019-2024, fresh evidence was the main ground of referral in 24 % of all conviction reviews sent to the High Court[3]. One particularly celebrated early "fresh evidence" referral was *Campbell v HMA*[4], the so-called "Ice Cream Wars" case. One of the grounds on which the Commission referred the case to the High Court was the existence of fresh evidence from a professor of cognitive psychology that it was highly improbable that a number of police officers were able to recall verbatim the accused's alleged incriminating

[1] *Gallacher v HMA* 1951 JC 38, at page 48
[2] *Criminal Appeals and Alleged Miscarriages of justice*, Cmnd 3245
[3] 2023-24 Annual Report at page 23
[4] *Campbell v HMA* 2004 SCCR 220

remarks. That case established an ongoing trend in the Commission's body of "fresh evidence" referrals in the sense that a significant majority of those that have followed have arisen from new psychiatric, psychological or other forensic evidence. These have included a string of historical cases concerning alleged coerced/compliant confessions[5], issues relating to DNA[6], forensic speaker comparison[7], medical evidence about sudden infant death syndrome[8] and issues relating to trauma[9]. As a result of its position at the end of the criminal justice process, the Commission quite frequently encounters the situation in which the body of knowledge underlying forensic evidence has advanced since the point at which the applicant was convicted. This may explain the bias towards forensic work in the Commission's fresh evidence caseload.

The Commission's Position

3. Section 106(3)(a) of the 1995 Act[10] allows for appeals against conviction and sentence based on the existence and significance of evidence which was not heard at the original proceedings. Section 106(3C) of the 1995 permits appeals based on the existence and significance of evidence from a person (or from a statement of a person) who gave evidence at the original proceedings that is different from, or additional to, the evidence given at the trial.

4. In the Commission referral of *Lilburn v HMA*[11], the court set out a three part framework for the analysis of the fresh evidence ground. This provides a useful basis for the present discussion. In any fresh evidence referral, the Commission will, following the approach in *Lilburn*, need to address the following questions:

    i. Is there evidence not heard at the original proceedings (ie is there fresh evidence at all)?

    ii. Is there a reasonable explanation for the failure to lead it at trial?

[5] *Gilmour v HMA* 2007 SCCR 417, *George Beattie* 2009 SCCR 446 & *Wilson v HMA* 2009 SCCR 666
[6] *Kelly v HMA*, unreported (appeal allowed), 6 August 2004
[7] *McIntyre v HMA,* unreported (appeal allowed), 12 April 2012
[8] *Liehne v HMA* 2011 SCCR 419
[9] *Graham v HMA* 2018 SCCR 347; *Dzinguviene v HMA*, unreported, 23 March 2023: https://www.judiciary.scot/home/sentences-judgments/sentences-and-opinions/2023/06/20/hma-v-ineta-dzinguviene
[10] All references to the 1995 Act in this section refer to appeals under solemn procedure. Similar provisions in relation to summary procedure can be found at section 175(5) of the 1995 Act.
[11] 2015 SCL 706

iii. Is it sufficiently material to suggest that a miscarriage of justice may have occurred?

Is There Fresh Evidence?

5. The answer to this question is usually quite straightforward, particularly where the evidence in question comes from a non-expert witness who was not called at the original trial. It was complicated in *Lilburn* by the existence of a significant number of new psychiatric reports, many of which covered ground that had been explored at the original trial. The court in *Lilburn* adopted a broad construction of the statutory language, observing that s106(3)(a) spoke of new "evidence" rather than "facts". That case arose from a dispute after trial among mental health professionals about the applicant's state of mind at the time of his offence. The court held that opinions relating to aspect of the appellant's mental state that had not been canvassed at trial would qualify, as might opinions on a question that had arisen at trial if they came from a different source.

6. The Commission must also consider whether the proposed fresh evidence is, in fact, evidence at all in the sense that it is admissible in court[12]. Again, the answer to this question is usually, but not always, quite straightforward.

Reasonable Explanation

7. Arguably the leading case on the subject of reasonable explanation remains the 1998 decision in *Campbell v HMA*[13]. In the more recent case of *Razzaq v HMA*[14], the court produced the following summary of the principles that it had derived from Campbell:

> "First, if there is not a reasonable explanation of why the evidence was not heard at the trial then questions as to the effect which it might have had at the trial do not arise for consideration. Secondly, the onus is on the appellant to provide a reasonable explanation for the failure to call that evidence at trial. Thirdly, it is not sufficient for an appellant to state that he was not aware of the existence of the witness or, where he was aware of the existence of the witness, that he was not aware that the witness was able or willing to give evidence of any significance.[15] It may be sufficient for the appellant to show that

[12] *Young v HMA* 2013 HCJAC 145
[13] 1998 SCCR 214
[14] 2017 SCCR 376
[15] See also *Cameron v HMA (No 2)* 2008 SCCR 748

he had no good reason for thinking that the witness existed, or, as the case may be, that he would give the evidence in question. Fourthly, the court should have regard to the interests of justice according to the circumstances of the particular case and the underlying intention of the legislation is that the court should take a broad and flexible approach. Fifthly, it is enough for the appellant to persuade the court to treat the explanation as genuine and he does not require to show by full legal proof that it is true."

8. As the court observed in the later case of *Hughes v HMA*[16], the test to be applied is an objective one. On the other hand, "full legal proof" is not required. It is enough if the court can be persuaded to take the explanation as genuine.

9. A failure by legal representatives to obtain evidence that they should have obtained or to lead at trial evidence that they ought to have led will not amount to a reasonable explanation. Scots law analyses such arguments as claims of defective representation. More information on the subject may be found in the corresponding position paper.

Materiality

10. The leading case in this regard is *Megrahi v HMA*[17], in which the court set out the following test:

"(2) In an appeal based on the existence and significance of evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, had it heard the new evidence, would have been bound to acquit.

(3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.

(4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.

[16] [2024] HCJAC 48 at paragraph 39
[17] 2002 SCCR 509, at page 585

(5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in its consideration of a critical issue at the trial.

(6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

11. If the Commission is satisfied that the additional evidence is capable of being regarded as credible and reliable by a reasonable jury, it will then go on to consider whether the additional evidence is likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at trial. This must be assessed in the context of the trial as a whole[18]. The Commission must consider that the absence of the fresh evidence may have resulted in a miscarriage of justice[19]

Section 106(3C)

12. As outlined above[20], section 106(3C) of the 1995 Act allows for appeals based on the existence of additional evidence from a person, or from the statement of a person, who gave evidence at the original proceedings and which is different from the evidence given at the original proceedings.

13. In considering evidence under these provisions, the Commission must be satisfied that there is a reasonable explanation as to why the evidence was not led at the original proceedings. This explanation must be supported by independent evidence. Section 106(3D) of the 1995 Act defines this "independent evidence" as evidence that was not heard at the original proceedings; which comes from a source independent of the person from whom the additional evidence emanates; and which is accepted as being credible and reliable. The Commission notes that appeals under

[18] *Al Megrahi v HMA* at paragraph 252
[19] *Fraser v HMA* 2008 SCCR 407
[20] At paragraph 3

this section of the 1995 Act are rarely successful. The decision in *McCreight v HMA*[21], however, provides an example of a case where the court accepted such evidence.

Sentence

14. When considering an application for a review of sentence on the basis of fresh evidence, the Commission must consider whether there is a reasonable explanation as to why the fresh evidence was not heard at the original proceedings; whether the evidence is credible and reliable; and whether the fresh evidence is cogent and important evidence of a kind and quality which would have been of material to the court at the original proceedings[22].

Specific considerations

15. Where an applicant is legally represented, the Commission would expect an application on the grounds of fresh evidence from a witness to contain a precognition, statement or affidavit from that witness. The Commission may reject cases at Stage 1 where no such supporting documentation has been produced.

16. In *B v HMA*[23], the court held that it would expect in relation to the establishment of a "reasonable explanation" some form of evidential foundation "in the form of an affidavit or a statement from either the appellant or his former agents that the [evidence] was not known to the appellant or his legal advisers." Where this is an issue, the Commission should take statements from the appellant, their legal team or, preferably, both.

17. Where the Commission has accepted a case for review, it may also choose to obtain its own signed statement or affidavit from a witness. Where the witness is not willing to cooperate with the Commission, the Commission may seek to exercise its statutory powers under s194H of the 1995 Act.

18. Where an applicant is seeking a review of conviction on the basis of "fresh evidence" in relation to a charge to which he or she has previously pled guilty, the Commission must consider whether the applicant is entitled to withdraw the plea[24]. For the

[21] 2009 SCCR 743
[22] *Reid v HMA* 2012 HCJAC 18
[23] 2014 SCCR 376 at paragraph 19
[24] *Kalyanjee v HMA* 2014 SCCR 397

additional considerations which apply in these cases, please see the Commission's position paper on the withdrawal of pleas of guilty.

19. Whilst it would be possible to analyse cases in which the Crown has failed to disclose material to the defence as questions of "fresh evidence", there is a separate body of law that pertains in this situation. It is thus the Commission's practice to consider such matters through the prism of "disclosure" rather than "fresh evidence"[25]. There is further discussion of the law on disclosure in the Commission's position paper on the subject.

20. One increasingly common theme in fresh evidence applications is the content of social media postings that the complainer (or another key witness) has made post-trial (or which, at least, have been discovered at that stage.) In this regard, the decision of the court in *RC v HMA*[26], which concerned such supposedly inconsistent postings, may be of some interest. It is important in these cases to bear in mind that a witness's social media "persona" is a construct that may bear little relation to their lived reality.

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[25] Although in relation to a marginal case, in which the police had failed to pass crucial evidence to the Crown, see the Commission referral of *Johnston v HMA* 2006 SCCR 236
[26] 2018 JC 1