Neutral Citation Number: [2021] EWCA Crim 432

Case Nos: 2018/2858/C3, 2018/2860/C3

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT KINGSTON UPON THAMES**
**HIS HONOUR JUDGE P DODGSON**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2021

**Before :**

**SIR JULIAN FLAUX**
**CHANCELLOR OF THE HIGH COURT**
**MR JUSTICE ANDREW BAKER**
and
**MR JUSTICE CALVER**

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**Between :**

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| **JONATHAN BEERE**<br>**DANIEL PAYNE** | **Applicants** |
| **- and -** | |
| **THE QUEEN** | **Respondent** |

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**Joel Bennathan QC and Annabel Timan** (instructed by **Centre for Criminal Appeals**) for the **Applicants**
**Deanna Heer** (instructed by **Crown Prosecution Service**)for the **Respondent**

Hearing dates : 23 to 26 February 2021

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# Approved Judgment

**Sir Julian Flaux Chancellor of the High Court:**

1. This case concerns applications referred to the Full Court by the Single Judge which are made by two of five defendants convicted in June 2011 of conspiracy to evade the prohibition on importation of a controlled drug, cocaine, contrary to section 1(1) of the Criminal law Act 1977. The five defendants are known in the media as "the Freshwater Five" for reasons which will become apparent. The applicant Jonathan Beere was sentenced to 24 years imprisonment with 134 days to count towards sentence. The applicant Daniel Payne was sentenced to 18 years imprisonment with 366 days to count towards sentence. Payne also pleaded guilty to counts of producing a controlled drug, possession of ammunition without a certificate and possession of a prohibited weapon, to which he was sentenced to concurrent terms of imprisonment of 2 years, 12 months and 12 months respectively. Of the co-defendants, Jamie Green was sentenced to 24 years imprisonment with 202 days to count towards sentence, Zoran Dresic was sentenced to 24 years imprisonment with 202 days to count towards sentence – he also pleaded guilty to a count of possession of a false identity document to which he was sentenced to a concurrent term of 12 months imprisonment – and Scott Birtwistle was sentenced to 14 years detention in a young offender institution with 66 days to count towards sentence.

2. The two applicants, Beere and Payne, now apply for an extension of time of 2,567 days, for leave to appeal against conviction, and to rely upon fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968.

**The facts and the evidence at trial**

3. On 31 May 2010, 250kg of cocaine was recovered from the sea in Freshwater Bay on the Isle of Wight. The drugs were wrapped and contained in rucksacks (waterproof camping holdalls) which were joined together by rope and attached to a buoy. It was the prosecution case at trial that the applicants and their co-defendants had been involved in the importation of the cocaine into the UK through 'coopering' in the English Channel. The cocaine was said to have been transported from Brazil by a commercial container ship, the *MSC Oriane* (hereafter, "the *Oriane*").

4. The applicants were said to have collected the cocaine from the sea, into which it had been jettisoned from the *Oriane*, using the fishing vessel *Galwad-Y-Mor* (hereafter, "the *Galwad*"). The co-defendant Green was a lobster fisherman and the owner and captain of the *Galwad*. The others on board were Payne and the co-defendants Dresic and Birtwistle. The evidence of a possibility of collection at sea by the *Galwad* came from the expert called by the prosecution, Paul Davidson, a master mariner and marine consultant, who was then with Brookes Bell, being a firm of marine, scientific and technical consultants and surveyors. His expert evidence was that the track of the *Galwad* crossed that of the *Oriane* shortly after the container ship passed by. The tracks of the two vessels and their alleged crossing at about 00.30 GMT on 30 May 2010 were plotted by Mr Davidson on an Admiralty chart which was before the jury. We should say that, throughout this judgment, when we refer to times, we shall use GMT for consistency.

5. The *Galwad* was said to have positioned herself ahead of the *Oriane*, allowed her to pass, then proceeded to the vicinity of her wake, where she slowed down and performed a particular, very slow-speed manoeuvre between about 00.32 and 00.35. The

prosecution case was that during that time those on board the *Galwad* had coopered the drugs from the sea, into which they had been jettisoned from the *Oriane*.

6. The prosecution also relied upon evidence that the satellite phone on board the *Galwad* made and received repeated calls at critical points during the voyage, including when the *Galwad* was said to have been manoeuvring in or near the wake of the *Oriane*. The calls were to and from telephones held by alleged co-conspirators Daniel Dugic (the 'Dexsa' phone) and Edward Austin (the 5034 phone). The 5034 phone was also in contact with a Dutch number at significant times during the voyage. Jonathan Beere's telephone was in contact with Jamie Green's telephone soon after the *Galwad* had left Freshwater Bay on its return to the Isle of Wight and was in contact with a phone held by Austin (the 'John Wilson' phone) soon after the crew of the *Galwad* disembarked at Yarmouth and following their arrests. Daniel Dugic was named on the indictment but never arrested. Edward Austin was named on the indictment and convicted at a subsequent separate trial. The phones associated with Dugic and Austin and the 5034 phone stopped being used at the same time on 31 May 2010 in the vicinity of Gatwick Airport soon after Green, Payne and Dresic had been arrested. We refer to the cell-site and telephone evidence in more detail below, as it was and is an important aspect of the prosecution case.

7. The prosecution case was that Beere, who was a friend of Green, had acted as a liaison between Green and the co-conspirators, Austin and Dugic, who were organising the importation. Dresic was a Montenegrin national. He arrived in the UK on 27 May 2010 having travelled on the Eurostar from Brussels on a false passport in the name Veljko Protic. The passport showed he had left Sarajevo on 26 May 2010 and travelled to Brussels via Budapest. The prosecution case was that he was present to oversee the safe collection of and subsequent onward delivery of the cocaine on behalf of Austin and Dugic.

8. On 28 May 2010, Dresic drove from London to Southsea in the company of Austin and Dugic. Police surveillance showed that they met Beere in a restaurant. Before entering the restaurant Beere made a number of apparently unsuccessful attempts to call Green's mobile phone. At the time Green was on board the *Galwad* having sailed to Weymouth. The group left the restaurant and boarded a hovercraft bound for the Isle of Wight. Soon afterwards Green made telephone contact with Beere.

9. Later that afternoon two mobile phones were purchased by the group from a phone shop in Newport on the Isle of Wight. One was registered with the false details of John Wilson, 32 New Cross Road, London SE14. The prosecution case was that this phone was retained by Austin. The other phone was registered with the false details of Tony Perelli, 24 Knaresborough Place, London SW5. This phone was recovered from Dresic on his arrest. Upon examination it was found to have been in contact with only one number, listed under "Dexsa" in the contact list. The prosecution case was that the Dexsa phone was in the possession of Dugic.

10. Later that day, 28 May 2010, there was further telephone contact between Green and Beere. At 17.04 Beere received a call from the John Wilson phone and thereafter between 17.13 and 20.59 there were a number of calls between Green and Beere. On Saturday 29 May 2010 at 09.36 and 10.31, Dresic made two calls to Dexsa. At 11.21 Green was in telephone contact with Beere after which between 12.03 and 13.15 there were a number of texts and calls between Dresic and Dexsa.

11. At about 16.44, the *Galwad* set sail from Yarmouth Harbour and headed south towards the shipping lanes. At trial it was accepted that those on board were Green, Payne, Dresic and Birtwistle. Whilst at sea there were further calls and texts between Dresic and Dexsa from 16.57 to 23.20.

12. The *Oriane* was travelling eastwards in the English Channel at an average speed of 17 knots. The track of that vessel was plotted by Mr Davidson on the Admiralty chart using AIS data obtained from a Dutch company called QPS. The AIS data was derived from the *Oriane*'s external GPS transmitter which was almost certainly located close to the wheelhouse, in accordance with normal on-board practice, although no evidence was ever obtained from the *Oriane* itself. There was an 11-minute gap in the AIS data from QPS between about 00.26 and 00.38 possibly because the vessel was out of the range of the various shore stations from which the AIS data was collected. Mr Davidson plotted a "course made good" line on the chart between the two positions for which there was AIS data. The *Galwad* was fitted with an Olex Marine Navigation System ("Olex") which used GPS technology to plot its position and record its past journeys. Mr Davidson accordingly used the data from the *Galwad*'s Olex to plot the track taken by the *Galwad*, including in the QPS data gap period, on the same Admiralty chart.

13. Mr Davidson calculated from his course made good lines that the *Galwad* crossed the *Oriane*'s track six times between 22.54 on 29 May 2010 and 00.35 on 30 May 2010. The telephone evidence demonstrated that, as the *Galwad* approached the path of the *Oriane*, those on board the *Galwad* were in contact with the Dexsa phone and the 5034 phone. Cell-site evidence co-located the 5034 phone with Austin, Dresic and Dugic (i) on their journey to the Isle of Wight on 28 May 2010; (ii) with the John Wilson and Dexsa phones on the Isle of Wight and (iii) on 30 May 2010, when the telephones travelled together from the Isle of Wight to Essex and south-east London. The 5034 phone had previously been in contact with the Dutch telephone number on 27 and 28 May 2010; it was in contact with that number again between 21.06 and 21.57 on 29 May 2010; it contacted the *Galwad* satellite phone at 22.10 and 22.27; and eventually made meaningful contact with it at 22.35 and 22.41. The Dexsa phone was in contact with the Dresic phone during the same timeframe.

14. Mr Davidson assessed that, between 22.54 and 23.15, not long after those phone calls, the *Galwad* crossed ahead of the *Oriane*'s track travelling in a south-westerly direction. At 23.32 the fishing vessel turned north and crossed ahead of the *Oriane*'s track at about 23.56. At that time a call was made from the satellite phone on board the *Galwad* to the Dexsa phone and, at 00.03 and 00.05, the satellite phone received two calls from 5034. The *Galwad* turned south and crossed ahead of the *Oriane*'s track between 00.07 and 00.09. It turned north again and crossed ahead of the track of the *Oriane* at about 00.11. At 00.12 a call was made from the satellite phone to the Dexsa phone. The *Galwad* then travelled in a north-easterly direction until 00.14, when it turned east and continued until 00.29 travelling ahead of and in the same direction as *Oriane*, as the container ship approached the *Galwad* on its starboard side. During that time at 00.18 a call was again made from the satellite phone to the Dexsa phone.

15. By 00.26 the *Oriane* was approaching the position of the *Galwad* and was only about one nautical mile away. At 00.29 the *Galwad* turned south heading for the track of the *Oriane* and, at the same time, the satellite phone received a call from the 5034 phone. By 00.30 the *Oriane* had reached and passed the *Galwad*. The *Galwad* then navigated as we described in paragraph 5 above, reducing speed from an average of over 5 knots

to between 1 and 2 knots and including the 2½ minute period at very slow speed (under 0.6 knots) between 00.32 and 00.35. These low speeds would have been slow enough to put out or retrieve lobster pots, but the total period of these manoeuvres of about 3½ minutes was too short for the vessel to have engaged in any meaningful fishing. The prosecution case was that all this was strongly consistent with the *Galwad* engaging in a planned rendezvous with the track of the *Oriane* and during the 2½ minutes of very slow-speed, picking up the rucksacks or holdalls containing the drugs. Mr Davidson's evidence was that, in his opinion, it was indeed possible for them to have been retrieved during that period of time. The *Galwad* then turned northwards and at 00.35 it again crossed behind the *Oriane* increasing speed to 6 or 7 knots and heading back towards the Isle of Wight.

16. None of the defendants disputed at trial the evidence of Mr Davidson as to the route of the *Oriane*. Beere was not on board and Payne claimed to have been asleep. Green was at the helm at the time and thus in a position to give evidence as to the relative positions of his own vessel and the *Oriane*. The trial judge summed up his evidence as follows:

> "*As to the Oriane, I wouldn't have known what the vessels were as I didn't have AIS… The radar is on the four mile range. I would have known when I had to change course, so the vessel can pass us. I became aware of the vessel when I was in the area to the left of the plan. It was moving quite quickly so I went northeast to get off track. I then ran parallel to it, and then it overtook us. And yes, I did also have phone calls coming in at that point. And then the vessel moved towards the south and we crossed in the wake of it. And then I was checking out the holes in the seabed and then I headed off northerly. I was not collecting 11 rucksacks*."

17. We will deal with the significance of Green's evidence for the present applications later in this judgment. Green also called an expert witness Mr Chinery, to provide an opinion on Mr Davidson's evidence as to the events mid-channel. None of the other defendants called expert evidence, thereby making a tactical decision to leave any challenge to the prosecution case on this aspect to Mr Chinery. They relied upon his evidence. Although Mr Chinery's opinion was that it was not feasible for the *Galwad* to have retrieved the drugs in the short time period between 00.32 and 00.35, neither he nor Green suggested that the *Galwad* did not cross in the wake of the *Oriane* or was not in sufficiently close proximity with the container ship for coopering to have taken place. Indeed, at a joint experts' meeting on 9 May 2011, Mr Chinery agreed with the positions of the *Galwad* and the *Oriane* as plotted by Mr Davidson and specifically accepted that the *Galwad* did pass close astern of the *Oriane* at approximately 00.31 on 30 May 2011.

18. The *Oriane* was under surveillance by the authorities as she passed through the English Channel, from a UK Border Agency cutter, *HMC Vigilant* (hereafter, "*Vigilant*"), and a surveillance aircraft. The surveillance operation, known as *Operation Disorient*, was a Serious Organised Crime Agency operation led by SOCA Silver Commander Miles Bonfield. The *Vigilant*'s operational log, together with an Admiralty Chart with plots of the 00.30 position for the *Oriane* and other positions as noted in the log prepared by Cdr. Tucker on the *Vigilant*, was disclosed in evidence by the prosecution prior to the trial. The defendants took a tactical decision not to refer to or challenge any of that material because they did not want the jury to learn that the *Oriane* had been under

surveillance by the authorities (although the jury did know that Beere, Austin, Dresic and Dugic had been under police surveillance). When the prosecution prepared a Sequence of Events to go before the jury which included a reference to the position of the *Oriane* as noted in the *Vigilant* operational log, Green's legal team objected to that entry being included, stating:

> *"Row 315 is objected to: the movements of the MSC Oriane are set out by Davidson on the basis of the AIS data, and are not in dispute; there is thus no need for the jury to hear of TUCKER's plotting of its movements, and in the absence of admissible evidence of the basis for the Vigilant's interest in the Oriane any evidence of that interest is objected to."*

19. As already noted above, at about 00.35 on 30 May 2010 the *Galwad* increased her speed and adjusted course to head back to the Isle of Wight. Her movements as she approached the Isle of Wight were observed by officers attached to the Middle Market Drugs Partnership ("MMDP") and, in particular, two Hampshire police officers, DC Jeans and DC Dunne, located on the cliff-top overlooking Freshwater Bay. At 16.20 the *Galwad* was observed sailing in a north-westerly direction towards Tennyson Monument, Freshwater. At 17.09 it stopped about 200 to 300 metres from the shore. Three people were seen on deck, two of whom appeared to be fishing with fishing rods. At 17.28 the vessel continued sailing in a westerly direction towards the Needles, stopping again about 100 metres from the shore at 17.42. At 17.45 it travelled slowly in the opposite direction before resuming its westerly course.

20. At 17.53 items were observed by the officers being jettisoned into the sea. Their observation log recorded 6 or 7 items being thrown overboard at intervals. In their subsequent statements and evidence they embellished this, asserting that they had seen 10 to 12 holdalls on a string being dispatched from the *Galwad* together with a red buoy. This evidence was the subject of extensive challenge at the trial and the reasons for the discrepancy in their evidence were explored at length. The judge summed up this matter fully over more than 10 pages of transcript in a summing up which runs to 90 pages of transcript. The judge described it as "extraordinary" that, if these officers involved in an operation to detect drug smugglers had registered what they were seeing as a string of holdalls and a buoy, they were prepared to leave the Isle of Wight apparently unaware of the significance of their observation. In other words, the jury were well aware of the issue about the unreliability of this evidence. Furthermore, it was not disputed by the defendants at trial that items *had* been jettisoned from the vessel in that location. In his evidence, Green claimed that these would have been rubbish bags and a bag used to line a bucket used as a lavatory.

21. The Olex data from the *Galwad* supported what was recorded in the observation log. At 16.58 the *Galwad* started a series of erratic manoeuvres close inshore of the south-west coast of the Isle of Wight. During that time, at some point between 17.10 and 17.29 the vessel was stopped. Between 17.50 and 17.54 the vessel was within 155 metres of the location where the rucksacks containing the drugs were found the following day. The prosecution case was that, given that the rope backline connecting the rucksacks was about 175 metres long, the Olex data was consistent with their having been jettisoned from the *Galwad*.

22. At 17.58 the *Galwad* proceeded back towards Yarmouth. At 18.00 Green telephoned Beere in a call lasting 1 minute 11 seconds. At 18.39 the *Galwad* entered Yarmouth Harbour and moored at Fisherman's Pier. The crew disembarked and left. Between 19.00 and 19.11 there were three calls between the Dresic phone and the Dexsa phone. At 20.09 and 20.12 Beere telephoned the John Wilson phone and at 20.05 Dresic was again in contact with the Dexsa phone. At 20.20 the crew returned to the harbour and at 20.39 the Dexsa phone rang Dresic.

23. At about 20.40 Green and Payne were arrested as they walked along the jetty away from the vessel. At 20.48 Dresic was arrested. Recovered from him were the false passport, €1,935 and £420.43 in cash and the mobile phone purchased on 28 May 2010 in Newport. Birtwistle was not arrested until 15 October 2010 and Beere was not arrested until 18 January 2011. Following the arrests on 30 May 2010, at 21.00 the Dexsa phone made an unsuccessful attempt to contact Dresic. At 21.11 the John Wilson phone rang Beere. The following morning, there was further telephone contact between the John Wilson phone and Beere and further attempts by Beere to contact Green and by Dexsa to contact Dresic. The last call made by the Dexsa phone was at 09.25 when it attempted to ring Dresic and the last call made by the John Wilson phone was at 09.27 when it rang Beere. The last call by the 5034 phone was at 09.33. At the time, all three phones were in the area of Gatwick Airport. None of them was used again.

24. On the morning of 31 May 2010, Simon Hutchinson, a local fisherman, was in the vicinity of Freshwater Bay picking up his crab pots when he noticed a rope tangled around his buoy line. Attached to this rope were what appeared to be bags or life jackets. At one end the rope was attached to an orange buoy which he pulled onto his boat followed by one of the bags. He saw that it was a rucksack or holdall which appeared to have been closed with tape. Upon cutting it open he discovered a number a packages containing white powder. He then contacted the coastguard. When the police attended, they found a number of rucksacks floating in the water which had been tied together in the same configuration as is used in lobster fishing, where lobster pots are linked to a long length of rope (the 'backline') via shorter lengths of rope ('legs' or 'stropes'). This configuration suggested that whoever had tied the holdalls together had some experience of lobster fishing. One end of the backline was attached to a buoy, the other end was attached to a makeshift anchor comprising a length of heavy chain and some iron plates. 11 rucksacks were recovered, containing a total of 255 packages, each containing approximately 1kg of cocaine powder, at between 74% and 92% purity. The estimated wholesale value of the cocaine was £13,387,500 and the estimated street value was £53,857,788.

25. Between 31 May and 2 June 2010 the *Galwad* was searched. No drugs or traces of drugs were found, but equally no lobsters or other fish were found. The equipment on board including the Olex, the satellite phone and the AIS Transceiver were seized.

26. In interview Green told a number of lies. He mentioned only three of them being on board *Galwad* on the trip, thereby concealing the presence of Birtwistle who had yet to be arrested. He said Dresic was a casual worker he knew as "Vic" who wanted work as a crewman and whom he had met for the first time in Yarmouth shortly before they set sail on 29 May 2010. Although in interview he mentioned the west-bound shipping lanes, he did not mention going down to the southern east-bound shipping lanes. He said that few fish (20-30 crab) had been caught; Vic was seasick, and they needed three people to fish for lobsters. He made no mention of mapping the seabed (his subsequent

explanation in evidence for the manoeuvres in or near the wake of the *Oriane*), saying that they had just mooched about checking his strings hoping Vic's condition and the weather would improve. On the way back they had fished for mackerel in Freshwater Bay. He denied that any items were thrown overboard.

27. Beere said in his initial interview that he had first met Dresic in Yarmouth on 28 May 2010, when he was passing through and saw Dresic in the company of Green, who was his friend. After disclosure of the surveillance evidence, he admitted that he had lied and said that he had gone to Southsea at Green's request to collect a new crew member. In fact there were three people when he got there and he travelled back with them to the Isle of Wight, where he took them to meet Green. Dresic had stayed with Green whilst Beere took the other two men to the ferry at Ryde. When the police told him about the two phones purchased in Newport, he then said that he had in fact dropped all three men in Newport and arranged to collect them an hour later. They had then all gone to a pub where they met Green. When told one of the phones was subsequently in contact with him, he said that having dropped the two men off at the ferry, they had then called to say they had missed it, so he had driven them to another port. He could not remember further calls.

28. Payne, like Green, lied in interview to conceal the fact that Birtwistle had been on board. He said that it had been difficult to fish because of the weather and Dresic's illness but also said that they had caught hundreds of lobsters and crabs, pulling pots in and out all day long. In a subsequent interview he changed this account, saying the catch was "very very minimal", about 20 to 30 crabs and a couple of lobsters. In fact, no fish were caught.

29. Dresic said in interview that he had travelled to the UK because a friend had found him a job on a boat. He had met Dugic ("Dexsa") in London and they had travelled together to the Isle of Wight. He made no mention of Austin. He said Dexsa had bought a phone for him, which he used to call Dexsa whilst on the boat on the way back to the shore when they were near the harbour. He said Dexsa may have called him but he could not remember. He said he had been seasick during the trip and had spent the whole time below deck apart from when he was being sick.

30. Birtwistle accepted that he was a regular crewman on the *Galwad* but denied being on board on 29 and 30 May 2010. He said he had been at Green's house all weekend doing odd jobs and helping Green's wife.

31. In their cases and evidence at trial, all the defendants accepted Birtwistle had been on board for what they said was a normal, if unsuccessful, fishing trip. Green maintained in evidence that Dresic was a casual labourer. During the trip he had been ill, making fishing difficult, so Green said that he had used the Olex to map the seabed, looking for ground which would be attractive to lobsters. He said specifically that the vessel's movements in the shipping lanes were to do with mapping a ridge and some holes where lobsters might be found. We have already referred to the fact that, in his evidence, he did not deny that the *Galwad* had crossed in the wake of the container ship and made the particular very slow-speed movements in or near its wake, though he denied collecting the drugs, explaining the reason for these as mapping the seabed. He also denied jettisoning the drugs in Freshwater Bay, saying now that the items thrown overboard were rubbish bags as we have described. His explanation for the telephone calls whilst they were at sea was that Dugic was concerned about Dresic's condition.

32. We have already referred to the evidence of the expert called by Green, Mr Chinery, that it would not have been possible to collect eleven rucksacks from the shipping lanes in the time available. He said the movements of the *Galwad* were consistent with mapping the seabed. He also said the string of rucksacks found in Freshwater Bay could have been carried on the tide for up to two miles because the anchor was insufficient to hold it in one place.

33. Beere's evidence was that he had met Dresic on 28 May 2010 as a favour to Green. He had not expected Dresic to be accompanied by anyone else. He said he had dropped the men in Newport for Dresic to buy some weatherproof clothes then took them to meet Green in a pub. After the meeting, he dropped all three men back at the hoverport at Ryde but later received a call from Dexsa saying they had missed the last boat, so he returned and took them to the catamaran. By this time Dresic was not there. The telephone calls with the 'John Wilson' phone were not to do with drugs but were to do with Dresic's seasickness.

34. Dresic's evidence was that he had come to the UK for work. He used a false passport because he had previously been deported from Germany. He broadly maintained the account he had given in interview. He could not really recollect the telephone calls whilst he was on board the *Galwad* but he said that they were nothing to do with drugs.

35. Payne agreed in evidence that he had worked as a crew member on the *Galwad* but said that he had spent most of the voyage below deck asleep. He agreed that he had thrown rubbish bags overboard on the return to Yarmouth harbour but denied seeing any drugs on the boat. Birtwistle's evidence was that nothing unusual had happened when the *Galwad* was in the shipping lanes. He agreed that rubbish would have been thrown overboard on the way back but denied any knowledge of drugs being collected or jettisoned.

**Procedural history leading up to the present applications**

36. Between 1 October 2014 and 31 January 2017, the Centre for Criminal Appeals on behalf of these applicants and the co-defendants made a total of five submissions to the Criminal Cases Review Commission ("CCRC"), asking it to refer the defendants' case to this Court. In its Final Statement of Reasons, dated 22 November 2017, the CCRC declined to refer the case, concluding that there was no real possibility that the Court of Appeal would quash the convictions based upon the submissions put forward. The CCRC also concluded that there were no further lines of enquiry that it could undertake which could lead to new evidence that could impact upon the safety of the convictions. It is not necessary to look at the detail of the Final Statement of Reasons since (a) many of the issues raised in the submissions are no longer pursued in the present applications and (b) the Final Statement was issued before the ECDIS data from the *Vigilant*, which forms the primary basis of the present applications, was made available to the applicants.

37. However, it is necessary to consider one of the issues raised in the submissions and the CCRC response on it, to the extent that it forms part of the case being presented by the applicants to this Court. An important aspect of the submissions made concerned alleged police misconduct within *Operation Disorient*. This focused on the inconsistencies in the evidence associated with the surveillance operation and the observations of DC Jeans and DC Dunne. This included criticism of the SOCA officers

involved, DC Breen, the surveillance commander, and DC Parry, the loggist, and their involvement in the embellishment of the observation evidence. Reliance was placed upon the fact that, in an unrelated case *R v McGuffie* [2015] EWCA Crim 307, this Court allowed an appeal concerning incriminating observations by a squad which included Breen and Parry which were recorded by them by way of late-added addenda but which were disputed by the accused. That appeal was allowed on the basis that the failure to disclose in that case the difficulties with the Freshwater Bay observation evidence in the present case had deprived Mr McGuffie of a fair trial, by denying him the opportunity to rely upon the striking similarities so as to cast doubt on the honesty of some of the same officers.

38. The CCRC rejected that submission, concluding that, weighing all the evidence, this was a *'compelling prosecution case of conspiracy to import cocaine'.* The safety of the convictions would only be undermined through *'significant new evidence…of such strength as to undermine a substantial strand of the prosecution's case, or suggest serious bad faith, such that the prosecution would represent an abuse of process.'* This alleged police misconduct is not a separate ground of appeal before this Court, but at least in their written submissions, Mr Bennathan QC and Ms Timan rely upon the same matters to invite the Court to disregard the observation evidence.

39. We can see no reason for doing so. That is because, as we have already recorded, the criticisms of the observation evidence and its embellishment *were* fully explored at trial and dealt with in detail by the judge in his summing up, and yet, the jury still convicted the defendants. Furthermore, the actual observation evidence as recorded in the observation log, that items were seen by the two officers being jettisoned into the sea, was not disputed by the defendants, who accepted that items were thrown overboard in Freshwater Bay, albeit that they contended that these were rubbish bags.

## The grounds of appeal

40. The four grounds of appeal advanced by the applicants ("the Grounds") can be summarised as follows:

(1) Ground 1: That the data from the ECDIS system on the *Vigilant* and specifically the radar data shows that the *Galwad* never crossed behind the *Oriane* or came sufficiently close to that vessel to make coopering of the drugs possible. Although a prosecution expert witness William Smith, who gave evidence at the trial, had downloaded the ECDIS data at the time in 2010, that data was not disclosed to the applicants until December 2018 and they were previously unaware of its existence.

(2) Ground 2: The ECDIS data discloses the existence of another vessel, other than the *Galwad*, which is designated as radar target A50 on the data. The memorandum following the experts' meeting in November 2020 records agreement that this could be a high speed small craft such as a RHIB. The applicants contend that this was either another suspect vessel or a law enforcement RHIB checking Freshwater Bay, after the *Galwad* had passed through. It is contended that, if the latter, this would substantially undermine the prosecution case that the *Galwad* deposited the drugs, as a law enforcement vessel in the bay less than an hour after the *Galwad* had left would inevitably have seen the drugs; and, if the former, the applicants were deprived of the opportunity to put before the jury some concrete evidence of a

candidate vessel other than the *Galwad* as the immediate source of the drugs found in the Bay the next day.

(3) Ground 3: The applicants rely upon entries in the "Bonfield Log" kept by SOCA Cdr. Bonfield, with whom the *Vigilant* was in contact, specifically entries at 00.50 on 30 May 2010 that the *Vigilant* had sighted a *'possible 'daughter vessel' at the stern of the Oriane'* and at 1.02 that the *Vigilant* had advised that *'the possible daughter vessel was a yacht that sailed north to south across the stern of the Oriane during the time this yacht crossed the path there was no activity on the stern of the Oriane.'* The applicants contend that, if the "yacht" was the *Galwad*, this suggests that the *Galwad* was observed and disregarded as a vessel of interest because there was no observation of activity on the stern of the *Oriane* at that time. It is contended that, because of the failure to disclose the ECDIS data, the applicants were deprived of the possibility of arguing that, in effect, this supported their case that the *Galwad* had not coopered the drugs.

(4) Ground 4: The log of the UKBA surveillance aircraft disclosed at trial stated that it took off from Bournemouth Airport at 18.00 and then saw the *Galwad* near the Needles on its way back to Yarmouth at 18.08. The aircraft camera operator, Mr Whittall, did not mention flying over Freshwater Bay in his statement dated 15 June 2010, but radar records in the ECDIS data showed what was likely to be a single surveillance aircraft flying over the area at 18.02. The applicants' case on this Ground is that, if this was the UKBA surveillance aircraft, its failure to notice 250kg of cocaine in the Bay, minutes after its alleged deposit by the *Galwad*, is so implausible as to exclude the possibility of, or at least cast doubt on, this central event alleged by the prosecution. The applicants rely upon a draft further witness statement for Mr Whittall, and what appears to be a final (albeit unsigned) version, dating from 2013 found in the papers for an Independent Police Complaints Commission ("IPCC") inquiry into the conduct of the investigation. We deal with the detail later in the judgment but, in essence, the applicants argue that the first draft statement suggests the possibility that the plane may have taken off from Bournemouth Airport up to twenty minutes earlier than recorded in the aircraft's surveillance log. This would make it a distinct possibility, it is said, that this was the aircraft seen on the radar flying over the Bay at 18.02.

## Expert Evidence

41. As that summary of the Grounds indicates, data from the ECDIS system on board the *Vigilant*, giving information as to the position of targets observable by the *Vigilant*'s systems (including other vessels and aircraft), underpins every aspect of the applications now before the Court. Extracting, interpreting and understanding the implications of that data requires specialist expertise. For that and other reasons, as this matter has proceeded before the CCRC, initially, and this Court, latterly, various experts were engaged on behalf of the applicants to provide expert reports. The respondent in turn engaged experts to provide responsive reports. For the purpose of the hearing before us, the main experts now instructed met to discuss their views and provided a joint memorandum following those discussions.

42. That process generated a substantial measure of agreement on a number of topics, but various differences or apparent differences of view remained. The credibility of the expert evidence relied on by the applicants, where disputed, and, if credible, its possible

impact (if any) on the safety of their convictions, must be considered under s.23(2) of the Criminal Appeal Act 1968. It is a matter for assessment in any given case, but (for example) it is not necessarily enough for the purpose of s.23(2)(a) of the Act (whether evidence appears to the Court to be capable of belief), for an applicant to say that there is a dispute between apparently qualified experts. By way of case management within these applications, therefore, permission was granted for the main experts to be called to give oral evidence at the hearing before us, *de bene esse* as to whether ultimately we would receive any additional evidence under s.23(1) of the Act. Before turning to consider the Grounds, we now identify those main experts.

43. Mallory Phillips is a retired ship's radio officer/chief electronics officer with some expertise in marine electronics and radio communication. After a career at sea from 1973 to 1986, Mr Phillips was employed ashore by Marconi in various management roles, including (from 2004 until retirement in 2012) that of Technical Support Co-ordinator responsible for the technical support and maintenance of marine communications equipment sold by the company.

44. Mr Phillips provided reports expressing views on a range of points, only some of which were within his expertise. The reports upon which we were invited to focus addressed the precision of the data generated by the *Galwad*'s Olex system, the *Oriane*'s AIS system, the shore-based AIS data for the *Oriane*, and the ECDIS data. When we refer to the 'precision' of the recorded data, we are referring (as were the experts) to matters inherent to the instruments and processing systems involved, assuming them to be functioning correctly and (where relevant) calibrated properly. It may be a separate question whether any given set of positional data is accurate (i.e. reliable, within the limits of that precision, as evidence that a given object was at the given position at the given time). Mr Phillips also provided reports expressing views about collision avoidance and ship-handling, tidal flow, buoyancy, ship stability, hydrodynamics, telemetry and seamanship.

45. Professor David Stupples is a systems engineer with particular expertise in signals intelligence, including radar and satellite positioning systems and data. His expert evidence for these applications focused on the radar-based data from the *Vigilant*'s ECDIS system, in particular the discrepancy to which we refer below between that data and the AIS positional data for the *Oriane* (relevant to Grounds 1 and 3), the tracking of target A50 (relevant to Ground 2), and the tracking of a light aircraft over the Isle of Wight (relevant to Ground 4).

46. Steven Myers had a career at sea as a deck officer on oil and gas tankers from 2003 to 2012 (progressively qualifying from officer cadet to chief officer), since when he has been employed ashore in various marine expert roles. He has particular experience and expertise in offshore transfers of personnel and cargo, small vessel handling and operations, safe navigation and large vessel operations, maritime health and safety, and the investigation of marine accidents. Mr Myers gave opinions on the use at sea of radar-based and AIS-based positions of other vessels, the likelihood of the *Vigilant* being aware of and able to accommodate a static gyrocompass input error, if there was one, the feasibility of the coopering operation posited by the prosecution, and the consistency of the *Galwad*'s movements as recorded by the Olex with various types of posited operation.

47. Mr Davidson, whom we have already mentioned, is a master mariner who had over 16 years at sea, serving on a wide range of different types of vessel, before employment ashore as a Fleet Marine Superintendent (2001-2005), UK Maritime and Coastguard Agency Marine Surveyor (2005-2008) and marine consultant as a partner in Brookes Bell from late 2008 until the end of 2019. Since January 2020 he has been a marine consultant with Minton Treharne & Davies. He is now His expert evidence before us focused principally on the relative movements of the *Galwad* and the *Oriane*, but he also gave evidence for these applications, so far as was within his expertise, on what could be gleaned from the ECDIS data recovered from the *Vigilant*. He also gave evidence of fact about the absence of that data, including his unawareness of it, during the proceedings in the Crown Court.

48. Paul Franks is an expert field service engineer for navigation electronics and data systems, with extensive experience and expertise in ocean-going navigational equipment including gyrocompass, radar, GPS, AIS and ECDIS. His expert evidence concerned the relative reliability of the different data now available, the effects of various conditions or phenomena on data accuracy, and the ECIDS data discrepancy to which we have already referred in paragraph 45 above, in particular.

49. Mr Phillips, Professor Stupples and Mr Myers were instructed on behalf of and called by the applicants. Mr Davidson and Mr Franks were instructed on behalf of and called by the respondent. Mr Davidson was the only one of the five who was involved in the case in the court below.

## Grounds 1 and 3

*Introduction*

50. We find it convenient to take Grounds 1 and 3 together.

51. It is important, in considering the substance of the applicants' contentions under Grounds 1 and 3 and in considering the safety of their convictions in the light of those contentions, to put them into the context of the case at trial and the issue the jury was asked to determine. There was without doubt a conspiracy to import 250 kg of cocaine, as alleged by the prosecution. The discovery of the drugs in shallow water in the Western part of Freshwater Bay, packed into 11 waterproof camping bags strung together on a line, proves that. The question for the jury was whether the applicants were part of the conspiracy.

52. As will often be the case on such a charge, there was no direct evidence of the applicants conspiring with each other or others (e.g. meetings, conversations or telephone calls overheard, or incriminating written correspondence). There was also no forensic evidence unequivocally linking the applicants to the drugs. Nor was there credible eye-witness evidence in terms linking the applicants to the drugs.

53. As we noted above, DC Jeans and DC Dunne testified, in effect, that they had seen the camping bags on their line being dropped over the side of the *Galwad*. The contemporaneous observation log recorded in an entry timed at 17.53 on 30 May, that they saw crew on the *Galwad*, "*throw 6 or 7 items overboard at intervals*". By the time of the trial officers Jeans and Dunne had made witness statements claiming that they had in fact seen items that were "*dark in colour and approximately the size of a large*

*holdall. They were tied together on a line and were dispatched from the boat one after another, totalling 10 to 12. The last item was a red floating buoy*." This account matched very closely the appearance of the drugs as later found in the water.

54. It was this elaboration of their evidence that was not credible.

55. As the judge fairly commented in summing up, in circumstances where the prosecution had not asked the jury to disregard that elaboration, "*If the Crown, as I say, had been able to – if they are, I should say – able to rely upon that evidence, then it would indeed be very strong direct evidence. And it is a matter for you, it is not a matter for me. But it does seem extraordinary, does it not, that if these officers, knowing that they are involved in an operation to detect drug smugglers, see what they have seen the night before [i.e. what, in their elaboration, they claimed to have appreciated at the time that they were seeing] that they are prepared to leave the island? Apparently completely unaware that the significance of what they have seen has been missed by everybody. It is a matter for you, not for me.*"

56. The obvious truth which cannot have escaped the jury is that DC Jeans and DC Dunne did not, at the time of their observation of the *Galwad*, identify that they were seeing or had seen holdalls being deployed in a line, as they described (and as were in fact found in the Bay the next day). Thus, there was, as we put it above, no credible eye-witness testimony in terms linking the *Galwad* (and therefore the applicants) to the drugs found on 31 May 2010.

57. It was however common ground, on evidence that remains uncontested on these applications, that the *Galwad* was in the right area of Freshwater Bay for about an hour from around 16.50 on 30 May 2010 to have dropped the drugs found the next day. It was also the evidence of those on board the *Galwad* that several dark bags *were indeed* dropped over the side whilst she was there; and the contemporaneous observation of DC Jeans and DC Dunne, as the jury knew from the cross-examination on their elaborated account, was in fact of seeing what they thought had been 6 or 7 items thrown overboard at intervals.

58. The key prosecution allegation in the case, of which the jury needed to be sure in order to convict, was that what the *Galwad* dropped over the side on the evening of 30 May had in fact been the drugs found in the Bay the following day. If sure of that, it is not difficult to see how a jury might then be sure of the guilt of those on board the *Galwad*, although it suffices for our purpose that nothing in the applicants' proposed appeal seeks to go behind the jury's decision on that, or provides any arguable basis for doing so. Likewise, if sure that the *Galwad* was in that way part of the drug smuggling operation, nothing in the applicants' proposed appeal seeks to go behind, or provides any arguable basis for going behind, the jury's decision on the whole of the evidence that Beere was part of the plot though not one of the crew.

59. Putting aside the discredited part of the observation evidence of DC Jeans and DC Dunne, the prosecution case, then, so far as material to all four Grounds of Appeal, was an entirely circumstantial case that the *Galwad* was indeed the immediate source of the drugs found in Freshwater Bay on 31 May 2010, having dropped them the previous day near to where they were then discovered by Mr Hutchinson. The defence case, without assuming any burden of proof, was that the visit to Freshwater Bay at the end of the day on 30 May 2010 was the final part of a rather unsuccessful but entirely innocent

overnight fishing trip, and what was dropped over the side in the Bay was refuse and/or latrine contents, not drugs.

60. One element of that circumstantial case, i.e. one circumstance relied on, if proved, as a piece of a puzzle that when put together pointed ineluctably, it was said, to the conclusion that the trip to Freshwater Bay had been the drugs drop, was that the *Galwad* was steered and manoeuvred in the vicinity of the *Oriane* in a manner consistent with a coopering operation to pick up one or more packages dropped from the stern of the *Oriane* as she passed. It was common ground on the expert evidence at trial that she was steered and manoeuvred in the vicinity of the *Oriane*. It was Green's evidence that she was so steered and manoeuvred, however he said that she was not engaged in any coopering operation but was mapping the sea bed for the purpose of possible future fishing, an explanation the jury evidently did not believe.

61. There was a major issue at trial whether, on what was the agreed duration and pattern of the encounter with the *Oriane* in the Channel, a coopering operation could in fact have been undertaken such as would have been required to haul in the quantity of drugs later found in Freshwater Bay. That is a related but different aspect of the matter, i.e. different to the basic pattern on the water of the *Galwad*'s movements relative to the *Oriane*'s. Evidently, the jury was satisfied on the evidence as a whole that the necessary coopering could have been, and was, undertaken.

62. That then is the context in which Grounds 1 and 3 arise, each concerning the interaction between the *Galwad* and the path of the *Oriane* on the night of 29-30 May 2010. Taking them from the applicants' Perfected Skeleton Argument for the hearing before us, which superseded all previous Grounds of Appeal, Notes and Skeletons submitted on behalf of the applicants, they are as follows:

"*The Applicants now seek leave to appeal on the basis of material not before the jury at their trial which, in summary, shows:*
*(1) The Galwad did not, contrary to the evidence at trial, ever get sufficiently close to the path actually travelled by* the *Oriane to permit the transfer of the drugs.*
*…*
*(3) The Vigilant was monitoring* the *Oriane and discounted* the *Galwad as the drugs-receiving vessel at the key time … .*"

63. Ground 1 (the *Oriane's* path) is said to be established by the ECDIS data recovered from the *Vigiliant* which, it is argued, should have found its way to the police investigation team so as to be used by Mr Davidson and disclosed to the defence. We say with confidence that it would have been used by Mr Davidson in 2011 if it had been made available to him. Having read his reports and heard from him in evidence ourselves, we are clear that he only ever sought to present, on the evidence available to him, the best indication he could of the paths taken by the vessels. It is agreed expert evidence before us that Mr Davidson did in fact present as good an indication as was possible on the data he was given, but that data included (as Mr Davidson appreciated) the 11-minute gap in the AIS positional data from QPS to which we have referred, a gap that would have been filled by the ECDIS AIS data.

64. Ground 3 (discounting the *Galwad*) is said to be established from evidence generated by *Operation Disorient*, all of which was available at trial but was not used because of the tactical decision by the defence not to mention the surveillance operation in respect

of the *Oriane*. It is said that when that evidence is put together with the ECDIS AIS data, a materially different picture is painted and a different tactical decision might have been taken.

65. It is convenient to take Grounds 1 and 3 together, therefore, since they concern the same single element of the circumstantial case going to whether the *Galwad* dropped the drugs in Freshwater Bay on 30 May 2010. Moreover, there is an obvious tension between Grounds 1 and 3, or there may be depending on our assessment of the material relied on for Ground 3, because on the face of things Ground 3 avers, and relies on, the fact that the *Galwad* was in close proximity to the stern of the *Oriane*, undermining the idea that there might now be some real room for doubt about that. Thus, Ground 1 cannot be considered properly without considering also the evidence relied on for Ground 3.

*The Evidence*

66. In this section of our judgment, we review the evidence said to bear upon Grounds 1 and 3. The conclusion of that review is that there is nothing for the applicants in Ground 3 unless, first, Ground 1 is arguable; and whether Ground 1 is arguable turns on whether we can accept the respondent's submission on how the discrepancy between the two sets of data from the *Vigilant*'s ECDIS is to be resolved.

Positional Data

67. As she was required to, given her size, the *Oriane* was broadcasting AIS messages relaying her GPS-derived position every 6 seconds. Accounting for the inherent positional precision of the satellite data she was receiving and the impact of the processing of that data within her systems so as to generate the outgoing AIS messages, those broadcast positions were precise to within ±18.5m (latitude) and ±12m (longitude). Our greater interest is in latitude, the applicants' contention being that the *Oriane* was always materially further South than the jury was given to understand.

68. Unless there be reason to doubt the accuracy of the *Oriane*'s contemporaneous AIS-reported positions, as a record of the positional data she received from the GPS satellite array, that data reliably shows where she was from time to time to within the precision stated in the previous paragraph. On the basis of these recorded spot positions a course made good can be plotted for her on a chart of the English Channel.

69. A central part of Mr Davidson's evidence in 2011 was his course made good of that kind plotted for the *Oriane*, alongside a course made good for the *Galwad* that he plotted from positional data taken from her Olex. The Olex is a navigation, fishery plotting and ocean seabed mapping system developed by Olex SA in Norway which was used to store GPS positional data received by the *Galwad* so that it remained, as received, precise to within ±10m.

70. The AIS positional data used by Mr Davidson in 2011 was obtained from QPS in Holland, a commercial data provider that stores AIS message data received from ocean-going ships by fixed *onshore* equipment. The 11-minute gap in that data between 00.26 and 00.38, as it happens, covered the very time when the *Galwad* engaged in the manoeuvres that at trial the prosecution said could have been coopering and the defence said was seabed mapping. There is nothing inherently unusual or suspicious about the

gap in the data; it did not and does not cast any doubt on the reliability of the data QPS did provide, either side of the gap; but obviously it meant that for the 11-minute period of the gap, Mr Davidson's course made good was a straight line between two points from which the path *actually* tracked by the *Oriane* – her course over the ground – may have deviated somewhat (within the limit that whatever her precise path, she did get from the first point to the second point within that time).

71. We reproduce as Appendix 1 to this judgment three of the diagrams shown to the jury showing Mr Davidson's plots for the *Oriane* and the *Galwad*, each showing the same plots but successively closer up. The *Oriane* line is red, the *Galwad* line is blue; and the *Galwad* positions labelled in green with either "I/C" or "O/C" match the times of incoming or outgoing calls respectively to or from the *Galwad*'s satellite phone.

72. Mr Davidson's plots showed the *Galwad* crossing what would have been the wake of the *Oriane* shortly after she had passed, and engaging in the allegedly suspicious manoeuvring (said by the defence to be seabed mapping), something like 100m south of his line for the *Oriane* (see Appendix 1, third diagram). The applicants criticise Mr Davidson for not explaining to the jury in terms that his plotted lines were courses made good that could not be said necessarily to match exactly the vessels' actual paths, particularly as regards the *Oriane* line for the 11-minute data gap period. As to that:

    (1) That Mr Davidson's plotted lines are what they are, i.e. a series of individual lines joined together, each of which 'joined the dots' with a straight line between two timed chart positions, is perfectly obvious, and was explained by him in his evidence (based on counsel's note of that evidence, there being no transcript available).

    (2) It seems likely that Mr Davidson did not spell out to the jury, in terms, that that meant he could not say his plotted lines matched precisely the vessels' respective exact paths.

    (3) That is not a material matter, however. If anything, the slight oddity of the prosecution case, so far as Mr Davidson's plots are concerned, was that if the jury treated them (unrealistically) as precisely accurate vessel tracks, then the only manoeuvring by the *Galwad* that might have been a drugs pick-up, if there was one, was slightly away from the *Oriane*'s path, with no specific evidence explaining why that may have been the case. To highlight more explicitly than may have been done before the jury the imprecision or uncertainty around Mr Davidson's line for the *Oriane* would only have highlighted that the allegedly suspicious manoeuvres might in fact have been *even closer* to the *Oriane*'s wake.

    (4) The supposed criticism of Mr Davidson is immaterial, only the more so, when it is remembered that Mr Chinery agreed Mr Davidson's plots as being a fair representation of the vessels' respective paths, and that Green's evidence (to which we return below) was that he *did indeed* cross the *Oriane*'s path and manoeuvre in the vicinity of her wake, as suggested by those plots.

73. Mr Davidson was also criticised before us for not drawing attention in his expert evidence for trial to a log entry in the *Vigilant*'s operational log for 00.30 on 30 May 2010 stating a position for the *Oriane* that, if accurate, put her off Mr Davidson's red

line, to the south of it. Mr Davidson fairly accepted in his evidence before us that he should have made clear in his original expert report that he had considered that noted position but regarded it as irrelevant or unreliable. In one of Mr Davidson's expert reports for this application he set out at some length a range of convincing reasons why, at the time, he did not regard that one logged position as reason to reject the course made good line the jury was given – the red line – as a sufficient and fair indication of the *Oriane*'s path.

74. The defence had the *Vigilant* operational log page in question; they also had a chart prepared contemporaneously by Cdr. Tucker with the logged position marked. For the reason given in paragraph 72(3) above, an adjustment to or uncertainty in relation to the red line indicating that at around 00.30 it might have the *Oriane* slightly north of her actual position would strengthen, not undermine, the prosecution case. In our judgment, fairly though Mr Davidson accepted that he should have explained in his expert report for trial that he had considered but placed no reliance on this 00.30 operational log entry, it is not arguable that his failure to do so had any material impact on the trial or the safety of the applicants' convictions. We note also that it is agreed in the expert evidence before us that Mr Davidson's red course made good line was the best indication of the *Oriane*'s path that could be presented on the material he was given at the time, and that any marine navigation expert would have done what Mr Davidson did with that material.

75. There is now a richer data set available for investigating the respective paths of the *Oriane* and the *Galwad*. It is through no fault at all on the part of the applicants or those who represented them in the Crown Court that that is so, as Ms Heer properly accepted on behalf of the respondent. The data set now available is richer because the *Vigiliant*'s ECDIS stored two sets of positional data for the *Oriane*, and because FleetMon (a shore-based supplier of AIS data, like QPS) has provided its records of the *Oriane*'s AIS messages and they include records for the 11-minute period of the gap in the QPS data.

76. Before turning to consider what the richer data set now available shows, and in particular whether it makes any material difference to the case as tried against the applicants, we should record how it came about that the *Vigilant* ECDIS data was not part of the trial. We do so relatively briefly, in light of the proper concession by the Crown we mentioned in the previous paragraph and the fact that there is no basis for any suggestion of a deliberate attempt to suppress or withhold evidence. It is right to do so nonetheless so that it can be clearly stated by the court, not just by counsel's concession, that what happened should not have happened. In short:

    (1) Mr Davidson was aware of the 11-minute gap in the QPS data from which he was working. He was also aware that Mr Smith, an expert marine electronics engineer instructed by the prosecution, had been tasked to visit the *Oriane* and obtain a copy of her ECDIS data. However, he accepted that he was also aware that Brookes Bell had asked the investigating officer to obtain ECDIS data from the *Vigilant*, if she had an ECDIS system.

    (2) We accept Mr Davidson's evidence that he was not aware until told, years after trial in the context of what became these applications, whether the *Vigilant* was so equipped, let alone that Mr Smith had in fact downloaded and retained a copy of her relevant ECDIS data. He ought to have asked whether ECDIS data had

been obtained from the *Vigilant*. We think that he should have followed up the query about ECDIS data in any event, but particularly so once he appreciated that the data he was using contained a gap of missing data that spanned the most important few minutes.

(3) Mr Smith obviously knew, prior to and at trial, that he had visited the *Vigilant*, learned that she was equipped with ECDIS, and taken a copy of her relevant ECDIS data. In a written explanation, he has said that he understood the relevant part of his brief to be to take and secure a copy of ECDIS data, if available, to ensure that the data would not be lost to the case should anything happen to the system or its data record as it continued to be put to use on board. He is able, this long after the fact, to say only that since that was the limit of his brief and no one asked him to do so, he did not think to pass on to anyone his copy of the data. His firm invoiced for and was paid for that element of his work, so he assumed people in the case knew of it.

(4) No application was made for Mr Smith to give evidence and be cross-examined about this before us, and obviously that was not done at trial either. There can be no question therefore of proceeding other than on the basis that his explanation summarised above has been given honestly. Though it was therefore an honest mistake, we have no doubt it was a serious and surprising mistake for Mr Smith as expert witness to make, in particular not to ensure that Mr Davidson was made aware that ECDIS data had been recovered and not to hand what he had collected over to the investigation team, with an explanation of what it was and who (for example, Mr Davidson) should be made aware of its existence.

(5) Finally, there is written evidence from the investigation team (again, honestly given, we take it, since there was no application to challenge it) that they did not understand what the ECDIS data would contain or what might be any significance to the case and they were relying on Mr Smith, as the independent expert retained to assist, to draw any such significance to their attention. In our judgment, there was fault there too. It should have been enough, for the investigation team to make it something to follow up, that Brookes Bell, through Mr Davidson's then senior partner, had made it clear that such data, if in existence, would be of interest. It was the investigation team's primary responsibility to join up such investigative dots, whether or not they had any substantial understanding of their own as to why the ECDIS data might be valuable.

77. As we have said, the ECDIS data included two sets of timed positional data for the *Oriane*, as recorded by the *Vigilant* on the night. One set of data is taken from the *Oriane*'s AIS messages as broadcast by her and received by the *Vigilant*. That data is stored in the form of offsets calculated by *Vigliant*'s systems from her then position as received by from the GPS array. It was agreed expert evidence before us that that introduces an additional imprecision in the data of ±10m, so that the ECDIS version of the *Oriane* AIS positions is inherently precise for latitude to within ±28.5m rather than to within ±18.5m as would have been the GPS position actually broadcast by the *Oriane*. That position as broadcast and received by the *Vigilant*, her direct equivalent of the data stored by QPS or FleetMon, was not contained in and could not be extracted from the available ECDIS data.

78. Either side of the 11-minute data gap in the QPS data, there is a very close correlation between the AIS positional data for the *Oriane* in the *Vigilant*'s ECDIS data, the QPS data, and the FleetMon data. During the 11-minute gap itself, there is very close correlation between the AIS positional data for the *Oriane* in the *Vigilant*'s ECDIS data and the FleetMon data, providing a more granular course made good indication of the *Oriane*'s path during that period than is available from the QPS data, as shown in the first diagram in Appendix 2 to this judgment. In that diagram, the *Vigilant*'s ECDIS AIS course made good for the *Oriane* is the black line, the FleetMon AIS course made good line for her is the green line, and the QPS course made good line is the red line.

79. We can be (and we are) sure on that basis that the relevant equipment on board the *Vigilant* and ashore at QPS and FleetMon was all functioning correctly and that their respective data sets are uncorrupted; and the expert evidence before us was to that effect. There is thus no credible room for doubting that the green and black lines (and the red line, outside the 11-minute gap period) give a good and accurate picture of the course the *Oriane* was following, according to the AIS messages she was broadcasting to the world at the time.

80. Of course, and this was also apparent from the expert evidence before us, if the GPS positions that the *Oriane* broadcast *were* unreliable for some reason, those three sets of AIS-based data (the *Vigilant*'s ECDIS, FleetMon and QPS) would be affected equally by the problem. They are all taken from those messages as sent by the *Oriane*. Their consistency *inter se* therefore does not itself prove that there was no problem with the reliability of the *Oriane*'s AIS positions.

81. In our judgment, the green and black lines are unarguably more favourable for the prosecution case as an indication of the *Oriane*'s path, in comparison to the red line used at trial. The point is the simple one made in paragraph 72(3) above, but *a fortiori*. If the green and black lines are used in preference to the red line, as they obviously should be now – they show the *same* line except that for the 11-minute QPS data gap period they are derived from the data that was missing for the red line – they (the green and black lines) resolve decisively in favour of the prosecution the one possible oddity that favoured the defence in the picture presented to the jury, an oddity that did not cause the jury to be unsure of guilt. For the ECDIS data to give rise to an arguable issue over the safety of the applicants' convictions, it would have to be because the other set of positional data from the ECDIS casts some credible doubt on the use of the AIS-derived positions to indicate the path of the *Oriane*.

82. For this application, the applicants, in reliance on Mr Myers' expert evidence, sought to revisit the issue of whether a coopering operation such as would have been required to lift the drugs found in Freshwater Bay, could realistically have been undertaken. But there is no force in the points Mr Myers makes if the green and black lines are now taken to be a fair representation of the path of the *Oriane*. To be clear, we are not saying that there might not be points to be explored as to whether, on the basis of the green and black lines and how the *Galwad* steered and manoeuvred relative to them, a jury could be sure that coopering could have been achieved. The point is that that question was fully litigated at trial and unarguably the green and black lines are more favourable for the prosecution as a basis for the question than the red line used at trial, by reference to which the actual jury must have been sure that coopering indeed took place.

83. The other set of positional data for the *Oriane* in the *Vigilant*'s ECDIS data was generated by her ARPA. Without needing to explain all of the detail, since this much was not in issue on the expert evidence before us:

(1) A course made good line plotted from the ECDIS ARPA data for the *Oriane* would be the yellow line on the diagrams in Appendix 2, a line correlating very closely to the green and black AIS-based course made good lines, but displaced c.200m roughly South-South-West.

(2) The ARPA data is substantially less precise than the AIS-based data, factoring in the cumulative instrument precisions involved and the additional processing to generate those data. That is illustrated by the diagrams at Appendix 3 to this judgment. The yellow line is, again, a course made good line plotted from the ARPA-based positions for the *Oriane*. The orange parallel lines above and below it represent the outer bounds of the Gaussian (or Normal) probability distribution of error, treating the recorded point data as the distribution mean, to 3 standard deviations (over 99.5% certainty). The difference between the two diagrams is only that one assumes a slightly smaller range than the other for the inherent imprecision in azimuth bearing measurement by the *Vigilant*'s radar.

(3) So that the 'corridor of uncertainty' presented in the Appendix 3 diagrams is not misunderstood, it does *not* mean, if the ARPA point data are reliable subject only to the cumulative inherent precisions of the instruments and processing involved in generating them, that there is more than a tiny chance that at any given moment, the *Oriane* was in fact on the upper orange line. Moreover, whatever the minute chance that that would be so, there would be an equal and opposite minute chance that she was on the lower orange boundary line. For example, Professor Stupples explained that even in the first diagram, with slightly larger assumed radar azimuth measurement error range, the Gaussian distribution calculation gives 95% certainty of being within ±26m of the yellow centre line, i.e. a 95% chance that at any given time the *Oriane*'s actual, exact position was between 26m 'above' and 26m 'below' the yellow centre line.

(4) At the material time the *Vigilant*, creating this ARPA record and also her AIS-based record of the *Oriane*'s position, was around 7 nautical miles West and a little North of the *Oriane*, so that the *Oriane* was approximately East-South-East of the *Vigilant*. It was agreed expert evidence before us that there is a consistent discrepancy between the ARPA positions and the AIS-based positions for the *Oriane* over the period of interest that equates to the ARPA positions being 'out' relative to the AIS-based positions by 0.9º azimuth, clockwise from the *Vigilant*, or the AIS-based positions being 'out' relative to the ARPA positions by 0.9º azimuth, anti-clockwise from the *Vigilant*.

(5) That is neatly illustrated in Appendix 2 to this judgment by the purple line. The purple line is the ARPA-based course made good line 'corrected' for an assumed static 0.9º azimuth error in the ARPA data, clockwise from the *Vigilant*. That purple line is a very good fit with the green and black lines. (Obviously, therefore, although not shown on the diagrams, if one instead 'corrected' the green and black lines for an assumed static 0.9º azimuth error in the AIS data, anti-clockwise from the *Vigilant*, the 'corrected' green and black lines would be a very good fit to the yellow line.)

84. All that now brings us back to Ground 1. As formulated in the Perfected Skeleton (see paragraph 62 above), the argument is that the data which the defence did not have at trial demonstrate that the *Galwad* never got close enough to the *Oriane*'s path (wake) for the posited drugs lift to be credible.

85. That may have been over-enthusiastic drafting on counsel's part, or it may be that following the oral expert evidence before us it was recognised that we were unlikely to find in the applicants' favour that the ARPA data established any such thing. Either way, Mr Bennathan QC's oral argument in support of Ground 1 was more nuanced. He submitted first, and we agree, that informed by the richer data set now available, no one would use the red line that was presented to the jury to illustrate the *Oriane*'s path. From there, he submitted, in summary, that:

    (1) If the court reached the conclusion on all the evidence now available that the green and black lines, beyond any real room for doubt, fairly represent the *Oriane*'s path, nonetheless the encounter between the *Oriane* and the *Galwad* on the night of 29-30 May 2010 was materially different to that presented to the jury based on the red line. We do not agree, as we explain in paragraph 86 below.

    (2) If the court concluded that the yellow line was, or might credibly be, a fair and realistic representation of the *Oriane*'s path, then it can now be seen that the failure to disclose the ECDIS data deprived the defence of the opportunity to put before the jury a credible case that the *Galwad* never got close enough for coopering. We agree.

    (3) If the court concluded that the matter of the *Oriane*'s path was just left shrouded in uncertainty by the new evidence, then the applicants were deprived by the failure to disclose the ECDIS data of a material prospect of a jury being left unsure whether the *Galwad* ever got close enough for coopering, meaning in turn that they were deprived of a real rather than fanciful prospect that the ECDIS data might have resulted in acquittal. We do not agree with that submission, essentially for the reason given in paragraph 72(3) above.

86. We are against the first of these submissions because, again, in our view, the red line used at trial unarguably provided *more* room for the defence to suggest doubt over whether there had been a sufficient opportunity for coopering than would the green and black lines. We note that trial counsel for Mr Green, having been asked specifically about the black line, realistically accepted that using it rather than the red line would not have materially altered the defence or improved its prospects. Their observation is qualified by a suggestion that adopting the black line would nonetheless have exposed the fact that "*Mr Davidson had made a significant error in relation to the line for the Oriane*"; but that, with respect, is not right. It mischaracterises the impact of the 11-minute data gap in the QPS data to say that there was a significant error by Mr Davidson. If, which is the premise, the data had been available to fill in that gap, then the black (or green) line and not the red line would have been put forward, and, as we have said, the case for the prosecution would only have been all the stronger for that than the case in fact put before the jury.

87. Whether considering this application through the lens of s.23 Criminal Appeal Act 1968, or from the overall perspective of the safety of the applicants' convictions,

Ground 1 thus comes down to whether, on all the evidence now available, the green and black lines fairly represent the *Oriane*'s path, without room for any real doubt.

88. So far as that is concerned, the positional data considered above was not and is not the only type of evidence available on how the paths of the *Oriane* and the *Galwad* interacted with each other on the night of 29-30 May 2010. We now summarise the other evidence on that aspect.

Drift

89. An expert report from Dr Pierre Casenave, Dr Ricardo Torres and Mr Tim Fileman from Plymouth Marine Laboratory ("PML"), commissioned by the applicants some years after the trial, concludes from computer modelling of the Channel and the prevailing conditions that if dropped by the *Oriane* so as to be capable of being collected by a 'daughter vessel', the drugs would have been in a surface current running at $0.09ms^{-1}$ 76.8ºN, i.e. at c.0.2 knots about half way between East and East-North-East. As we have mentioned, the part of the *Galwad*'s movement, accurately recorded by her Olex, that the prosecution said demonstrated the drugs lift, is the 2½ minute period between 00.32.25 and 00.34.57 on 30 May 2010.

90. During that period, the *Galwad* made an average of under 0.6 knots, in the direction of the current described by PML, in what would have been the wake of the *Oriane* if the green and black lines reliably indicate her path, parallel to her wake (but c.100m South of it if the red line reliably indicated her path), before turning nearly full circle to starboard at c.2.4-2.5 knots over the next ½-minute and proceeding North-East out of the area at 6.5-7.0 knots (her full ahead speed being c.8.0 knots). This is shown in the third and fourth diagrams in Appendix 2 (for the pattern of movement – the speeds were in Mr Davidson's original expert evidence for trial and are not in dispute).

Jamie Green

91. The applicants gave no evidence concerning the relative movements of the *Galwad* and the *Oriane*. Beere was not on board; Payne was on board but claimed to have been asleep throughout. Neither Dresic nor Birtwistle gave evidence on the point or claimed any ability to do so.

92. Green accepted that he was at the helm of the *Galwad* at the material time. He gave clear and detailed recollection testimony about her movements under his control and how they interacted with the *Oriane*'s path. Whether it was honest evidence, as regards what he was doing, *viz.* mapping the seabed, as he said, and not collecting drugs out of the water, was for the jury to decide, and evidently the jury was sure he was lying about that. That is not the present point, which is that Green's navigation evidence was by nature first-hand witness testimony of an actual recollection of how he manoeuvred his boat relative to the *Oriane*.

93. His evidence was that he would not have known at the time the names of the large commercial ships he encountered in the main Channel shipping lanes as he "*didn't have AIS*". He told the jury that there was AIS equipment on the *Galwad* but it was not connected up. That was not challenged at trial, but is challenged before us on the basis of expert evidence we now have that the *Galwad*'s equipment was receiving AIS messages. Since this detail was not explored with him at trial, it may not be fair to the

applicants to treat that part of Green's evidence as dishonest for the purpose of the current application. We therefore put that point to one side.

94. Green's description of what the *Galwad* did – how he navigated her and why, relative to the large commercial ship (which undoubtedly was the *Oriane*) – was his (claimed) actual, clear and detailed recollection. It is true, as Mr Bennathan QC emphasised, that some of what Green said was expressed in terms of what he 'would have' known or done, and that by the time he gave evidence he had Mr Davidson's course made good plotting that Mr Chinery agreed. But in our judgment, that does not detract from the plain fact that Green was giving evidence of his *actual* recollection, not merely a reconstruction steered by the agreed expert evidence.

95. We have quoted in paragraph 16 above Green's evidence on the point as summed up by the Trial Judge. We have read the transcript of Green's evidence so far as material to the point, which confirms the accuracy of the summing up and that Green was giving evidence of recollection, as opposed to reconstruction.

96. Mr Bennathan QC also emphasised that Green gave no account on this topic in interview. His Defence Statement was consistent with his trial evidence in relation to how and why he navigated the *Galwad* as he did, relative to the *Oriane*, although there was a partial inconsistency in relation to what fishing activity she was performing because the Defence Statement referred to shooting pots as well as seabed mapping. But the Defence Statement and trial evidence, Mr Bennathan QC noted, came months later, and only after Mr Davidson's main expert report for trial. We give the applicants the benefit of the doubt on that timing point, though the first of Green's two Defence Statements appears to have been provided on 25 February 2011 (the copy we were shown is undated, but that date appears from the transcript of Green's cross-examination), just two days after the date of Mr Davidson's report (23 February 2011).

97. Green's failure to give any account in interview, giving indeed a substantially false account of the trip out into the Channel and back, was more generally a significant point against him at trial. But for the immediate purpose, Mr Bennathan QC's submission was that it rendered it credible, indeed he submitted likely, that Green's seeming actual recollection of the specifics of the two vessels' proximity and relative movements, was or may have been honest but unreliable. He suggested further that it was inherently unlikely that those details would have been memorable. This was one of many fishing trips in Channel waters (voyage 70 recorded by the *Galwad*'s Olex, and she was not Green's first fishing boat).

98. We disagree:

    (1) There is no evidence from Green on this point. An application to call fresh evidence from him in this Court was issued but not pursued. It is thus speculation by the applicants that he does not or might not accept that in 2011 he had the recollection as to the relative movements of his boat and the *Oriane* that he gave to the jury.

    (2) The detail of the *Galwad*'s manoeuvring near the *Oriane* was obviously memorable to Green if she was picking up a massive drugs drop, as alleged by the prosecution; and the simplest explanation for his detailed recollection in all the circumstances of this trial was just that, leading him to accept the pattern of

movements alleged (because it was materially accurate), but advance an innocent explanation for it (seabed mapping) and an emphasis upon the difficulties of the alleged coopering operation, bearing in mind timing, environmental conditions and the capabilities of the *Galwad*'s equipment.

(3) In any event, the voyage in question was Green's last as skipper of the *Galwad*, immediately after which he was arrested and his boat seized. That in itself ought to have made the voyage a memorable one. Furthermore, were Green innocent of involvement in this massive drugs drop, then remembering that last voyage in as much detail as possible, and giving whenever the time came a good account of it, was the most important matter imaginable for Green, from the moment he became aware of the reason for his arrest.

(4) If Green had any reason at all to cast doubt upon the prosecution reconstruction of the relative movements of the two vessels, it is not credible that that might have been driven out of his mind by his being given that reconstruction. Rather, in our judgment his memory would surely have been triggered by that presentation. It was a major plank of the prosecution case that the *Galwad* crossed the wake of the *Oriane*, and conducted the allegedly suspect very slow speed manoeuvres near to that wake in the few minutes after the *Oriane* passed, having first positioned herself ahead of the *Oriane* to allow her to pass (bearing in mind that the *Oriane* was making way at a rate of knots far in excess of the *Galwad*'s capabilities – she would not have been able to get near to the path of the *Oriane* promptly to collect a drop if she had started from astern of the *Oriane*). We do not regard as credible the notion that the *Galwad* did not come close enough to the *Oriane* or her path for coopering ever to have been a possibility, or never crossed the *Oriane*'s wake, and yet Green accepted and testified to the jury that she did both.

(5) Mr Bennathan QC submitted that the *Galwad* may have had materially similar close encounters in the Channel shipping lanes before. There is very little evidence for that. The agreed expert evidence is that the speed and steering pattern of the alleged coopering manoeuvre was similar to past seabed mapping patterns, but that is a different point. Green said in cross-examination that "*You do get times when the vessels get very close*", and that his boat had been hit once. The *Oriane* was a laden deep sea container ship, nearly 300m in length and around 40m broad. The *Galwad* was a tiny dot in comparison, just 12m in length. It is not remotely credible that, on this final voyage immediately after which Green was arrested, the *Galwad* should never have come as close to the leviathan as the prosecution said, and yet Green, if innocent, failed to remember that and therefore failed to challenge the claim.

The Bonfield & *Vigilant* Logs

99. The fact that the *Oriane* was a surveillance subject of interest to the *Vigilant* was known to the defence at trial. Some documentary evidence from the *Vigilant* was served, and one of her officers, Cdr. Tucker, was a witness at trial. The jury was not told, however, that the *Oriane* was under surveillance by the *Vigilant*. That was not necessary for an understanding of the evidence that was led at trial, and a tactical decision was made by the defence not to deploy material revealing that the *Oriane* was a specific surveillance target. The context was that there was no evidence showing the *Oriane* to have carried

and dropped the drugs, other than the same circumstantial evidence relied on to claim that the *Galwad* picked them up. The defence understandably did not want a jury thinking there was or might be independent reason to suppose that the *Oriane* was being used as part of any smuggling.

100. For completeness as to that, we add that there was evidence suggesting that the cocaine had been put on board the *Oriane* in South America, but it was served very close to trial leading the trial judge to exclude it. That will also have been part of the immediate context of the defence decision to keep the trial clear of any notion that the *Oriane* was an object of suspicion independently of the evidence the jury would receive focusing on the *Galwad*.

101. It is material to note the carefully conditional observations of trial counsel for Green in relation to that tactical decision:

> *"Our stance was not to adduce evidence before the jury of the Vigilant's interest in the Oriane, because there was no evidence before them to indicate that the drugs had come from the Oriane, and the Vigilant's interest might have been taken by the jury to suggest that there was intelligence incriminating the Oriane … . If, however, the gold line [i.e. the yellow line on the Appendix 2 diagrams] were taken to represent the actual route of the Oriane then it would not have mattered if the jury made the assumption that the drugs had indeed come from the Oriane – indeed, we may have encouraged such an assumption – because the Galwad would not have been close enough to the Oriane to have been able to collect them."*

> *"It was because Mr Davidson's evidence as to the tracks of the Oriane and the Galwad was taken to be correct that it was desirable to exclude evidence that the Vigilant was observing the Oriane. If instead we had been able to establish that at the relevant time the Galwad had neither crossed the wake of the Oriane nor been sufficiently close to the track of the Oriane for collection of items thrown from it to have been possible, then the fact that the Vigilant had been observing the Oriane would have been of minor significance (because even if the drugs had come from the Oriane, they could not have been collected by the Galwad)."*

102. We regard those observations as candid and realistic. Any suggestion that the material we are about to mention might be of value to the defence depends on there first being an arguable case at all, and then after taking that material into account, that the *Galwad* might not have got close enough to the *Oriane*'s wake to recover packages dropped from her stern.

103. The Bonfield Log was kept in SOCA Cdr. Bonfield's command room, noting field observations called in by *inter alia* those on board the *Vigilant* as part of *Operation Disorient*. The Bonfield Log was disclosed part way through trial. The tactical decision to which we have referred drove in turn a decision not to make use at trial of Bonfield Log entries now relied on by the applicants as significant. We should explain that the

Bonfield Log was kept in BST, so we have corrected the entries to GMT; and that the log entry times are just that, i.e. the times at which the entries were made, not the times at which the logged observations, as called in, were originally made:

> *"22.40 UKBA Cutter [i.e. the Vigilant] has locked onto MSC the Oriane & is monitoring.*
>
> *00.41 UKBA Cutter has visual on MSC the Oriane.*
>
> *00.50 Cutter advises MB [i.e. Cdr. Bonfield] that they have a possible 'daughter vessel' at the stern of MSC the Oriane. Cutter is unsure if this is a sailing vessel or fishing vessel at this time. The Cutter is in communication with aircraft [a reference to a UKBA plane, to which we make further reference below, that was part of Operation Disorient].*
>
> *00.56 Cutter advises that at this time there is no activity on the stern of MSC the Oriane.*
>
> *01.02 ... Cutter advises MB that the possible daughter vessel was a yacht that sailed north to south across the stern of the MSC the Oriane during the time this yacht crossed the path there was no activity on the stern of the MSC the Oriane. The Cutter will keep monitoring the MSC the Oriane & monitor the yacht on radar. The Cutter and Aircraft are maintaining control of the MSC the Oriane."*

104. We think it clear, and it is also the applicants' submission, that the "*yacht*" thus identified by the *Vigilant* on the night as a "*possible 'daughter vessel'*", was the *Galwad*. No other possible daughter vessel, i.e. small craft steering in close proximity to the *Oriane* or her path, was identified during the surveillance operation. For Ground 3, the applicants focus on the references to not sighting activity at the stern of the *Oriane* when the *Galwad* was in the vicinity.

105. The Perfected Skeleton, quoted in paragraph 62 above, articulates Ground 3 in these terms, namely that when monitoring the *Oriane* at the key time, the *Vigilant* "*discounted the Galwad as the drugs-receiving vessel*". But in fact, far from discounting her, it is plain that the *Vigilant*, and *Operation Disorient* as a whole, treated her as a suspect following, and in part because of, those logged observations, and did so notwithstanding that they did not extend to seeing the *Oriane* drop anything or the *Galwad* pick anything up. As the operation continued into 30 May 2010, the *Galwad* was referred to in the Bonfield Log as "*suspect vessel SU116*" (SU116 being her call sign).

106. The applicants developed their submission, with which we have said we agree, that the possible daughter vessel identified by the *Vigilant* was the *Galwad*, in a slightly complex fashion, using *inter alia* the *Vigilant* ECDIS records that were not available at trial. In our view, it was plain enough on the evidence available at trial that the *Galwad* was the possible daughter vessel identified by the *Vigilant*, although from their *McCook* responses it seems that at all events Green's trial counsel did not appreciate that at the time. Trial counsel go on to suggest that they might have used the fact that the *Vigilant*

did not report seeing activity at the stern of the *Oriane*, if they had appreciated that the possible daughter vessel was the *Galwad*. However:

(1) As we have noted, trial counsel realistically accept that they would not have made a different tactical decision about introducing the *Vigilant* surveillance operation to the jury at all unless, by reference to what is now Ground 1, they would have been able to cast genuine doubt, in a way that favoured the defence, over what the jury was told about the *Oriane*'s path.

(2) In giving the response they did about possibly using the 'no activity at the stern' evidence, trial counsel did not consider the impact of the *Galwad* being the possible daughter vessel on the idea that there might be helpful doubt about the *Oriane*'s path, which in the questions put to them they were asked to assume.

107. The defence made a tactical decision that the jury should not know that the *Oriane* was under surveillance by the *Vigilant*, though well aware that there would be no evidence at trial directly implicating the *Oriane* in carrying drugs and no eye-witness evidence of coopering, but thinking that the possible daughter vessel identified by the *Vigilant* was not the *Galwad*. We regard as fanciful the notion that the defence might have considered even for a moment allowing the jury to know not only that the *Oriane* was under surveillance as she was, but also that, as part of that surveillance operation, the *Galwad* was identified as a possible daughter vessel (albeit with no eye-witness observation of any drugs drop or pick-up), unless there were some real room for doubt whether the *Galwad* got close enough for coopering to be a possibility.

108. In short, there is nothing for the applicants in Ground 3 unless, first, Ground 1 is viable; and when considering whether Ground 1 is viable (and then, if it is, whether there might be leave to appeal on Ground 3 also), all the evidence now available must be considered. Ground 1 cannot be evaluated without reference to the material which the applicants focus upon for Ground 3. Were there an issue at a trial, as there was not in 2011, on whether the *Oriane*'s path meant coopering by the *Galwad* was a possibility, the prosecution would be entitled to adduce the evidence now relied on in the context of Ground 3 as part of dealing with that issue. It was only because the defence did not take issue with the *Oriane*'s path that the tactic of not mentioning the surveillance operation to the jury was even an option.

109. Returning to the Bonfield Log, a log entry entered slightly out of sequence as a "*Late entry*" for 02.32 states: "*Aircraft identified sailing vessel believed to have come from France due to direction of travel*". In entries for 02.42, 02.55 and 02.57, the Bonfield Log notes reports received from the UKBA plane indicating that, prior to going off task to refuel at 02.57, it had spotted a "*possible suspect vessel*" that was a "*small fishing vessel*" fitting the description of the *Galwad* that we think it clear was not the sailing ship thought to have come from France also spotted by the plane.

110. Before turning to the next source of evidence, that of Mr Whittall from the UKBA plane, we should mention for completeness that we have seen copies of the *Vigilant*'s Deck Log and Work Record for 29-30 May 2010 that were not available at trial. In the context of Grounds 1 and 3, one entry is of possible relevance, namely the results of the *Vigilant*'s navigational equipment checks "*carried out as per Standing Orders Departure Checks*" prior to departure from Gosport on 29 May 2010, which are recorded in these terms:

*"GPS 50º 47 48N 001º 06 93W*
*checked to chart 2624, Course/Head*
*208ºM & 196º G 12º Error satis –*
*Course from chart 195º T"*

111. We shall come back to that entry when considering the discrepancy in the ECDIS data between the ARPA and AIS positions for target vessels.

UKBA Plane

112. A UKBA Britten Islander plane, with three Border Agency officers on board, was used as part of the Operation Disorient surveillance exercise. The camera operator, Mr Whittall, was a witness at trial. A Disclosure Note dated 27 April 2011 (the first day of the trial) referred to aspects of the surveillance operation, including the observations referred to in paragraph 109 above. Derived, we take it, from the Bonfield Log, the Disclosure Note gave times in BST.

113. The Disclosure Note drew the distinction we drew above between the sailing vessel thought to have come from France (Bonfield Log entry 02.32; Disclosure Note, paragraph 3), and the fishing vessel later confirmed during the course of the surveillance to be 'SU116', i.e. the *Galwad* (Bonfield Log entries from 02.42 onwards).

114. The following evidence from Mr Whittall was served by the prosecution:

(1) A statement dated 15 June 2010, which will also be relevant when we come to Ground 4. So far as Grounds 1 and 3 are concerned, this first statement related Mr Whittall's sighting from the plane at 02.42 on 30 May 2010 of the small fishing vessel, his initial observation of it then, and his reacquiring sight of it from 04.20, when there was daylight, so that he was able to and did identify it as 'SU116'.

(2) A second statement dated 21 April 2011, just under a week before trial. This second statement, to answer two supplementary questions he had been asked, said this:

a. "*Further to my statement of 15 June 2010 I have been asked to clarify what occurred when a small vessel started to approach the MSC Oriana [sic] container vessel which was being monitored. I monitored this small vessels course and found it not [to] be of interest due to it not approaching the container vessel on the course the MSC had taken.*"

b. "*Further to my statement of 15 June 2010 I have been asked if there were any vessels within the area of my surveillance patrol capable of collecting parcels from the sea – in answer to this question throughout the times I was on patrol I saw no other small vessels that approached the track of the MSC Oriana [sic]. I saw numerous large merchant vessels all in the shipping lanes none of which slowed down or approached the MSC Oriana.*"

115. Against the first of those supplemental answers, Green's leading counsel at trial added on his copy of the second statement, in manuscript in the margin, "*3:32 BST*". That is

to say, we think it plain, the defence were given at the time the explanation that this second statement concerned the Bonfield Log entry about the sailing vessel that became paragraph 3 of the Disclosure Note.

116. Mr Bennathan QC submitted that putting Mr Whittall's statements together now, but as may not have been appreciated by trial counsel, they supported the proposition that the *Galwad* did not get close enough to the track of the *Oriane* to have been of interest as a possible coopering vessel. This requires reading "*I saw no other small vessels that approached the track of [the Oriane]*" as meaning 'other than the sailing vessel'. We do not think it can bear that interpretation. Mr Whittall's statement was that the sailing vessel was discounted as being of any interest because it did not approach the *Oriane*'s track. Taking his statements together, in the context of the Bonfield Log evidence of the *Operation Disorient* observations that night, Mr Whittall appears to us to have been confirming that he saw no small vessel other than the *Galwad* (the subject matter of the case) approaching the track of the *Oriane*, but equally was not saying that he had himself seen the *Galwad* prior to 02.42 (and therefore was not saying he had seen her near to the *Oriane* or the *Oriane*'s path at the key time just after 00.30).

117. In that regard, we note that the UKBA plane only took off at 00.14 and the plane is noted in the Bonfield Log as not being in radio contact with the *Vigilant* or Silver Command at the time of the *Vigilant*'s observation of the *Galwad* near to the *Oriane*, and is first noted as being part of the surveillance 'control' of the *Oriane* only after 01.00. After that (in a Bonfield Log entry for 01.20), the Bonfield Log records the plane as calling in that there was then no daughter vessel in her vicinity. The *Oriane* was proceeding at c.17 knots, so that by 01.00 and later, she would have been miles away from where the *Galwad* had manoeuvred near to her path.

118. This material was all available to the defence – late served though the second statement, the Disclosure Note and the Bonfield Log were – and it is no surprise that they did not seek to cross-examine Mr Whittall to confirm that he had not seen the encounter between the *Galwad* and the *Oriane*, given the tactical decision about not mentioning the surveillance operation and the fact that there was no dispute about that encounter, the issue being only what the *Galwad* was doing there. Indeed, it became common ground at trial, and on that basis was at one point clarified to the jury by the judge in response to a question, that the first aerial sighting of the *Galwad* was at 02.42. As we have sought to explain, that seems to us still to have been the correct reading of Mr Whittall's evidence and the Bonfield Log.

119. Taken as a whole, Mr Whittall's statements and the Bonfield Log do not, without something more, provide any arguable support for the submission that the *Galwad* was ruled out as being of interest because she was seen from the air not to have got close enough to the *Oriane* for coopering to have been possible. Thus again, both in order for it to be said to arise out of the new evidence, and on its substance, the argument raised by reference to Mr Whittall's evidence depends first on other evidence raising some real doubt about the *Oriane*'s AIS-based path. Indeed, this is how the point is put in the Perfected Skeleton:

> "*The ECDIS data showing [so it is argued] that the Galwad did not get close enough or follow the Oriane's course raises the possibility that this reported sighting by Mr Whittall [viz. of a sailing vessel that he ruled out as of interest] is in fact a sighting of the Galwad.*"

*The Yellow Line*

120. This therefore being the Rome to which all roads lead, as regards Grounds 1 and 3, we now consider whether, on all the evidence now available, there is a credible case to put to a jury in favour of the yellow line for the *Oriane* on the diagrams in Appendix 2, that is to say the course made good line for the *Oriane* drawn using the ARPA positional data and making no correction to that data.

Data Analysis

121. Mr Franks conducted an impressive and comprehensive analysis of the data available. He explained, and we accept for the reasons he gave, that if all relevant equipment is operating and set correctly, vessel positions stated in their AIS messages are inherently reliable and accurate to within a very tight margin of precision (relative to the size of the *Oriane* or even the *Galwad*), and more reliable and accurate than radar-based positions.

122. The applicants relied on guidance to mariners from authoritative sources, for example the IMO, emphasising that reliance exclusively on AIS-based positional data is inappropriate for navigation and collision avoidance, for which purpose of course a vessel's own 'eyes and ears' (including radar) must be paramount. But that is because AIS positions received may not give a complete picture even of other vessels in the vicinity (because not all will be broadcasting or doing so reliably) let alone of all relevant obstacles or dangers. It is also because, in particular, those on board any given vessel should know whether their own equipment is in good working order, properly maintained, and cannot know that of all vessels around them.

123. None of that detracts from Mr Franks' starting position, which was agreed by Mr Phillips in his written reports, that AIS positional data, if generated from properly received and processed GPS signals, is the most reliable and accurate way of pinpointing the position of a vessel at sea from time to time.

124. The materially exact correlation between the AIS data for the *Oriane* now retrieved from QPS, FleetMon and the *Vigilant* demonstrates beyond doubt that they are (individually and collectively) accurate records of the AIS positions the *Oriane* was broadcasting to the world as she navigated the main southern (West to East) shipping lane in the English Channel on the night of 29-30 May 2010. The expert evidence has identified that the *Oriane*'s internal GPS locator was not functioning; but it is only a backup source for the underlying GPS position of the vessel to be used in her AIS messages if for some reason her external GPS receiver failed to receive data from the GPS array. Since there is a full record of AIS messages in fact broadcast with meaningful positional data, it is plain that there was no such issue, i.e. the AIS messages from the *Oriane* were necessarily generated by her receipt of her position from the GPS array in real time.

125. The only suggested source of possible error or unreliability of the *Oriane*'s AIS-based positions, therefore, is if she was sailing with an incorrect chart datum selected for her AIS messages. This spawned a somewhat speculative issue in the expert evidence before us as to whether, if the *Oriane* was using the incorrect chart datum, no meaningful position would have been broadcast by her AIS and/or the use of the wrong chart datum would have been apparent to recipients of her AIS messages. We do not

think we could rule out the possibility that apparently meaningful positional data might be broadcast, though the incorrect chart datum was in use, without revealing that fact.

126. Mr Myers accepted, and we agree, that unless that were the position, in other words, as long as the *Oriane* was not using the wrong chart datum for the purpose of her AIS messages, then there could be no reason to doubt their material accuracy for the purpose of identifying the *Oriane*'s actual position at the time of each message and, therefore, there could be no reason to doubt the material accuracy of the green and black lines. He also agreed, as do we, that it would have been irresponsible and dangerous for the *Oriane* to be transiting one of the world's busiest commercial shipping lanes using the wrong chart datum for her navigation and AIS messaging. In the abstract it can be said that mistakes can be made, and from his career at sea Mr Myers remembered one occasion when, briefly, the wrong chart datum had been selected, in that his vessel failed to switch from a local South American chart datum as she commenced her open ocean passage after a call at a South American port. Though theoretically possible, in our judgment it is extremely unlikely indeed that the *Oriane*, after a trans-Atlantic crossing, was passing through the Channel on the wrong chart datum.

127. Furthermore, if the *Oriane*'s AIS positions, as broadcast, were unreliable because the wrong chart datum was in use, the behaviour of her ARPA-based positions stored in the *Vigilant*'s ECDIS, relative to her AIS-based positions, should differ from that of other vessels. By definition, her AIS-based positions would then possess a discrepancy unique to her unless, which is utterly preposterous, every other vessel tracked by the *Vigilant*'s systems that night was sailing in the Channel with the same dangerous and unexpected chart datum error on board. But there is no such unique discrepancy.

128. Rather, Mr Franks' investigation, using all the data available, that is to say using 2,088 data pairs (AIS-based and ARPA-based positions) for 32 vessels over a period of c.20 hours from the late afternoon of 29 May to the early afternoon of 30 May, demonstrated that:

    (1) Allowing for the inherent precision levels in the data, there was a close correlation between AIS and ARPA positions for range (the distance between the *Vigilant* and target).

    (2) There was however a distinct discrepancy phenomenon for azimuth (angular bearing from North of a line drawn from the *Vigilant* to a target). Mr Franks found that "*the azimuth determinations showed a clear trend across all 2088 pairs, with the ARPA record having a mean offset 0.9 degrees clockwise from the corresponding AIS record. This was superimposed with a cyclic variation approximately +/- 2 degrees varying slowly over time.*" This bearing variation "*for all ships tends to be synchronised. In simple terms, all tracked targets generally follow the same pattern and move together toward a maximum or minimum difference at the same time*", and was "*evenly distributed regardless of azimuth*" (i.e. it was not a phenomenon somehow caused only for, or disproportionately for, vessels at certain bearings from the *Vigilant*, but was consistent across targets wherever they were relative to her).

129. The azimuth discrepancy pattern was illustrated by Mr Franks by a scatter diagram, his Figure 2, which is reproduced in Appendix 4 to this judgment. To be clear, as Mr Franks explained, he did not show in Figure 2 every one of his 2,088 point results, because

there were a few of significantly greater magnitude than the bulk of results shown as spots on the scatter diagram that rendered meaningful presentation of all the results in one diagram on the page problematic. Those 'outliers' (for magnitude) were still synchronous with the discrepancy pattern shown, however, Mr Franks explained, and did not change the consistent mean error that suggested a static input error in the gyrocompass.

130. Mr Franks acknowledged that there was no primary science or published research by reference to which he could match the particular pattern of that bearing discrepancy phenomenon against the variables in play for the *Vigilant* and her targets. We do not think that matters. What matters is that the phenomenon Mr Franks found and described:

(1) *must* originate with the *Vigilant*, to be in that way a synchronised pattern of error over time across all targets;

(2) can be explained, as Mr Franks explained it, by "*a static heading input error of +0.9 degrees*" (to produce the consistent mean error of 0.9º clockwise) and "*a variable component [that] is likely to be a combination of heading input error possibly caused by poor gyrocompass stability, combined with ARPA plot results distorted by vessel manoeuvres*";

(3) can only sensibly come from the ARPA data, because there is no mechanism by which the AIS-based positional data sent to the *Vigilant* by those 32 different vessels could generate that pattern of error;

(4) can indeed, and would, come from the ARPA data, if it were affected by a standing +0.9º azimuth error in the *Vigilant*'s gyrocompass, the key item of equipment involved in generating the ARPA data but not the AIS data.

131. We note, though it would not necessarily detract from Mr Franks' analysis were it otherwise, that Mr Franks completed his data review and reached his conclusions, and specifically concluded that the data discrepancy indicated a static +0.9º azimuth error in the gyrocompass, without any reference to plotted positions or any attempt to see for himself what they would be, an exercise to which he properly said he would defer to qualified navigators. As it is, corrected for that static error, the *Oriane*'s ARPA-based course made good line becomes a materially perfect match with her AIS-based course made good line (the yellow line becomes the purple line, which materially exactly matches the green and black lines).

132. We did not regard Mr Phillips as properly qualified to deal with this aspect of the case, and to be fair to him he deferred to Professor Stupples on it. Regrettably, we did not regard Professor Stupples' evidence on it as credible. He said he was unable to provide any explanation at all for what might generate the azimuth discrepancy pattern identified by Mr Franks. However, we did not understand him to be suggesting that Mr Franks' explanation for it could not be correct or to be proposing any reason within his expertise why Mr Franks' explanation might be incorrect.

133. Professor Stupples proposed, in our judgment unscientifically, that the mean azimuth error of +0.9º, if it represented a static component of error in the *Vigilant*'s ARPA calculations, did not require the ARPA yellow line to be corrected, because the

magnitude of that error was within the bounds of the Gaussian probability distribution for the precision of the ARPA positions. That evidence must be discounted entirely in considering what conclusions to draw from the data analysis. The Gaussian probability distribution, and a posited static input error from the gyrocompass, are wholly distinct. The former, as is clear from Professor Stupples' own explanation of it in his expert report, does not in any way seek to model or encompass the latter. In our judgment, Professor Stupples should have accepted as much, and we conclude that his failure to do so is attributable to a realisation, but unwillingness to admit, that Mr Franks was correct.

134. For his own part, Professor Stupples carried out a different data comparison, comparing the bearing of the *Galwad* from the *Vigilant* as calculated from the *Galwad*'s Olex records of her position and *Vigilant*'s own position as recorded in her ECDIS, and the bearing for the *Galwad* given by the ARPA-based positional data for her in the ECDIS data. The *Galwad* was not required to, and did not, broadcast AIS messages, given her size, so she is not one of the 32 vessels in Mr Franks' study. Professor Stupples found a variable azimuth error, as had Mr Franks, with a similar mean, 0.7º clockwise compared to Mr Franks' 0.9º clockwise from a much larger data set. The variable element fits the pattern observed by Mr Franks' study.

135. Professor Stupples said that he limited his comparison to 11 data pairs (from an available 45 pairs) because (a) it was necessary to limit the comparison to times when the *Galwad* and the *Oriane* were both visible to the *Vigilant*'s radar and (b) he cut the sample off at 01.00 because after that the *Galwad* was too far from the *Vigilant* for reliable radar bearings. However, as to (a) Professor Stupples did not in fact use all available data for when both targets were visible (and we prefer and accept in any event Mr Franks' opinion that that was no valid basis for limiting the data comparison exercise), and as to (b) the *Galwad* did not get further from the *Vigilant* than at the start of Professor Stupples' review period until considerably later than 01.00. Because of that, we regard Professor Stupples' *Galwad* data comparison as less valuable than Mr Franks' comprehensive study, although the basic result – a variable azimuth error, on average 0.7º clockwise – is consistent with it. We add that since Professor Stupples was comparing ARPA-based ECDIS records with the *Galwad* Olex data, and it remains common ground that the latter are accurate and reliable, the azimuth error he found must come from the *Vigilant*'s ARPA system or the inputs it was using.

136. Professor Stupples also carried out a spot check using just 2 (of 75) data pairs for a target vessel called the *Kornati*. It so happens that at those two points in time, there was a close bearing match between the *Vigilant*'s ECDIS data for the *Kornati* as between AIS-based and ARPA-based positions. It was not clear to us that the two data pairs had been chosen for any reason other than that they had that characteristic. We consider that the presentation by Professor Stupples of that spot check as if it evidenced or corroborated the accuracy of the ARPA record seriously undermined the credibility of his evidence. Appendix 4 includes Mr Franks' Figure 6, a scatter diagram like his Figure 2 but for the *Kornati* only as target vessel. It is immediately apparent that a proper use of the available data should have led Prof Stupples to conclude that it could not be said that the *Kornati* ARPA record provided a good match with the AIS record, such that the former did not require correction, and indeed should have led him to realise the azimuth discrepancy pattern described and explained by Mr Franks.

137. Considering the data analysis evidence on its own, accepting Mr Franks' views as impressive, balanced and properly considered, and rejecting Professor Stupples' evidence as not credible to the extent it was not consistent with Mr Franks', in our judgment there is a powerful case for the proposition that the yellow line, plotted from the ARPA record in the *Vigilant*'s ECDIS, is 'displaced' in comparison to the black line, plotted from the ECDIS AIS record, by c.0.9º azimuth, clockwise, because there was a static input error of that nature and magnitude coming from the *Vigilant*'s gyrocompass that would affect the ARPA-based positions but not those calculated from the *Oriane*'s AIS messages.

Other Evidence

138. As for other evidence, first and foremost, there is the evidence of Green, reviewed above. The choice now being between the black, green and purple lines and the yellow line, his evidence strongly supports the material accuracy of the former and the material inaccuracy of the latter. We have rejected the argument that Green's evidence can sensibly be explained away as having been generated by Mr Davidson's red line and Mr Chinery's agreement to it or as no more than reconstruction on Green's part.

139. Second, Green told significant lies in interview. He was not interviewed by reference to Mr Davidson's evidence, or his red line for the *Oriane* in particular, as that evidence was not available when he was interviewed by the police but came later. However, as one would expect, both from the nature of the occasion and from the questions he was asked, it was plainly his opportunity to describe that final overnight voyage of the *Galwad* before she was boarded and searched and he was arrested. He falsely claimed to have headed directly to one of his established fishing grounds, well away from where he actually took the *Galwad*, arriving early in the morning on 30 May 2010, and said nothing of the visit to the southern shipping lanes, or of seabed mapping, or of the encounter with the *Oriane*.

140. Third, there is the *Operation Disorient* evidence that the *Galwad* (being, as the applicants themselves submit, the relevant daughter vessel) was sighted near to, and was seen to cross from North to South of, the stern of the *Oriane*.

141. Fourth, there is the supporting telephone evidence which we have described in paragraphs 13 to 15 above, with the striking correlation between the timing of those telephone calls and the suspicious movements of the Galwad.

142. Fifth, as we noted in our review of the evidence, there is now an expert report on the likely drift effect experienced by packages, were they dropped by the *Oriane* as the prosecution posited. It suggests that during the *Galwad*'s very slow speed 2½ minutes a little after 00.30 on 30 May 2010, she was following exactly such a drift path.

143. Sixth, we agree with the respondent that the *Vigilant* deck log entry which we have quoted in paragraph 110 above is more consistent than not with the proposition that the *Vigilant* had a known 1º gyrocompass error. Despite the use of the word 'Course', the relevant record appears to us to be of pre-departure checks with the vessel alongside in Gosport. On that reading, she was identified to be aligned 195º true but with gyrocompass showing 196º.

Conclusion

144. Principally because of the strength of the respondent's technical case through Mr Franks' evidence, as strongly corroborated by Green's evidence, and the lack of credibility of the appellants' technical case through Professor Stupples, but further reinforced by the other aspects of the evidence to which we have just referred, our conclusion is that there is no credible case that the yellow line for the *Oriane,* plotting a course made good from the ARPA data without applying any correction, might be preferred to the congruent course made good lines plotted from the AIS data for the *Oriane* (the green and black lines, and the red line either side of the 11-minute QPS data gap) and from the ARPA data, corrected for the error that on analysis was we think plainly present (the purple line).

145. On that basis, we agree with the simple, primary submission of Ms Heer for the respondent, namely that nothing has been put before this court, whether by way of new evidence, reconsideration of old evidence, or argument, that makes any material change favourable to the applicants compared to the case against them as presented to the jury. In fact, as we have noted, the ECDIS data, FleetMon data and drift analysis, being the material not available in the court below, both support and substantially improve the prosecution case for the propositions that (a) AIS-based positional data for the *Oriane* was and is accurate and reliable, and (b) the *Galwad* therefore can be seen to have put herself in just the right place at just the right time, and to have manoeuvred in just the right way, for coopering items dropped from the stern of the *Oriane* as she passed. Those propositions are only further supported, on a fair reading of it, by the *Operation Disorient* material that was not used by the defence at trial for understandable tactical reasons.

*Disposal*

146. Under s.23(1)(c) of the Criminal Appeal Act 1968, we have power to receive any evidence not adduced in the Crown Court if we think it "*necessary or expedient in the interests of justice*". The jurisdiction is not confined to evidence the defence reasonably could not have adduced at trial, but extends in principle to evidence available to the defence but which they chose not to use. Whether the interests of justice demand or render it expedient to receive such evidence, i.e. to allow such a choice to be revisited, will require very careful scrutiny, but it does not go to the existence of the power.

147. The principle was stated in these terms by Lord Judge CJ in *R v Erskine; Williams* [2009] 2 Cr App R 29 at [39]:

> "*Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focusing on the interests of justice. The considerations listed in (2)(a)-(d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been put but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied.*"

148. The reference to the considerations listed in (2)(a)-(d) is to s.23(2) of the 1968 Act, requiring the court, in considering whether to receive evidence pursuant to s.23(1), to "*have regard in particular to –*

> *(a) whether the evidence appears to the Court to be capable of belief;*
>
> *(b) whether it appears to the Court that the evidence may afford any ground for allowing an appeal;*
>
> *(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and*
>
> *(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.*"

149. As regards the ECDIS data, FleetMon data and drift analysis, there is the reasonable explanation for its not being adduced in evidence in the Crown Court that it was not available to the defence (s.23(2)(d)); and there is no difficulty over its putative admissibility (s.23(2)(c)) on the issue that, were leave to appeal granted, would be an issue on appeal, namely the track of the *Oriane* and whether the *Galwad* was close enough for coopering to be possible. Nor is there any difficulty over whether that evidence, *so far as it goes*, appears to be capable of belief (s.23(2)(a)). In that regard, we emphasise for the ECDIS ARPA data that it only purports to be a record of what the *Vigilant*'s ARPA system recorded at the time for the position of targets, and there is no reason whatever to doubt its reliability as such. The contentious question has been what the reliable record of what the *Vigilant*'s ARPA system recorded tells one as to the actual position of the *Oriane* from time to time whilst under surveillance by the *Vigilant*.

150. On that contentious question, we do not regard the evidence of Mr Phillips as properly qualified to be admissible, and we do not regard the evidence of Professor Stupples as credible. We find the evidence of Mr Franks to be properly qualified, credible and persuasive.

151. In the light of our conclusion on the question of the yellow line (paragraph 144-145 above), it does not appear to us that any of the evidence now relied on that was not adduced in the Crown Court affords the applicants any arguable ground of appeal.

152. As regards the material that was available at trial but not used, there is the reasonable explanation for its non-use at trial (s.23(2)(d)) that it only served to assist the prosecution on a point that was not in issue, and was for other reasons dangerous for the defence to deploy. It is credible evidence that would be admissible on the issue of the *Oriane*'s path, were that raised as an issue on appeal. However, it does not appear to us that it affords the applicants any arguable ground of appeal. On the contrary, it would only improve the case against the *Galwad*, and therefore against the applicants, as compared to the case that was put to the jury, and there is no basis for proposing that justice demands the tactical decision not to deploy the material at trial to be reconsidered.

153. Stepping back, whether by reference to the material that the defence did not have at trial, or by reference to the revisiting of material that was available to the extent that

has been proposed, or a combination of the two, there is no arguable basis for the proposition that a better case might be put to a jury now, that the *Galwad* did not or might not have come close enough to the *Oriane* at the material time for coopering to be a possibility, than could have been put at trial. No such case was put at trial because the point was not in issue. When subject to critical scrutiny, there is nothing in the submissions advanced on behalf of the applicants amounting to a reason why a credible challenge on that point could now be advanced that was not advanced below. There is no reason in this case why exceptionally it might then be in the interests of justice to receive the new evidence.

154. The applications under s.23 of the 1968 Act, so far as they concern Grounds 1 and 3, are refused; and leave to appeal out of time on Grounds 1 and 3 is also refused.

**Ground 2**

155. Grounds 2 and 4 both concern the issue whether those on board the *Galwad* were responsible for jettisoning the drugs in Freshwater Bay. Indeed in his reply submissions, Mr Bennathan QC said that Ground 2 was better seen as an aspect of Ground 4. As we have already noted, Ground 2 concerns another vessel disclosed by the *Vigilant's* ECDIS data, designated as radar target A50 on the data. The experts agreed that this could be a high speed small craft such as a RHIB. The applicants' case was that this was either another suspect vessel or a law enforcement RHIB which then went on to check Freshwater Bay after the *Galwad* had passed through. A50 last appears on the ECDIS data at about 18.59 on 30 May 2010, travelling at about 46.5 knots in the general direction of Freshwater Bay, although it was lost on the radar before it reached the Bay. It is to be noted, therefore, that there is no evidence that A50 went into Freshwater Bay as opposed to moving in that general direction. The *Galwad* had left the Bay area at about 18.00.

156. The applicants' argument was that, if this RHIB was a law enforcement vessel checking the Bay after the *Galwad* had passed through, this would profoundly undermine the suggestion that the *Galwad* had deposited the drugs. It is submitted that, if a law enforcement vessel was on surveillance in the Bay so soon after the *Galwad* had allegedly deposited the drugs, those on board would inevitably have seen any drugs which had been deposited.

157. The difficulty with this argument is that, as Ms Heer pointed out, there is absolutely no evidence whatsoever of any law enforcement vessel other than *Vigilant* being in the vicinity at the relevant time. The *Vigilant's* own RHIB was not deployed until much later, at about 21.00 as shown in her deck log entry for that time: *"Launch RHIB"*. This was borne out by the Bonfield Log where an entry at 20.35 reads: *"DR arranges for the RIB [sic] from the cutter to be despatched to Yarmouth harbour"*. Mr Bennathan QC suggested that the Court should consider the evidence that there was no other law enforcement vessel in the vicinity with caution because there was some confusion about the presence of law enforcement planes, evidently a reference to the applicants' case on Ground 4. However, there is nothing in the material before the Court that even begins to suggest that A50 was a law enforcement vessel.

158. The applicants' alternative case is that this was another suspect vessel. However, that is pure speculation. It does not seem to have been of interest to those on board the *Vigilant*, despite A50 having passed close to the *Vigilant,* since the *Vigilant* did not

continue to observe the RHIB, if that is what it was, instead proceeding to Yarmouth. Furthermore, in any event, as Ms Heer submitted, the evidence at trial was that, after the *Galwad* left Freshwater Bay, the Bay was not kept under surveillance until the drugs were found by Mr Hutchinson the following morning. There was evidence of other vessels being in the vicinity, so that the jury was made aware that during that period when the Bay was not under surveillance, another vessel could have deposited the drugs. This was an argument which was deployed by the defence at trial, so that the issue was fully litigated. The jury must have rejected the suggestion.

159. We consider that, even if the evidence of the high speed small boat shown on the ECDIS data had been available to the jury, it would not have had any material impact on their deliberations. As Ms Heer pointed out, they would have been considering this additional piece of evidence in the context of the other evidence, which although circumstantial, strongly supported the prosecution case that it was the *Galwad* which deposited the drugs in Freshwater Bay.

160. In particular, as set out at paragraph 21 above the Olex data of the *Galwad's* movements in the Bay was consistent with the observation evidence of items being jettisoned from the vessel into the sea and with the *Galwad* having jettisoned the rucksacks or holdalls close to where they were found the following morning. Furthermore, Green lied about this in interview, denying that anything had been thrown overboard, although he later accepted at trial that items had been thrown overboard as observed by DC Jeans and DC Dunne, whilst contending that these were rubbish and latrine bags, an explanation the jury rejected. There is also the evidence that the rucksacks or holdalls of drugs were tied together in the same manner as lobster pots, supporting the prosecution case that whoever tied them together had some experience of lobster fishing.

161. Overall, we do not consider that the evidence about A50, although not available at trial through no fault of the applicants, affords the applicants with any arguable ground of appeal.

**Ground 4**

162. As we set out in summarising this Ground at paragraph 40(4) above, the applicants rely upon a first draft statement of Mr Whittall in 2013 as suggesting the possibility that the UKBA surveillance aircraft left Bournemouth Airport up to twenty minutes earlier than recorded in the aerial surveillance log, so that this may have been the aircraft seen on the *Vigilant* radar flying over Freshwater Bay at 18.02, minutes after the *Galwad* had allegedly deposited the drugs in the Bay. It is submitted that its failure to notice the drugs in the sea casts serious doubt on the prosecution case that the *Galwad* deposited them. The applicants rely upon the evidence of Professor Stupples that if the aircraft took off at about 17.40 that would allow time for it to be in the location over Freshwater Bay where the radar track starts at 18.02. Professor Stupples also expressed the opinion that those on board the aircraft would have been likely to see the drugs deposited in the sea if they had been by that stage.

163. In our judgment, the starting point in any consideration of the evidence is the aerial surveillance report or log completed by those on board the aircraft, which is contemporaneous evidence. That shows the take-off time from Bournemouth Airport as 18.00. It also contains a record of the weather recorded at 17.45 which it seems to us

is likely to have been filled in whilst the aircraft was on the ground before take-off. The other relevant entries are as follows:

> *"17.55 New Flash Card removed from packaging and placed in reorder (No number on card)*
>
> *18.08 [Position] The Needles Potter SU116"*

164. As we have noted at paragraph 105 above, SU 116 is the call-sign of the *Galwad* and "Potter" seems to be a reference to the vessel being a lobster-fishing boat, but at all events, those entries are consistent with the aircraft crew having been tasked with finding the *Galwad* which Mr Whittall confirmed in his evidence. There are then entries in the log showing that there were problems with camera recording, but recording seems to have started at about 18.43. There is nothing in the log to suggest that the aircraft flew over Freshwater Bay and Mr Whittall's original statement of 15 June 2010, some two weeks later, does not mention having done so.

165. What Mr Bennathan QC relies upon is the draft statement of Mr Whittall prepared by the IPCC in 2013. The relevant section reads:

> *"Later that same day we were tasked by UKBA to go to a specific location and identify the same fishing vessel. In my previous statement I stated I unwrapped a new compact card and placed it in the recorder at 17.55. I can say that we took off no more than fifteen minutes prior to this. We could not fly before this due to flying time restrictions. [Andy could you briefly explain the flying time restrictions here] It took us a couple of minutes to find the boat and we flew straight from our base to the location. The boat was not right at the Needles. It was a little further to the East when in spotted it at 18.08.*

166. The words in square brackets, evidently a query raised by the drafter of the statement, demonstrate that this was a draft statement and, in any event, it is not signed. There is then a further statement, which, although also unsigned, is clearly later and may be in a final form. The sentences beginning *"I can say"* and *"We could not fly"* together with the query in square brackets have been removed so that the relevant section reads:

> *"Later that same day we were tasked by UKBA to go to a specific location and identify the same fishing vessel. In my previous statement I stated I unwrapped a new compact card and placed it in the recorder at 17.55. From getting into the area it only took us a couple of minutes to find the fishing vessel. It was not quite at the Needles, but was a little further to the East when I spotted it at 18.08.*

167. As to why the sentences in the earlier draft were deleted, we do not regard this as in any sense a matter of concern, contrary to what was suggested by Mr Bennathan QC and Ms Timan in their Further Note of 29 January 2021. It seems likely that when the issue about flying time restrictions was clarified with Mr Whittall, he was not prepared to say the aircraft had taken off at about 17.40 as the first draft was suggesting, which would in any event have been inconsistent with the contemporaneous entry in the log which

gave a take-off time of 18.00. Alternatively, it is possible he could not remember when the aircraft took off, in which case the best evidence as to the time of take-off would remain the contemporaneous evidence in the log.

168. For the applicants' case that the aircraft spotted on the radar at 18.02 flying over Freshwater Bay to have any force, they would have to be able to say that the aircraft took off sufficiently before 18.00 to get from Bournemouth Airport to Freshwater Bay by 18.02. That would involve establishing that the log had been completed incorrectly. That might well be arguable if Mr Whittall had signed a statement saying that the aircraft took off some 15 minutes before he loaded the new compact flash card, but he did not sign such a statement and the fact that the relevant passages have been removed from the second statement suggests that either he was not prepared to say what had been in the first draft or he could not remember the time.

169. In our judgment, all that the applicants are left with on the material before the Court is that someone who drafted a statement for Mr Whittall thought the aircraft might have left at 17.40, but Mr Whittall was either not prepared to say that or could not remember. Either way, the contemporaneous evidence in the log of a take-off time of 18.00 is the best evidence available. In the circumstances, we do not consider it arguable that the aircraft shown on the radar flying over Freshwater Bay at 18.02 was the UKBA aircraft. The applicants' case that it was is speculation, unsupported by the contemporaneous evidence of the aircraft log.

170. However, even if it *were* arguable that this was the aircraft seen on the radar flying over the Bay at 18.02, we do not consider that would cast serious doubt on the prosecution case that it was the *Galwad* which had deposited the drugs. As Ms Heer pointed out, it is important to remember that the aircraft was tasked with finding the *Galwad* and keeping her under surveillance. When the aircraft crew located the vessel, she had left the Bay and was near the Needles. Neither Cdr. Bonfield nor those in the aircraft knew that the *Galwad* had deposited the drugs, the focus was on finding her, and that was the aircraft's assigned task. In the circumstances, even if the aircraft flew over the Bay, a failure to see the drugs is not particularly surprising. The opinion of Professor Stupples that those on board the aircraft would have been likely to see the drugs deposited in the sea is of little if any value, as we did not regard him as a reliable witness, for the reasons we have given in relation to Grounds 1 and 3, and, in any event, this is not a matter for expert evidence.

171. Yet further, even if it were arguable that the aircraft flew over the Bay minutes after the *Galwad* left and failed to spot the drugs, that would be only one piece of evidence which the jury would consider in the context of the other evidence. As we summarised at paragraph 160 above, there is strong, albeit circumstantial, evidence supporting the prosecution case that it was the *Galwad* which deposited the drugs in the Bay.

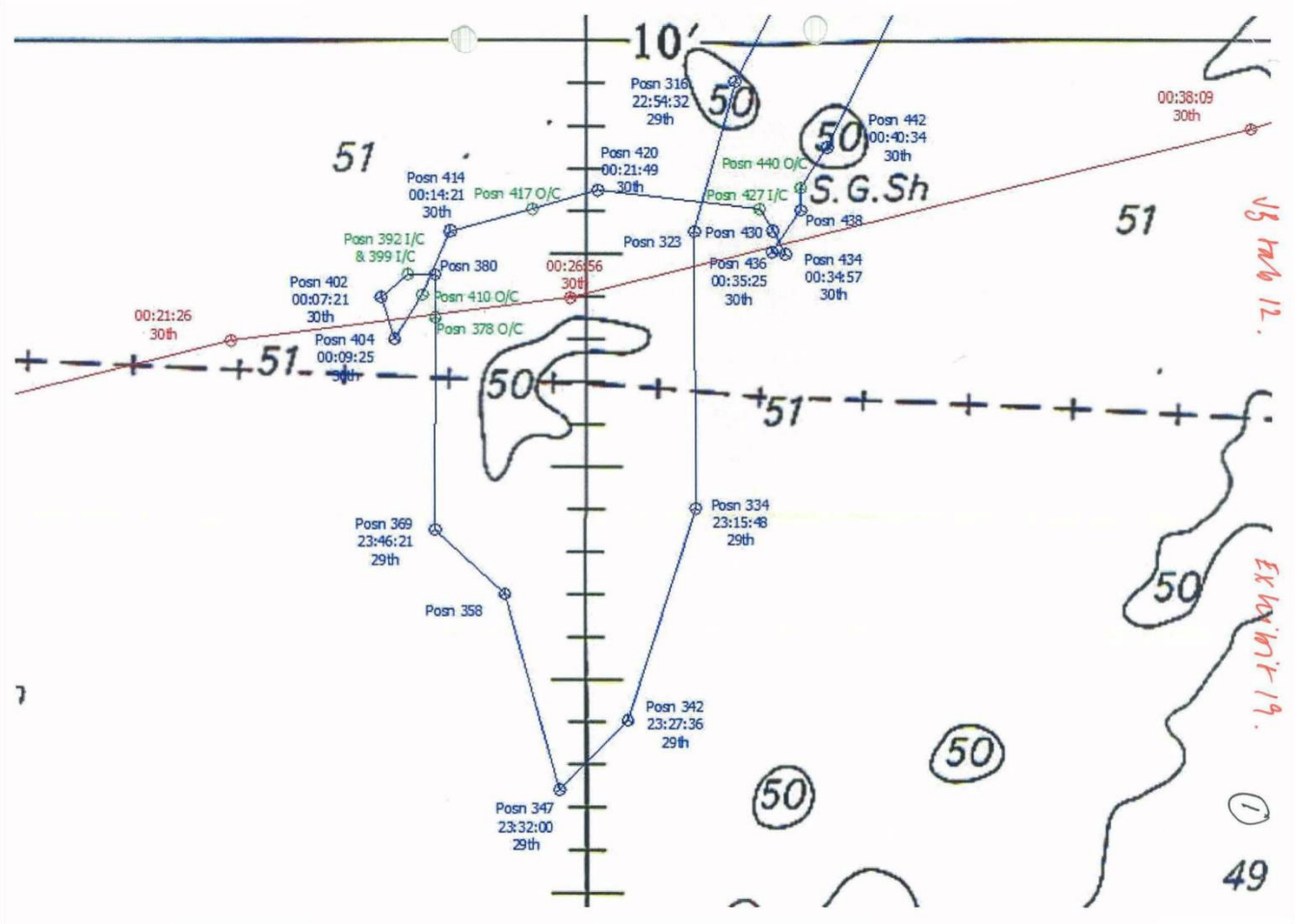
172. Moreover, the context in which any argument that the UKBA aircraft flew over the Bay and failed to spot the drugs would fall to be considered by the jury would include all the evidence available in relation to the ECDIS data. Ground 4 cannot be considered in isolation. For the reasons we have set out in detail in relation to Grounds 1 and 3, the evidence now available in relation to the course of the *Oriane* considerably strengthens the prosecution case against these applicants. In all the circumstances, we do not consider that the evidence now available in relation to Ground 4 affords the applicants with any arguable ground of appeal.

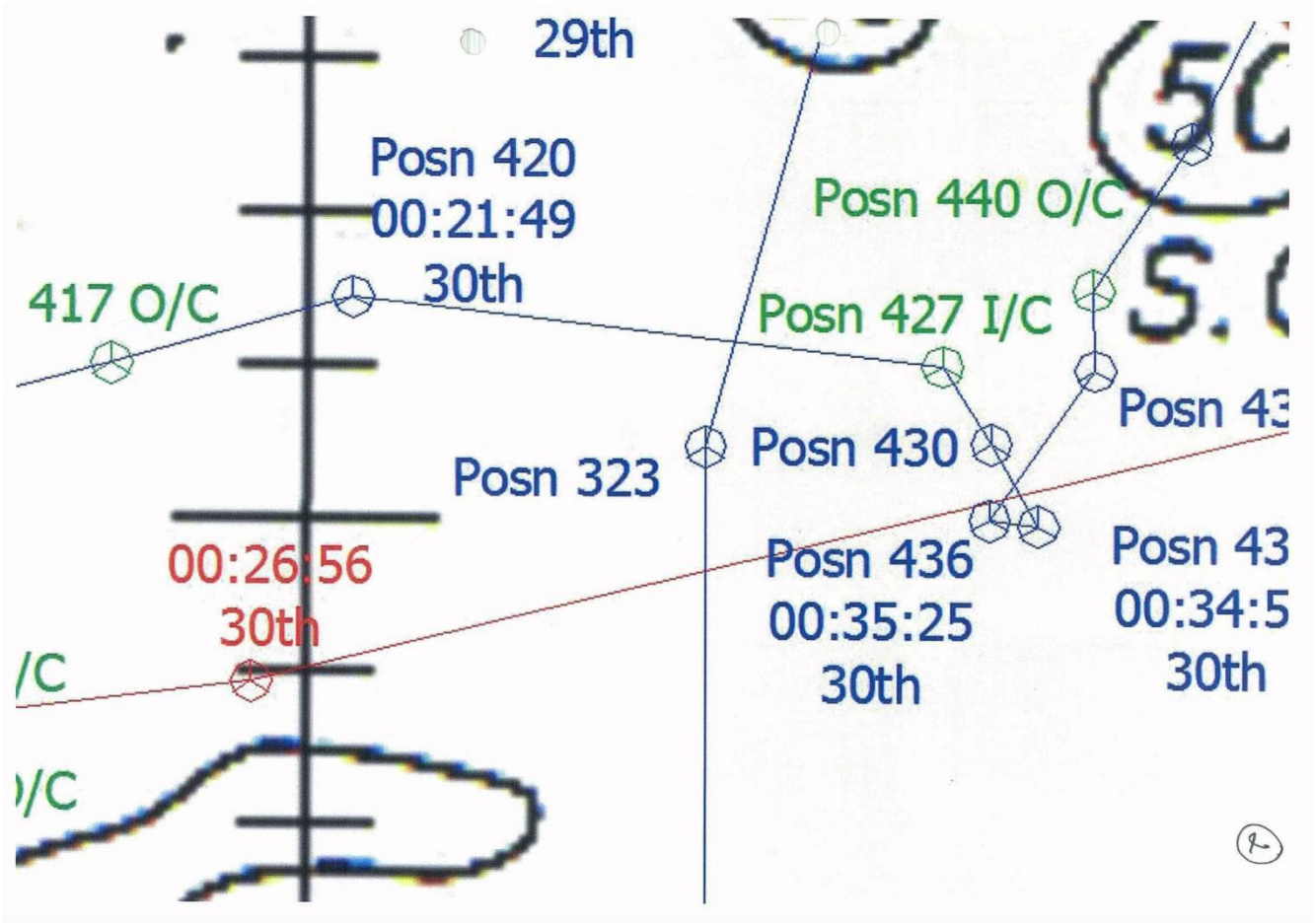
## Overall conclusion

173. Standing back and looking at all the evidence available at trial as well as the evidence now available, whilst the evidence is circumstantial, this was as the CCRC concluded a *"compelling prosecution case of conspiracy to import cocaine"*. The Grounds of Appeal do not begin individually or collectively to cast doubt on the safety of these applicants' convictions. The applications for leave to appeal conviction are accordingly refused, as are the applications for an extension of time and to adduce fresh evidence.

# R v Beere & Payne

## Appendix 1

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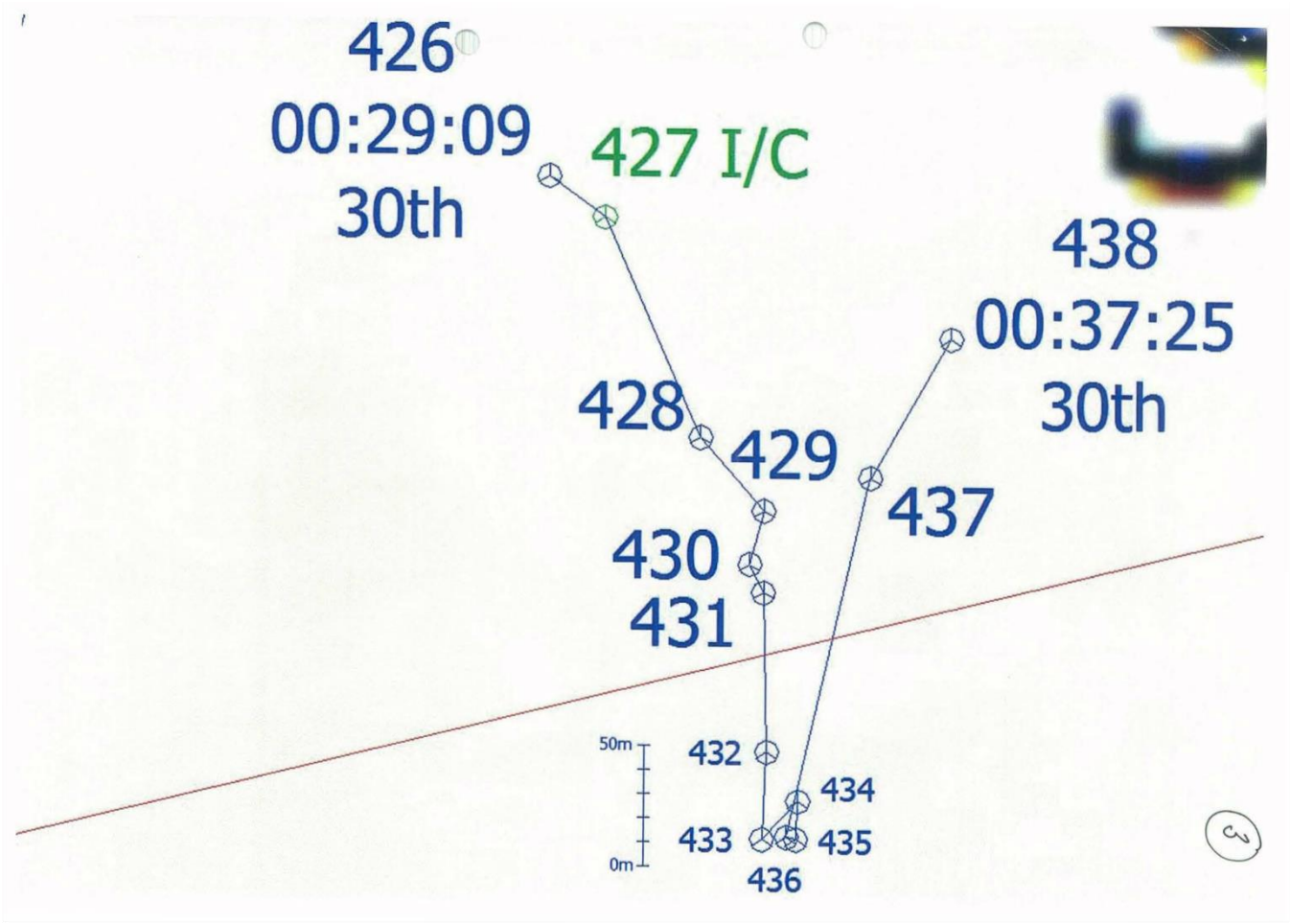
/C
/C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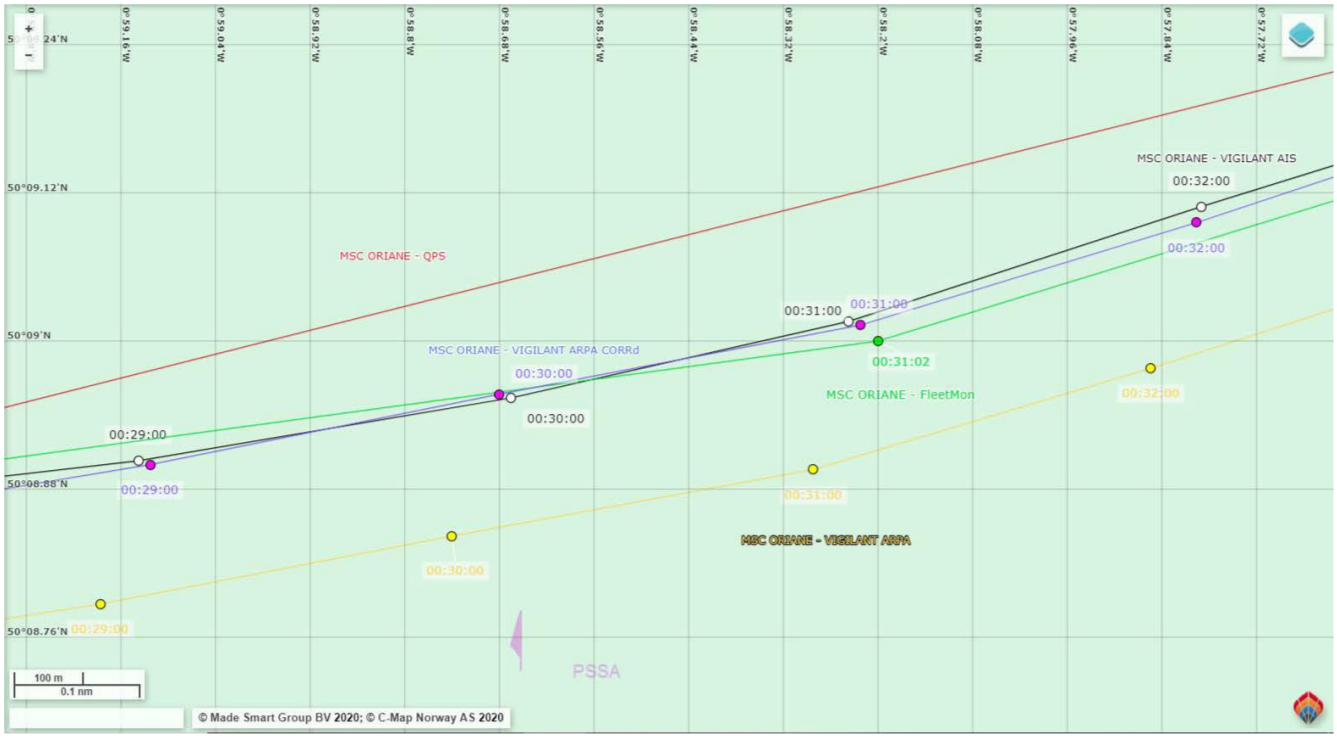
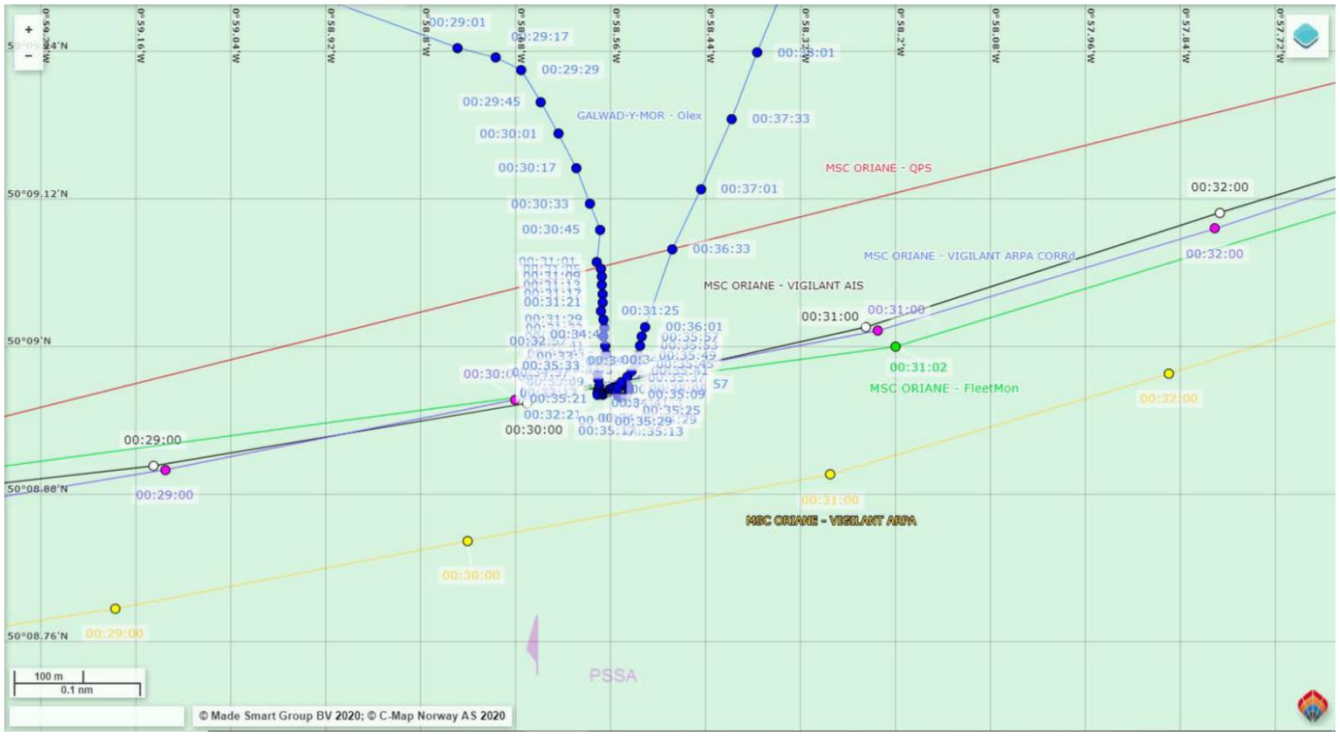
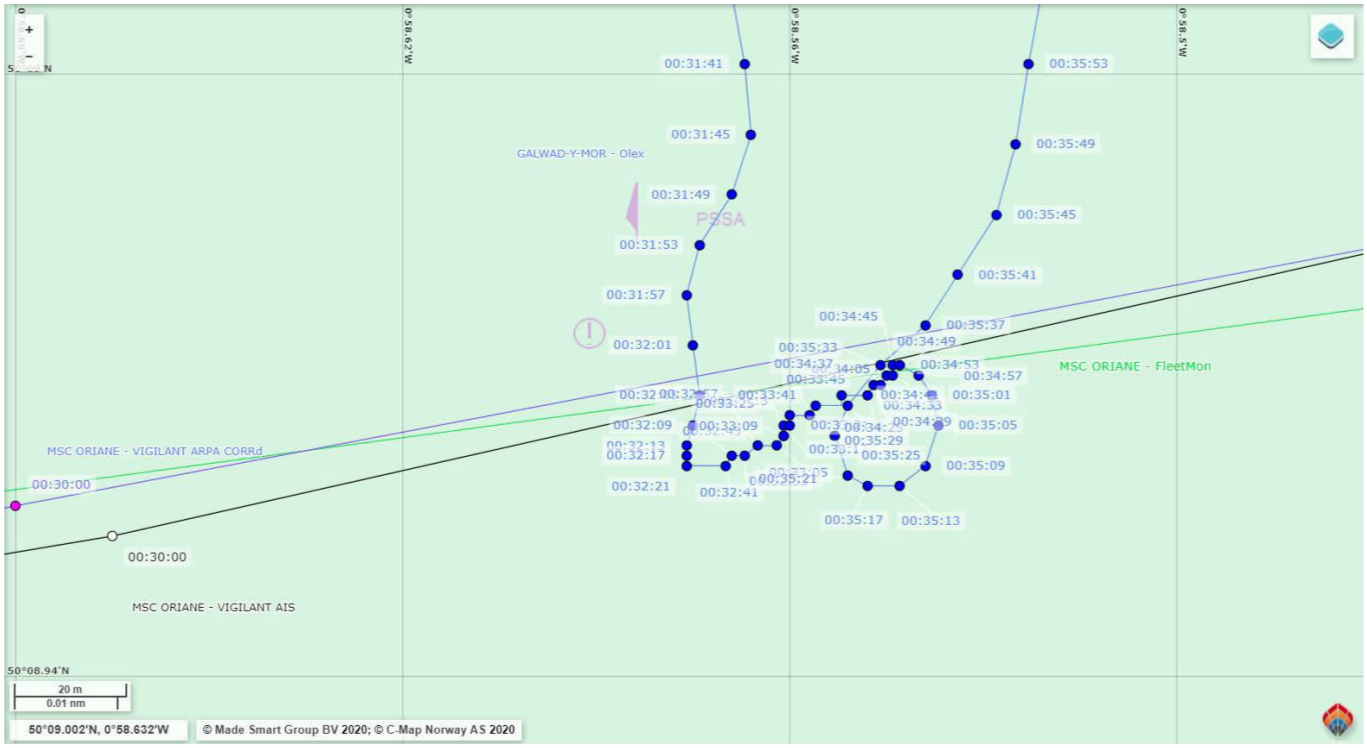
436

# R v Beere & Payne

## Appendix 2

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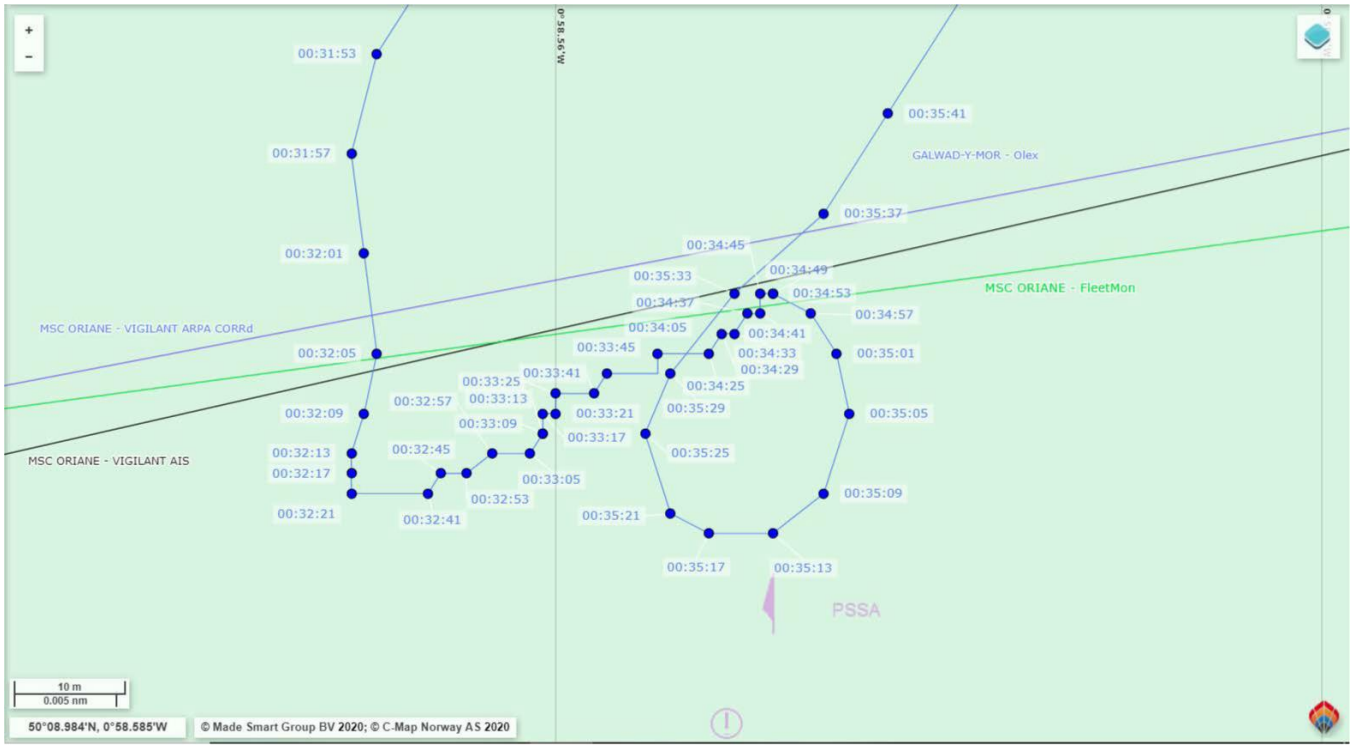
© Made Smart Group BV 2020; © C-Map Norway AS 2020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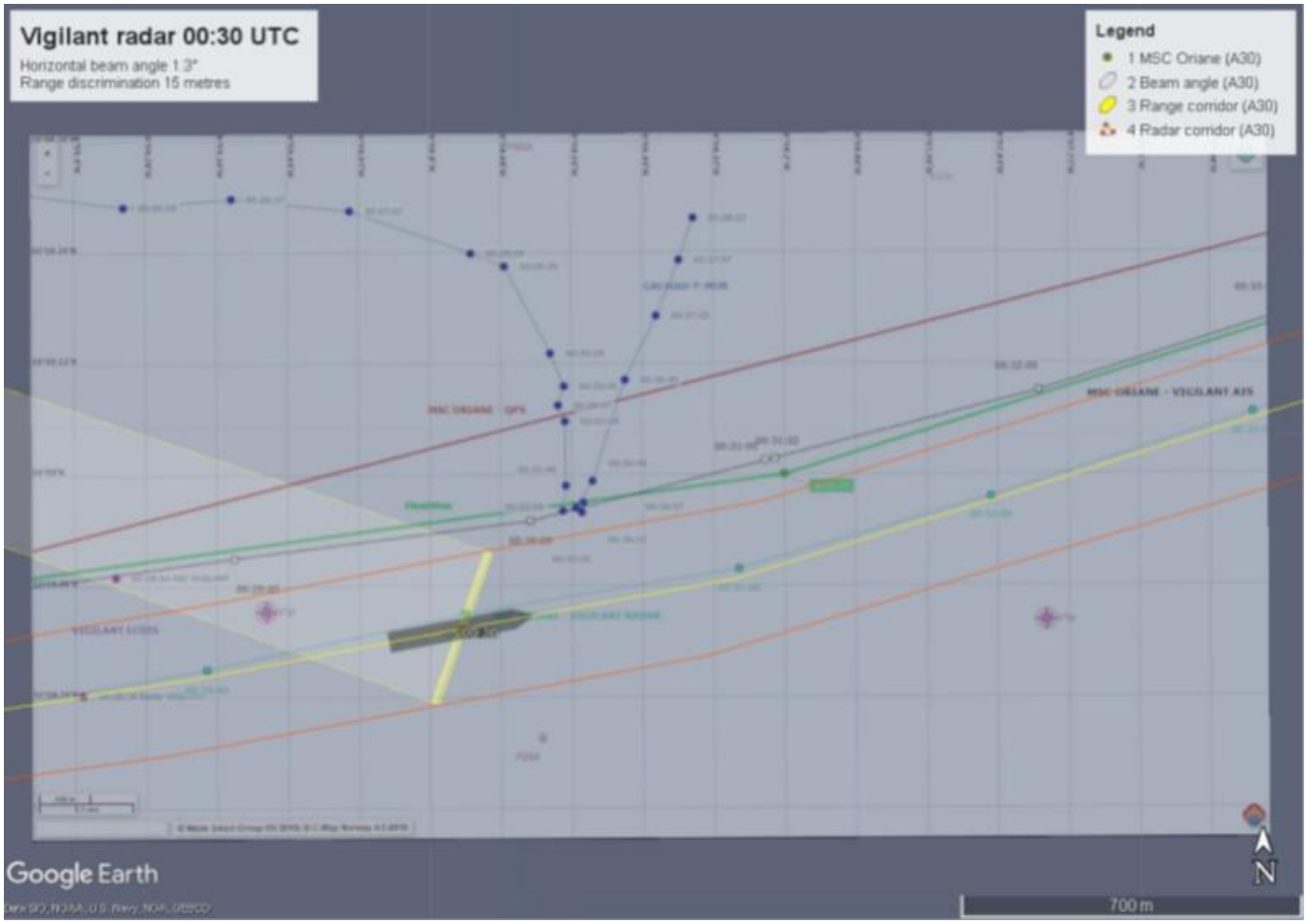
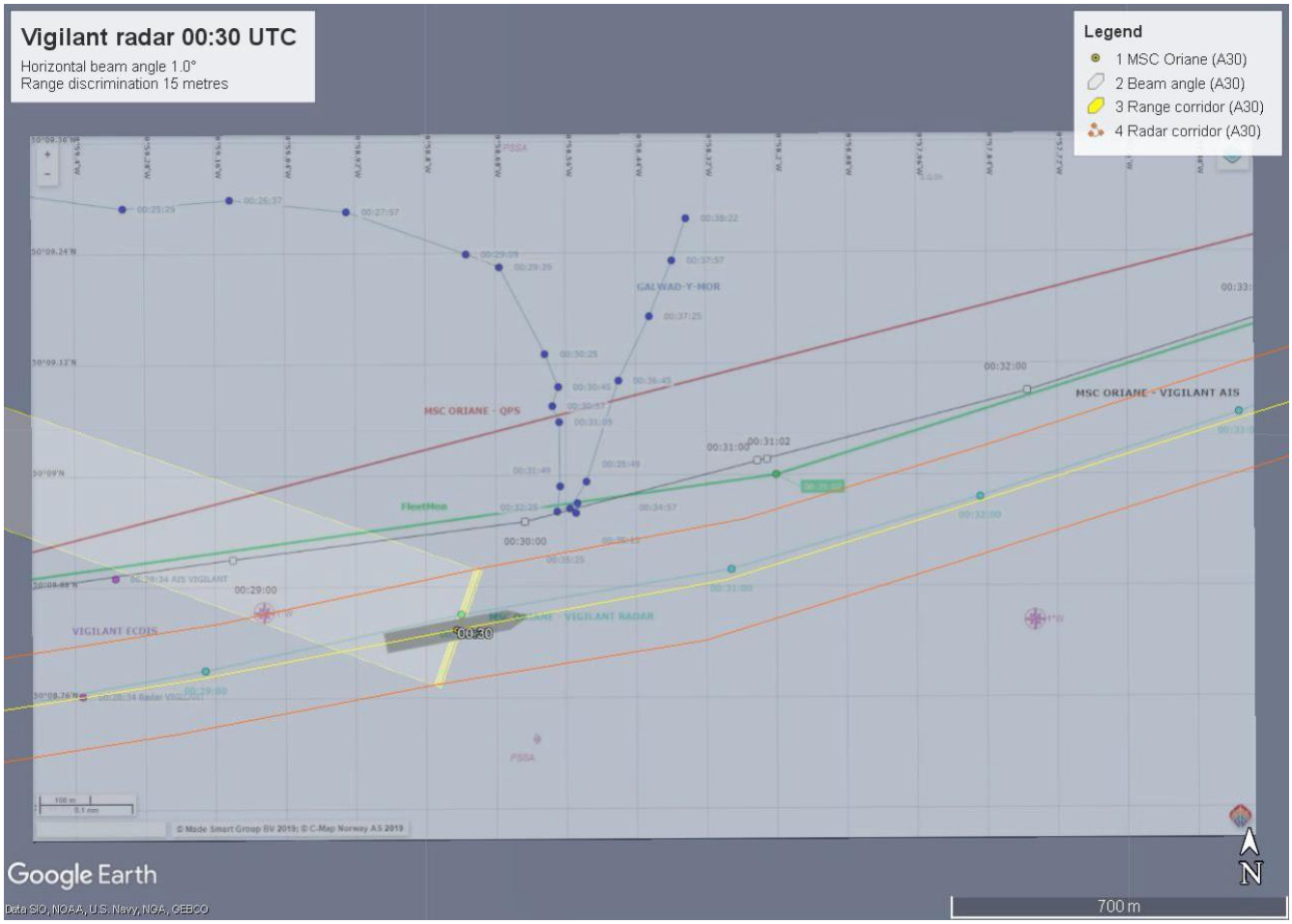
# R v Beere & Payne

## Appendix 3

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Range discrimination 15 metres
Legend
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3 Range corridor (A30)
4 Radar corridor (A30)
GALWAD-Y-MOR
MSC ORIANE - QPS
MSC ORIANE - VIGILANT AIS
FleetNos
VIGILANT ECDIS
VIGILANT RADAR
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PSSA
© Made Smart Group BV 2019; © C-Map Norway AS 2019
Google Earth
Data SIO, NOAA, U.S. Navy, NGA, GEBCO
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700 m

**R v Beere & Payne**

**Appendix 4**

**Figure 2**

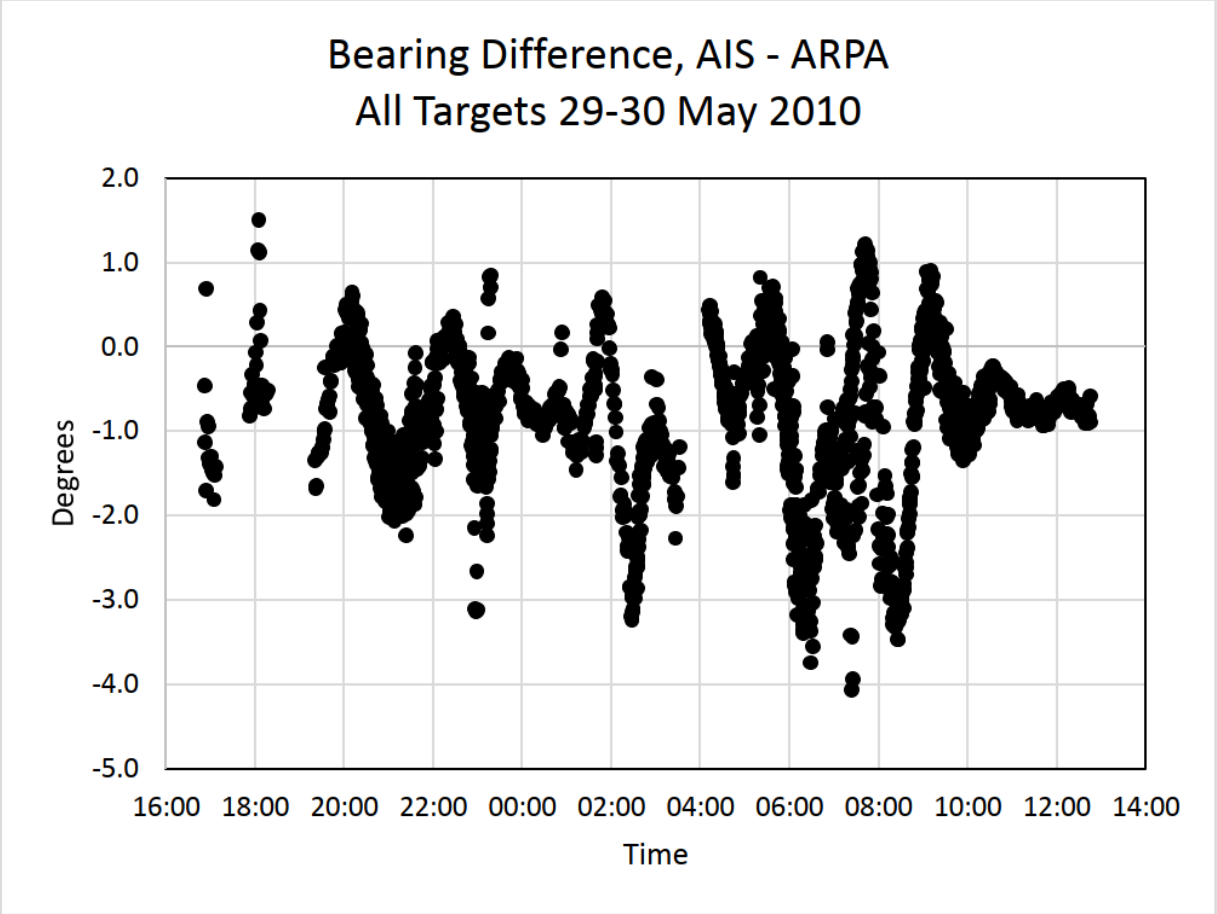
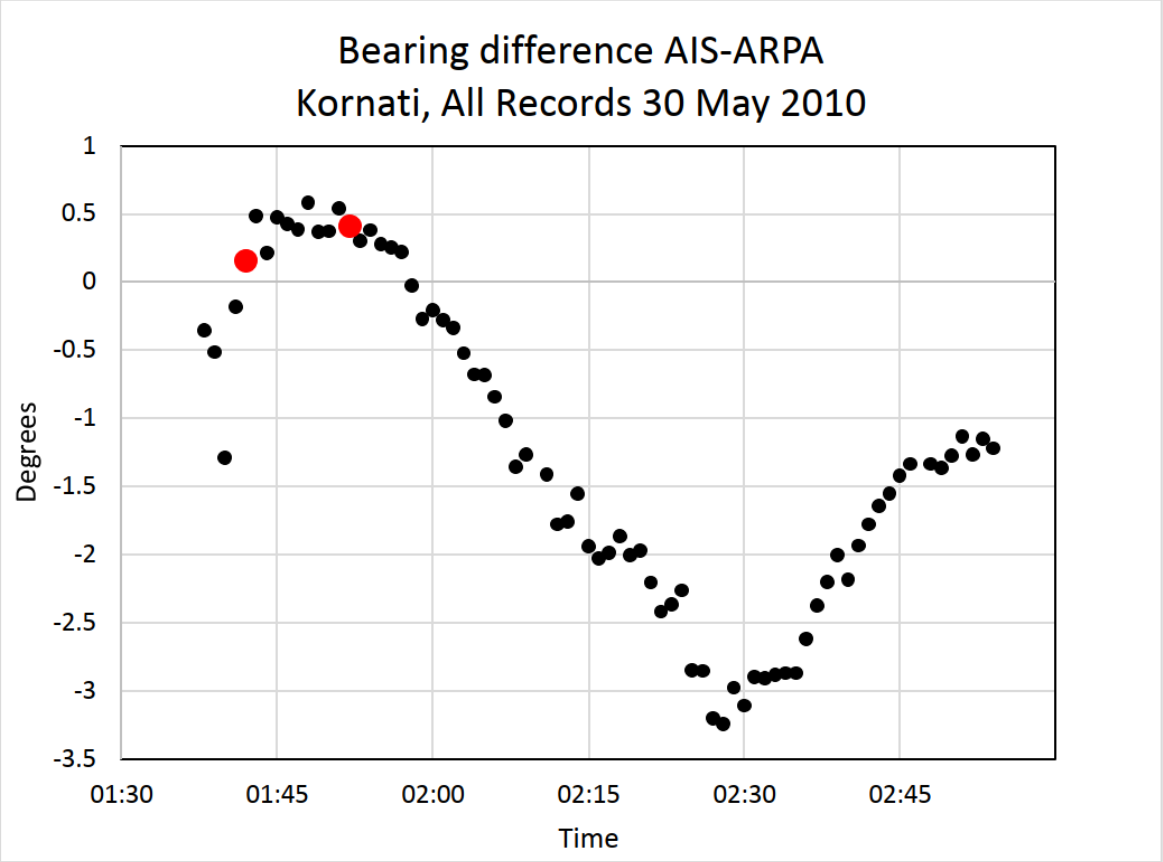


**Figure 6**




Records selected for calibration of radar by Professor Stupples are shown in red.