Neutral Citation Number: [2019] EWHC 2693 (Admin)

Case No: CO/492/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ADMINISTRATIVE COURT

Leeds Combined Court Centre
1 Oxford Row, Leeds, LS1 3BY

Date: 14/10/2019

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

DEREK CANNING	**Claimant**
- and -	
CRIMINAL CASES REVIEW COMMISSION	**Defendant**

- -
- -

Mr Canning in person
The Criminal Cases Review Commission did not appear and was not represented

Hearing dates: 28 August 2019

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Approved Judgment

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His Honour Judge Davis-White QC :

1. This is the renewed oral application for permission to apply for judicial review of the decision by the Criminal Cases Review Commission (the "CCRC") not to refer the relevant conviction of the applicant ("Mr Canning") in 1995 to the Court of Appeal (Criminal Division) (the "Appeal Court").

2. Mr Canning appeared before me in person. The CCRC was not represented and did not appear. Although he said he was nervous, Mr Canning presented his case with care and courtesy. I am grateful to him, particularly in assisting me in finding my way through the documents.

3. On 27 October 2015 Mr Canning applied to the CCRC for a review of his conviction in 1995 and its referral to the Appeal Court. The initial decision, refusing to refer, is contained in a letter dated 7 June 2018 (the "June Letter"). In the absence of a response by 5 July 2018, that decision would have become final. However, Mr Canning did respond. According to a letter from the CCRC dated 31 October 2018 (the "October Letter"), he sent the CCRC a further 35 letters, enclosures and emails from 7 June 2018 onwards. By the October Letter, the CCRC confirmed its decision not to refer the conviction to the Appeal Court.

4. The details of the relevant conviction are as follows. On 18 May 1995, at the Crown Court at Newcastle Upon Tyne, Mr Canning was convicted of one count of keeping for sale a number of peregrine falcons (count 1) and six counts of selling peregrine falcons (counts 2 to 7). In each case, the relevant activity was said to amount to a breach of Article 6 of EEC Regulation 3626/82 and Regulation 3(1) of the Control of Trade in Endangered Species (Enforcement) Regulations 1985. As regards count one, the particulars were that on 6 July 1993 at Stamfordham, Northumberland, Mr Canning kept for sale a number of Peregrine Falcons. As regards counts two to seven, the particulars were (looked at together) that on six different dates between 18 July 1992 and 5 July 1993 he sold one or two peregrine falcons to six different people. Mr Canning was sentenced to 18 months' imprisonment concurrently in respect of each count. As I understand it, the main defence at the trial was that Mr Canning had bred the relevant birds in captivity and that as such they fell outside the relevant prohibition.

5. Mr Canning applied for permission to appeal against conviction and sentence. Permission to appeal against sentence only was granted by the Single Judge. Mr Canning renewed his application for permission to appeal against conviction. On 15 January 1996, the full court granted Mr Canning permission to appeal against conviction and heard both appeals. Both appeals were dismissed.

6. Mr Canning has previously made an application to the Commission on 12 May 2006. As I have said, the judicial review sought in this case is of a decision made on his (re-)application on 27 October 2015. A further re-application has been made by him and was accepted by the CRCC on 1 February 2019 following the submission of new evidence. At the hearing before me Mr Canning told me that this latest re-application in fact put forward no new evidence and that it has since been rejected.

The evidence and materials before me

7. A potential difficulty that arises is that the CCRC in their acknowledgement of service filed in these proceedings on 1 March 2019 and in relation to the second re-application accepted on 1 February 2019, has stated:

> "*Consideration of the new evidence submitted by the Claimant is an ongoing process. The Claimant has included some of the new evidence in his bundle for this Claim but the new evidence did not form part of his 2015 application and so has not been considered as part of the judicial review proceedings".*

8. I am therefore faced with a position where, apparently, some of the material before me is material that the CCRC says is new material, not forming part of the material before it when it reached its relevant decisions, which they are considering (or have considered) further on another re-application and which they have not considered in the context of the decision subject to, or in these, judicial review proceedings. The material is not further identified.

9. Although I am unable to identify which material the CCRC says was unconsidered by it, I have Mr Canning's assertion that in substance nothing new has been provided to the CCRC. I cannot conduct an audit but that is certainly my impression. I also bear in mind that the CCRC's October letter clearly took into account materials submitted by Mr Canning between June and the date of the letter. My suspicion is that the CCRC when referring to new documents being filed in the judicial review, are largely if not entirely referring to documents such as, for example, Mr Canning's detailed comments on the October Letter, which really repeats again a number of points that he has previously made elsewhere. I have therefore considered all the material that is before me. I consider that this approach is correct, rather than seeking to identify precisely what material the CCRC is referring to as unconsidered on the decision under review, for the following reasons.

10. I doubt that any material unconsidered by the CCRC will make a difference either way to the decision of the CCRC under review, but in case I am wrong I say the following. In the event that I decide on the material before me that permission should be granted for judicial review to proceed, the CCRC will be able to consider whether anything they had not previously considered was such as to require it to reconsider its decision or whether to defend the claim. If, on the other hand, I decide on the material before me that permission for judicial review should not be granted, that would not prevent the CCRC considering any new material and coming to the view that nonetheless it will refer the case to the Appeal Court. On its face the latter position might be said to be surprising, but it is not. It reflects the different roles of the decision maker and any court reviewing that decision. Quite simply there is an ambit within which a reasonable decision, properly directed as a matter of law, may be made and I refer to the passage from Lord Bingham's judgment which I cite in paragraph 28 below.

11. One of Mr Canning's general complaints appears to be that the CCRC has not considered all the documents in the case. In that context, in oral submissions, he referred to documents having been sealed and returned with the seals unbroken. This matter appears to have been referred to in the October Letter:

> "*After the CCRC wrote to inform you of its provisional decision not to refer your case, you responded with your comments. We note that you have asked us to read each page of your further submissions, and that you have included, on some pages, seals so that you can check whether this has been done.*
>
> *Please be aware that it is been established in law that it is not obligatory for the CCRC to deal with every single argument that has been presented to it. See R (on the application of El Heri) v CCRC [2009] EWHC 3558 (Admin) per Elia J* [the relevant passage is then set out]
>
> *During our review of your further submissions it was clear that several of the documents you had sent were copies of documents you had sent to us before, therefore these were not considered a second time. Rather, we have dealt with the essence of your further comments in response to our previous decision."*

The reference to the "previous decision" is a reference to the provisional decision contained in the June Letter.

12. I am satisfied that the CCRC has sufficiently considered all the materials put before it by Mr Canning and that in substance it has considered and dealt with all the arguments and evidence relied upon by Mr Canning. Mr Canning's real point is that, so he says, the decision and reasoning of the CCRC is irrational because it does not accept his evidence/submissions. He does not suggest that the CCRC has failed to apply the correct legal test in reaching its decision, rather that its decision and reasoning is so flawed that it meets the test for judicial review of being irrational or, as it is sometimes put, *Wednesbury* unreasonable being the concept identified in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223.* At the risk of oversimplification the question is whether the decision of the CCRC is so unreasonable that no reasonable commission acting reasonably and properly applying the law could have made it. The test is a different (and stricter) test than merely showing that the decision was unreasonable.

13. I also note that the June and October Letters in terms set out "The papers we have looked at" and that these comprise: the transcripts of the trial judge's summing up (only extracts of which appear to be in the bundle before me), the Court of Appeal judgement and other papers relating to Mr Canning's appeal (again only extracts of the Court of Appeal judgement appear to be in the bundle before me), Mr Canning's previous application to the CCRC, Mr Canning's (2015) application to the CCRC and the correspondence he sent in support of it and Mr Canning's comments on the CCRC provisional decision (contained in the June Letter) not to refer the case. In addition the letters refer at various points to other documents considered by the Commission which include copies of the police interview of Mr Canning, the reports of Mr Robinson, Mr Scott, Mr Whitworth and Mr Burden and various other statements from named individuals,

14. The Claim Form in this case was issued on 29 January 2019. The detailed statement of grounds is identified as being the skeleton argument and two (arch lever) files of unpaginated expert reports and documents. The skeleton argument, which starts by saying that it is "a very short skeleton argument" is unpaginated and by my count is 135 pages long. It comprises some 335 paragraphs and in addition extracts from various documents including further comments of Mr Canning on almost each one of

the documents. The two files of documents include what are described as "vital reports" provided by Dr Peter Scott, a veterinary surgeon, Mr Peter Robinson, a consultant ornithologist "practicing [sic] as an Expert Witness and Bird Litigation Expert" and Mr Granville Rooley, a retired solicitor. These reports were, as I understand it, put before the CCRC. Before me, they, with the skeleton argument, were relied upon as being the "vital" documents setting out the case of, and facts relied upon by, Mr Canning. As well as being contained in the two arch lever files that I have referred to, they were provided to me in the form of separately bound documents.

15. The two files contained a number of other documents including a further Skeleton Argument (different to the one supplied to me in a separate binder); the reports that I have referred to (but with further formatting by Mr Canning for emphasis and also containing further comments by him); a complaint to the Bar Council in 2006 and further related documents, being a complaint against the individual who was Mr Canning's barrister at the relevant criminal trial; various copies of the CCRC's decision letters, with further annotations (and inserted copy documents) by Mr Canning; unsigned police statements of Mr Canning, making allegations against Mr Sharrock and Mr Parkin, two of the witnesses for the prosecution at the 1995 trial; documents relating to a criminal case against a Mr Hartley leading to a judgment in 2018 and a copy of a Freedom of Information request to the RSPB with an accompanying 43 page schedule of documents to which the request related; a document described as a "Very Short summary of Shorrock's and McNiven criminality for Kevin Cox (RSPB) and Hexham Police" comprising 135 sheets of papers, most of which were printed double-sided; what is described as "Documents showing that PC Heiniger lied in my court case" comprising some 65 sheets of double-sided paper; 21 sheets of double-sided paper described as showing the distance between two points and that Mr Canning could not have driven between them in the time given, the documents include photographs, maps, commentary, extracts of transcripts, and a further 33 sheets (printed double-sided) of paper described as "A finally [Sic] summary of my case".

16. Her Honour Judge Belcher considered the question of permission on the papers and refused it on 10 April 2019. In the reasons she comments that "*the documentation supplied by C is voluminous and very repetitive. It has taken several hours to read*". I would echo those sentiments. I also note the comments of the Bar Council in a letter dated 21 April 2006 as regards the documentation sent to it as referred to above:

> "*I am returning the considerable amount of documentation you have sent. This is in no way intended to diminish the importance and seriousness of your complaint but it must be presented in a clear and digestible form with the issues supported by specific evidence. The Complaints Commissioner will not need the complete documentation and files in respect of the case"*

17. Although at the hearing before me Mr Canning kindly offered to send me all or any of the further myriad of files that he has amassed over the years, I did not consider it necessary to avail myself of his kind offer. Despite this, after the hearing he sent me an 8 page document entitled "Centre for Criminal Appeals' Briefing on Review of CCRC Board Minutes: Highlights" and a further 151 pages of board minutes of the CCRC running from January 2016 to December 2017. Mr Canning was informed that

I was only prepared to consider the documents put before me at the hearing but I have considered these further documents *de bene esse*.

18. With the benefit of hindsight, this is a case that would have benefited from some rigorous case management prior to the question of permission having to be considered by a Judge. It is simply unacceptable to bring a claim for judicial review which fails to set out succinctly in a "clear and digestible form" the main grounds but instead overwhelms the court with hundreds of pages of repetitive documents and comments and then invite the court to identify from them what the case actually is.

19. I will have to consider the law in a little more detail but wholeheartedly endorse the following comments of HH Judge Belcher, set out in the "reasons" section of her decision of 10 April 2019:

> "*In considering the challenge, this court is limited to a review of the decision making process. It forms no part of this Court's jurisdiction to consider whether it might have reached the same decision as D has reached in this case. The issues are whether D has acted irrationally or has failed to take into account something it ought to have taken into account, or has taken into account something it ought not to have taken into account…..*
>
> *In reality this is a challenge to the merits (C plainly does not agree with D's conclusion), rather than to the decision making process."*

20. The point that the judicial review process in this case is sought to be used as an appeal rather than a judicial review, and, I would add an appeal by way of rehearing rather than review, is confirmed by the "expert" report of Mr Rooley dated 20 July 2018. That report sets out his opinion as to whether there is a "proper basis for *an appeal* against the CCRC's decision of the 7 June 2018" (emphasis supplied) and goes on to identify what in his view are grounds of appeal.

21. As regards the so-called, "vital" expert reports, I should also say that permission to adduce them had not been obtained from the court, they are not in a form complying with the requirements of the CPR and in many respects they contain material that is simply not expert evidence either at all and/or not expert evidence that the relevant person is competent to give. For example, Dr Scott purports to give evidence as to the legal effect of the relevant legislative provisions and as to how indictments are to be framed. Nevertheless, I have taken them into account for what they are worth and as, in effect, submissions.

The Criminal Appeal Court, the CCRC and judicial review

22. It is convenient to set out the following extract of the judgment of the Lord Chief Justice (as he then was), Lord Bingham in *R v CCRC ex p Pearson* [1999] 3 ALL ER 498 dealing with appeals to the Court of Appeal, Criminal Division (the "Criminal Appeal Court"):

> " *It is essential to the health and proper functioning of a modern democracy that the citizen accused of crime should be fairly tried and adequately protected against the risk and consequences of wrongful conviction. To this end, police operations to investigate crime and interrogate suspects are closely controlled by*

statutes, codes and rules; the conduct of prosecutions is entrusted to an independent, professional prosecuting authority; and legal aid is made available to fund all but the very well-to-do to defend themselves in serious cases. The main protection of the citizen accused of serious crime is, however, to be found in our system of trial by judge and jury. This system is so familiar as to require no description. But we draw attention to two characteristic features of jury trial germane to this application. First, the procedure is adversarial. There is no duty on the trial judge, as in an inquisitorial proceeding, to investigate what defences might, if pursued, be open to a defendant, nor to interrogate or call witnesses. It is the function of the judge to direct the jury on the relevant law and to summarise (perhaps very briefly) the evidence, and to define the issues raised by the prosecution and the defence, including any possible defence disclosed by the evidence even if not relied on by the defendant. The judge need not, and should not, go further. Secondly, the decision on the defendant's guilt is made following a trial, continuous from day to day, by a jury assembled only for that trial, with no responsibility for the proceedings before the trial begins or after it ends. Thus the decision-making tribunal must reach its decision on the argument and evidence deployed before it at a final, once-for-all, trial. A defendant may quite properly put forward defences cumulatively and alternatively at a single trial, but not serially at different trials.

It has been recognised that trials by judge and jury may on occasion result in wrongful convictions. The Court of Appeal, Criminal Division, as successor to the Court of Criminal Appeal, exists to correct such errors in appeals brought before it. Thus the mandatory duty of the Court of Appeal, laid down in section 2 of the Criminal Appeal Act 1968 (as amended by section 2 of the Criminal Appeal Act 1995) is to allow an appeal against conviction if the Court thinks that the conviction is unsafe and to dismiss such an appeal in any other case. The Court of Appeal is empowered by section 7 of the 1968 Act, on allowing an appeal against conviction, to order an appellant to be retried if it appears to the court that the interests of justice so require, and by section 23 to receive fresh evidence.

The expression "unsafe" in section 2(1)(a) of the 1968 Act does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the Court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done (Cooper (Sean) (1969) 53 Cr.App.R. 82, [1969] 1 Q.B. 267 at 271). If, on consideration of all the facts and circumstances of the case before it, the Court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the Court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances."

23. He then went onto consider the circumstances in which the appeal court might receive fresh evidence as follows:

"So far as is relevant to this application, section 23 of the 1968 Act now provides:

> *"(1) For the purposes of this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice—…*
>
> *(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.*
>
> *(2) The Court of Appeal shall, in considering whether to receive any evidence, 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 the 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."*

This power has evolved over the years. In section 9 of the Criminal Appeal Act 1907 the Court of Criminal Appeal was empowered to receive new evidence if the Court thought it necessary or expedient in the interests of justice. By section 5 of the Criminal Appeal Act 1966 , this power of the Court to receive fresh evidence became a duty if certain conditions were satisfied:

> *"Without prejudice to the generality of section 9 of the 1907 Act (supplemental powers), where evidence is tendered to the Court of Appeal under that section, the Court shall, unless they are satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise their powers under that section of receiving it if—*
>
> *(a) it appears to them that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and*
>
> *(b) they are satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it."*

As originally enacted in the 1968 Act, section 23 again conferred a general power to receive fresh evidence if the Court thought it necessary or expedient in the interests of justice, and also a mandatory duty to receive such evidence subject to the conditions in section 5 of the 1966 Act, reproduced in section 23(2) of the 1968 Act. Under section 23 as it now stands, it is plain that the Court of Appeal has a discretion to receive evidence not adduced in the trial court if the Court thinks it necessary or expedient in the interests of justice to receive it. The Court of Appeal is never subject to a mandatory duty to receive the evidence, but is bound in considering whether to receive the evidence or not to have regard in particular to the specific matters listed in subsection (2). The Court of Appeal is not precluded from receiving fresh evidence if the conditions in subsection (2)(a), (b), (c) and (d) or any of them are not satisfied, but the Court would for obvious reasons be unlikely to receive evidence which did not appear to it to be capable of belief, or which did not appear to it to afford any ground for allowing the appeal, or which would not have been admissible in the trial court. The Court of Appeal would ordinarily be less ready, and in some cases much less ready, to receive evidence which the appellant had failed without reasonable explanation to adduce at the trial, since receipt of such evidence on appeal tends to subvert our system of jury trial by depriving the decision-making tribunal of the

opportunity to review and assess the strength of that fresh evidence in the context of the case as a whole, and retrials, although sometimes necessary, are never desirable. On any application to the Court of Appeal to receive fresh evidence under section 23 in an appeal against conviction, the question which the Court of Appeal must always ask itself is this: having regard in particular to the matters listed in subsection (2), does the Court of Appeal think it necessary or expedient in the interests of justice to receive the new evidence? In exercising its statutory discretion to receive or not to receive fresh evidence, the Court of Appeal will be mindful that its discretion is to be exercised in accordance with the statutory provision and so as to achieve, in the infinitely varying circumstances of different cases, the objective for which the discretion has been conferred. The exercise of this discretion cannot be circumscribed in a manner which fails to give effect to the statute or undermines the statutory objective, which is to promote the interests of justice; the Court will bear in mind that the power in section 23 exists to safeguard defendants against the risk and consequences of wrongful conviction.

24. He then went on to consider the question of re-trial, the referral of cases to the Appeal Court and the CCRC:

"The power to order retrial was first conferred on the Court of Appeal by section 1 of the Criminal Appeal Act 1964 , but the power was only exercisable where an appeal against conviction was allowed by reason only of the reception or availability of fresh evidence. This provision was re-enacted in 1968, but was amended by section 43 of the Criminal Justice Act 1988 so as to remove the restriction of the power to fresh evidence cases. The Court of Appeal is now readier to order retrials than it was.

The Criminal Appeal Act 1995 abolished the power of the Secretary of State to refer cases for reconsideration by the Court of Appeal, and created the Commission. This was to be a body of not fewer than 11 members, of whom at least one-third were to be legally qualified and at least two-thirds to have knowledge or experience of the criminal justice system. The procedure of the Commission, by paragraph 6(1) of Schedule 1 to the Act, was to be such as it might determine. By section 9 of the Act, the Commission was empowered to refer to the Court of Appeal the conviction of any person convicted of an offence on indictment in England and Wales, and such a reference was to be treated by the Court for all purposes as an appeal by the defendant against conviction under the 1968 Act. Section 13 of the Act prescribes the conditions for making references. In the case of a conviction, the section provides:

"(1) A reference of a conviction ... shall not be made under any of sections 9 to 12[1] unless—

(a) the Commission consider that there is a real possibility that the conviction ... would not be upheld were the reference to be made,

(b) the Commission so consider—

(i) in the case of a conviction ... because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or ..., and

(c) an appeal against the conviction ... has been determined or leave to appeal against it has been refused.

[1] The reference is now to s12B.

(2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it."

Thus the Commission's power to refer under section 9 is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else. Save in exceptional circumstances, the judgment must be made by the Commission, in a conviction case, on the ground of an argument or evidence which has not been before the Court before, whether at trial, on application for leave to appeal or on appeal. In the absence of such exceptional circumstances, the Commission cannot therefore invite the Court to review issues or evidence upon which there has already been a ruling. Resort to the Commission must ordinarily follow and not precede resort to the Court of Appeal.

The "real possibility" test prescribed in section 13(1)(a) of the 1995 Act as the threshold which the Commission must judge to be crossed before a conviction may be referred to the Court of Appeal is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant's prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.

The judgment required of the Commission is a very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take. In a case which is likely to turn on the willingness of the Court of Appeal to receive fresh evidence, the Commission must also make a judgment how, on all the facts of a given case, the Court of Appeal is likely to resolve an application to adduce that evidence under section 23, because there could in such a case be no real possibility that the conviction would not be upheld were the reference to be made unless there were also a real possibility that the Court of Appeal would receive the evidence in question. Thus, in a conviction case of this kind, the first task of the Commission is to judge whether there is a real possibility that the Court of Appeal would receive the evidence. The Commission has, in effect, to predict how the Court of Appeal is likely to answer the question which arises under section 23, as formulated above. In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? If so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an

> *affirmative answer to both questions. The parties are agreed, and we accept, that the test of "real possibility" is the appropriate test in asking both questions and not only the question arising under section 13(1)(a).*
>
> *If the Commission does refer, the Court of Appeal treats the case as any other in which leave to appeal against conviction has been granted. It will make its decision under section 2 of the 1968 Act on the strength of the argument, and evidence (if any), deployed before it."* (emphasis supplied).

25. As regards the considerations that bear on the judgment of the CCRC in deciding whether to refer a case to the Court of Appeal, it is sections 9 and 13(1) of the Criminal Appeal Act 1995 that govern the position. They are considered by Lord Bingham in the extract of the judgment from *Ex P Pearson* that I have set out above. As pointed out by the Administrative Court in *R (on the application of Cleeland v CCRC* [2019] EWHC 1175 (Admin), the "double question" referred to by Lord Bingham as being the one to be asked by the CCRC regarding the real possibility of new evidence being received by the Court of Appeal and the real possibility of the Court of Appeal not upholding the conviction, requires refinement in the light of the decision in *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72:

> *"[20] ...In that case the House of Lords held that the Court of Appeal can only ever have an imperfect and incomplete understanding of the process which led a jury to conviction; and while it can make its own assessment of the evidence that it has heard, it is (clear cases apart) at a disadvantage in seeking to relate that evidence to the rest of the evidence that was before the jury. It is for this reason that it will usually be wise for the Court of Appeal to test its own provisional view by asking whether the evidence, if given a trial might reasonably have affected the decision of the jury to convict*."

26. So far as judicial review of the CCRC and the question of the considerations that bear on the judgment of the Administrative Court when considering a challenge to the CCRC's decision is concerned, the confined role of the Administrative Court has been stressed in a number of cases.

27. In *Ex p Pearson* (above) Lord Bingham described the nature of the role as follows:

> "*... We are not sitting as a court of appeal but as a court of review, and it is no part of our duty to decide whether the Commission's conclusion was right or wrong but only whether it was lawful or unlawful. We are clearly of opinion that it was not irrational. Nor was it vitiated by legal misdirection. It is not, however, in our judgement appropriate to subject the Commission's reasons to a rigorous audit to establish that they were not open to legal criticism. The real test must be to ask whether the reasons given by the Commission betray, to a significant extent, any of the defects which entitle a court of review to interfere…."*.

28. The confined role of the Court exercising judicial review powers in the context of the broad nature of the CCRC's judgment was illustrated by Lord Bingham as follows:

> "*Had the Commission decided to refer this case to the Court of Appeal, that would (if based upon a proper direction and reasoning) have been a reasonable and lawful decision. The decision not to refer was in our view equally reasonable*

in law. The question is fairly and squarely within the area of judgement entrusted to the Commission. If this court were to hold that a decision one way or the other was objectively right or objectively wrong, it would be exceeding its role. The Divisional Court will ensure that the Commission acts lawfully. That is its only role."

29. In *R (Hunt) v CCRC* [2001] 2 Cr. App. R 76 (DC), Lord Woolf CJ referred to the fact that s13(1) of the 1995 Act:

> *"[3]…. is worded in a manner which reserves a residual discretion to the Commission not to refer, albeit that the case is one where there is a real possibility the Court of Appeal would not uphold the conviction. The language of the section applies in the same way irrespective of whether the application is on a question of law or a question of fact*"

30. He went on to say:

> *"[16]… it is important that this court restricts attempts to raise grounds for challenging the decision of the Commission unless a proper basis is established, justifying the consideration of the allegation by this court. It is to be remembered that the Commission only becomes involved after the exercise by an applicant to the Commission of his rights in the court below and, if he seeks this, on appeal. It is a residual, but a very important, jurisdiction which the Commission exercises. It imposes a heavy burden on the Commission … . It is a jurisdiction which requires the Commission carefully to exercise the discretion which it is given by Parliament. In these circumstances it is important that the courts should not in inappropriate cases allow the Commission to be sucked into judicial review proceedings which are bound to distract it from fulfilling its statutory role …"*

31. In *Mills and Poole v CCRC* [2001] EWHC (Admin) 1153, Lord Woolf CJ (giving the judgment of the court) said as follows:

> "*[14] … It is important that this court does not fall into the trap of forming a view as to how the Court of Appeal would react and then concluding that that is what the Commission should necessarily have concluded, since this would be to usurp the Commission's function. Decisions of the Commission cannot be quashed merely because a court on a judicial review might have or indeed would have come to a different view of the significance of the material or the prospects of success"*

32. In *R (Nassibian) v CCRC* [2010] EWHC 200 (Admin), Openshaw J said:

> " *Parliament has entrusted to the Commission the duty of determining whether there is a real possibility of a conviction being upheld. This court should intervene only when there is some substantial reason for thinking that the Commission have acted irrationally. It is a very high threshold. It is not enough*

for the applicant to continue to protest his innocence and to argue that the Commission must have made some error because they did not accept his story."

33. As I shall go on to explain, one of Mr Canning's main points is that the relevant (EEC) Regulation and (UK) Regulations only applied to pure bred peregrine falcons and not to hybrid falcons. This is a legal question of the construction of the legislation in question. As was pointed out by the passage from the *Hunt* case that I have cited, the approach of limited interference by a reviewing court in assessments and decisions of the CCRC applies equally to matters of law as to matters of fact. That point has been stressed in other cases.

34. *In the Matter of an application by Quinn* [2005] NIQB 21 Lord Chief Justice Kerr, as he then was, referred to Lord Bingham's evaluation of the task before the CCRC in the *Pearson* case and went on to say:

> *"**[24]** I respectfully agree with this reasoning. The Commission's task is to evaluate the prospects of success for a reference, if made, and, as Lord Bingham has pointed out, this is a somewhat atypical exercise in that it involves an estimate of how another tribunal will view the arguments that it has to evaluate. In a case such as the present, however, the task is perhaps not as difficult as, for instance, where a decision has to be made whether the Court of Appeal might receive fresh evidence and, if so, what effect that evidence might have on the safety of the verdict. Here the Commission was engaged on an analysis of legal issues that the Court of Appeal would have to resolve on a largely undisputed factual matrix.*
>
> ***[25]** It is important to recognise that, in dealing with a challenge to the Commission's decision not to refer a case, particularly where that involves a claim that the Commission had reached a wrong view of the law, the court is not necessarily required to reach a conclusion on the competing legal arguments. If the assessment of the legal issues (and therefore the likely outcome of a reference) taken by the Commission is a tenable one, the court should not interfere, even if it considers that there is merit in the contrary view."*

35. To similar effect, in *R (on the application of Jonathan King) v CCRC* [2005] EWCA 2357 (Admin) Walker J said:

> *"[12] The other matter that I should mention before I turn to the submissions of Mr Pownall is that the Commission's powers are governed by statute. Under the Criminal Appeal Act 1995 the Commission can refer a case to the Court of Appeal only if, among other things, it considers that there is a real possibility that the conviction would not be upheld if the reference were to be made. That judgment, of course, is for the Commission, not for this Court. This Court can intervene by way of review if some error of public law is shown to have been made. There have, indeed, been authoritative statements that in cases of this kind, if the assessment of the legal issues taken by the Commission is a tenable one, the Court should not interfere."*

36. Finally, I should note that many of Mr Canning's arguments are that his trial was unfair and in breach of article 6 of the European Convention on Human Rights. In *R (on the application of Dowsett) v CCRC* [2007] EWHC 1923 (Admin), the European

Court of Human Rights held that, as regards his conviction, the claimant's rights under Article 6(1) of the Convention had been violated and awarded him costs totalling euro 15,500 and concluded that a finding of violation constituted sufficient just satisfaction. The issue in question was prosecution disclosure. The conviction in that case was also referred by the claimant to the CCRC for review. The CCRC came to a view as to what should have been disclosed and the effect of that document. It concluded that there was no real possibility that the conviction was unsafe and refused to refer. The Administrative Court considered first the relationship between breaches of article 6 and the concept of an unsafe conviction and concluded that:

> "*[16] …not every breach of Article 6 will make a conviction unsafe. The nature of the breach and the facts of the case must in every case be analysed."*

The test applied by the CCRC in this case

37. Mr Canning does not suggest that the CCRC has applied the wrong test in reaching its conclusion not to refer. Rather, he says that its conclusion not to refer Mr Canning's conviction is irrational or unreasonable and one that a reasonable commission properly applying the law could not reach. For the avoidance of doubt I should say that I am satisfied that the Commission did apply the correct test when approaching its task even if, looking at individual passages of their decision letters in isolation it might be said that the test is paraphrased in a manner that might be said to be inaccurate. (To be fair Mr Canning does not take this point). It is necessary to consider the decision letters as a whole.

Legal and factual argument regarding "hybrids" and the offences in question

38. What I understand to be the main argument of Mr Canning is that the convictions are unsafe because they are incorrect as a matter of law. Hr maintains that the birds that he kept and sold were not peregrine falcons (*falco peregrinus*) within the meaning of the relevant legislation but rather hybrids.

39. Essentially, the offences of which Mr Canning was convicted are offences under regulation 3(1) of the Control of Trade in Endangered Species (Enforcement) Regulations 1985 (the "1985 Regulations"). That regulation made it an offence (among other things) to keep for sale or sell "any specimen referred to in Article 2(a) or 3(1) of the Principal Regulation". The "Principal Regulation" was defined as Council Regulation (EEC) No. 3626/82 (the "EEC Regulation"). A relevant exception was where anything was done under or in accordance with an exemption granted under article 6 of the EEC Regulation.

40. Article 2(a) of the EEC Regulation provided that the specimens to which the EEC Regulation applied were "(a) any animal or plant, whether alive or dead, of the species listed in Appendix 1 to the Convention, any part or product of animals or plants of these species which are listed in Annex B to this regulation, as well as any other goods which appear from an accompanying document, the packaging or a mark or label , or from any other circumstances , to be parts or derivatives of animals or plants of these species". The "Convention" was a reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for

signature on 3 March 1973 (the "Convention"). The EEC Regulation was, at least in part, to ensure that the Convention was adopted uniformly throughout what was then the European Economic Community.

41. Under article 1 of the Convention, unless the context otherwise required "species" was defined as meaning "any species, sub-species, or geographically separate population thereof." Appendix 1 includes the following:

Falconidae Falcons and caracaras	*Falco araea* Seychelles kestrel *Falco newtoni aldabranus* Aldabra kestrel *Falco peregrinus (peligrinoides/ babylonicus)* Peregrine falcon (Barbary falcon/Shaheen included) *Falco punctatus* Mauritius kestrel *Falco rusticolus* Gyrfalcon	

42. The notes to Appendix One to the Convention include the following: "The translations of the Latin names are given as a guide only"

43. Article 6 of the Convention provided that member states could grant exemptions in certain circumstances to the general prohibition on (among other things) sale and keeping for sale relevant species as transposed into regulation 3 of the EEC Regulation. These circumstances included (among others) an exemption granted by a member state for the reason that:

> "*(b) the specimens of an animal or plant species were bred in captivity or artificially propagated, or are parts of such animals or plants or derived therefrom*";

44. The EEC Regulation was replaced by Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (the "EC Regulation").

45. The EC Regulation extended the definition of "specimen" so that it included (among other things):

> "*A specimen will be considered to be a specimen of a species listed in Annexes A to D if it is, or is part of or derived from, an animal or plant at least one of whose 'parents' is of a species so listed . In cases where the 'parents' of such an animal or plant are of species listed in different Annexes, or of species only one of which is listed, the provisions of the more restrictive Annex shall apply. However, in the case of specimens of hybrid plants, if one of the 'parents' is of a species listed in*

Annex A, the provisions of the more restrictive Annex shall apply only if that species is annotated to that effect in the Annex".

46. The 1985 Regulations were replaced by the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (the "1997 Regulations") which tied the relevant species that were protected by that provision to the EC Regulation.

47. The main points taken by Mr Canning, as I understand them, are:

i) He was wrongly charged for activities in that the counts on the indictment in terms related to "Peregrine Falcons" rather than in terms to "*Falco Peregrinus*". In other words the indictment was invalid by reason of its wording;

ii) The birds that he had at the time were in fact hybrids.

iii) At the time that he committed the alleged offences, the relevant species protected by the criminal offence provisions did not include hybrids and hybrids only became protected later;

48. The CCRC dealt with each of these points. As regards the formality of the charge the CCRC were, in my view, entitled to reach the view that this was not a point that justified referral to the Appeal Court. They concluded that the jury had been properly directed. The use of the common name as a matter of language rather than the scientific name would not of itself mean the substance of the count was inaccurate or defective as a matter of law. Mr Canning's real complaint is that, so he says, hybrids were not caught by the 1985 Regulations and the relevant birds in relation to which he was charged were hybrids.

49. As regards the question of whether in fact the birds in question were hybrids, the CCRC was of the opinion that at the trial (and on the appeal) no issue had been raised that the birds in question did not satisfy the test of being peregrine falcons because they were hybrids. Rather the main battle lines were whether the birds had been bred in captivity (the defence) or taken from the wild (the prosecution case). Although Mr Canning asserts that he had mentioned in his police interview that the birds were hybrids and that his Counsel did not follow his instructions I cannot see that the CCRC is wrong in its assessment. In any event, the CCRC went on (correctly in my view) to consider the question of whether there was sufficient evidence to justify referring the matter to the Appeal Court on the basis of a case that the birds in question were hybrids and that hybrids were not covered by the relevant legislation at the time.

50. The CCRC concluded, having taken into account the material submitted by Mr Canning, that it considered it unlikely that the Appeal Court would, in the event of a referral, find that there was sufficient evidence to support the position that the birds in question were, as a matter of fact, hybrids. Mr Canning disagrees with this assessment of the evidence. Among other things, he asserts that all that is necessary is for him to raise an evidential case that the birds were hybrids and that it would then be for the prosecution to disprove it. This misunderstands the process before the Criminal Appeal Court. He also criticises the CCRC for not investigating his case further by obtaining its own scientific evidence. The CCRC set out the reasons for

not seeking its own expert evidence. It further explained that the individuals now asserting that the birds in question were definitely hybrids have failed to explain and justify their conclusion and that such conclusions are not backed up by setting out the relevant tests applied and a demonstration that they are reliable.

51. The reasons of the CCRC regarding showing the birds in question to be hybrids as a matter of fact cannot be said to be irrational. In my judgment, the assessment reached by CCRC regarding the factual position of the birds in question as hybrids was one that it was open to it to reach on the evidence before it.

52. The CCRC also considered the legal question of whether hybrids were covered by the 1985 Regulations. It concluded that, although Mr Canning's argument was one that could be made, the purpose of the legislation was to protect endangered species and that it was intended to (and did) cover hybrids. Again, this is a view which in my judgment they were entitled to reach. Mr Canning places great reliance on provisions of the Wildlife and Countryside Act 1981 and the provisions regarding registration and marking and the views expressed in relation thereto. These matters are referred to in Mr Rooley's report, which report the CCRC also refers to in its October decision letter and which it clearly took into account. I do not consider that these matters made the decision or view of the CCRC on this overall issue as "irrational" or other than one that is a tenable one to hold. This legal question is not one for "expert evidence". The fact that legislation was later changed expressly to include hybrids does not necessarily mean that they were not covered b the preceding legislation as HH Judge Belcher has explained in her reasons when refusing permission on the papers.

53. The CCRC correctly applied the test being whether it was of the view that the case as to hybrids (in fact and in law) had any real possibility of success if argued before the Appeal Court and concluded that it did not. In my judgment it was entitled to reach that conclusion and the contrary is not sufficiently arguable for the purposes of the grant of permission to proceed with judicial review.

Birds gifted not sold

54. The CCRC considered the evidence put forward by Mr Canning on the review that the birds in question were gifted and not sold. It considered that that evidence did not significantly undermine the evidence heard ta trial from those who saw the adverts, contacted Mr Canning and bought the birds and indeed that Mr Canning had accepted this himself at trial. In my judgment this is an assessment that the CCRC was entitled to come to.

Birds bred in captivity and not the wild

55. At the trial DNA evidence was adduced regarding the birds in question. Mr Canning placed before the CCRC evidence which, he said, fundamentally undermined that DNA evidence. However, the Criminal Appeal Court had already considered the DNA evidence and came to the conclusion that the overall significance of the DNA evidence was that it was "minimal" and "marginal". Mr Canning submitted that the evidence was not minimal or marginal but key and relied upon TV evidence (which I did not see) from the RSPB so saying and the sentencing remarks of the trial Judge. The CCRC concluded that the Criminal Court had the relevant sentencing remarks and came to the conclusion that it did regarding minimal significance, the sentencing

remarks were not directed at saying the DNA evidence was key but that the cost of the DNA evidence was not something that entered into the sentencing process and that the RSPB interview was (in effect) that person's view which did not undermine the view already taken by the Criminal Appeal Court. In short, say the CCRC, there was other evidence which still justified the conviction and the challenges to the DNA evidence is not such as to justify a reference to the Criminal Appeal Court. In my judgment, this was a conclusion that the CCRC was entitled to reach.

56. At the trial evidence was also given regarding the circumstances in which Mr Canning had been arrested in 1992. He was arrested the day after birds/eggs had, apparently, been taken from a nest and found to be in possession of chicks. The prosecution said, in effect that on that occasion he had been involved in taking birds/eggs from the wild. Mr Canning raises various submissions as to why this evidence should not have been put to the jury and/or that it was unfair that it was put and/or there was evidence contradicting the hypothesis that he had taken the eggs/chicks (eg. the age of the chicks that he had with him when arrested and the driving distances involved). Among other things he says that there was not disclosure of various matters to him, that inspection of the nests in question from which the birds/eggs were taken was carried out unlawfully because there was no evidence the individuals (Mr Little and PC Heiniger) had relevant licences, the eggs in question were security marked whereas the shells found at Mr Canning's home were not. Among other things the CCRC concluded that there was no real prospect of now recovering documents that had not been disclosed at the time and hadn't come to light in the meantime and that, even if recovered, they did not consider that there was anything to suggest the documents would assist Mr Canning's case; that there is no evidence the individuals inspecting the nests did not have licences but even if they did not that would not affect the admissibility and cogency of their evidence; that issues such as age of the chicks, markings and distances could have been raised at the trial and had been raised and considered in the previous referral to the CCRC. The CCRC did not consider that such matters justified a referral. In my judgment, these were conclusions that the CCRC was entitled to reach.

57. In addition, Mr Canning raised a number of points concerning the role and involvement of Mr Shorrock the RSPB Officer involved in the prosecution. As regards failure to disclose material, the CCRC dealt with those issues in connection with other aspects of the case. As regards what was, in essence, said to be Mr Shorrock "taking over the prosecution" the CCRC concluded that his involvement was not inappropriate and that in any event the evidence did not depend significantly on Mr Shorrock or his integrity. As regards an allegation that a warrant had been incorrectly executed and that Mr Shorrock's name was on it, the CCRC concluded, in substance, that given the passage of time it was not possible to ascertain the true position. Finally, as regards evidence that Mr Shorrock was no longer relied upon by the police in investigating cases, the CCRC concluded that there was no evidence that Mr Shorrock was regarded at the time of the convictions as unreliable or significantly lacking in integrity or unable to meet the necessary requirement's to assist police investigations and that his position was not such as that undermining his credibility now would undermine the prosecution cases on which Mr Canning was convicted based as it was (among other things) on video evidence, his admissions, the evidence from individuals who claimed to have bought the birds and Mr Canning's poor record

keeping. In my judgment, these were conclusions that the CCRC was entitled to reach.

58. Finally in this connection, the CCRC considered the evidence from Mr Canning regarding the breeding technique that he described at trial and which he says shows that the results that he said could be obtained could indeed be obtained. The CCRC concluded that this evidence did not have significant significance regarding the safety of the convictions. The prosecution case was not that that the techniques described were impossible or that if employed they could not achieve the results argued for, rather that it was unlikely or not a true representation of what Mr Canning had been doing. Accordingly, the CCRC concluded that this was no new evidence which undermined the safety of the conviction. In my judgment, these were conclusions that the CCRC was entitled to reach.

DEFRA and RSPB

59. Mr Canning provided a great deal of evidence of what he asserted to demonstrate malpractice and attempts to pervert the course of justice on the part of individuals at each of DEFRA and RSPB. The CCRC concluded that such material did not undermine the safety of Mr Canning's conviction because it did not directly relate to his trial and conviction. In my judgment, this was a conclusion that the CCRC was entitled to reach.

Article 6 and matters said to have gone wrong during the criminal trial

60. The relevant matters were all considered by the CCRC, largely under other heads, and there is nothing in the repetition of the points under the headings of article 6 of the Convention or in connection with complaints about the manner in which individuals conducted themselves (such as Mr Canning's then barrister) which adds to the picture.

General concerns regarding the CCRC

61. A significant part of Mr Canning's attack on the decision of the CCRC in this case is in fact an attack on the adequacy of the funding and general operations of the CCRC. Thus, in paragraph 3 of his Skeleton argument contained within the separate binding, he asserts that "the Panorama programme plus the CCRC's own minutes expose the fact that the CCRC are "NOT FIT FOR PURPOSE". I have not seen the Panorama programme that he refers to. However, as mentioned, Mr Canning has since the hearing provided me with Board Minutes of the CCRC in 2015-17 which he says reveal (among other things) that one of the Commissioners has doubts about its ability to identify miscarriages of justice (September 2017); its reputation with the Criminal Appeal Court is low (December 2016) (the criticisms apparently being referring cases that did not merit it and where convictions were upheld) , work pressures on case review managers (April 2017) such that work was being delegated to interns (September 2016), concerns as to the role of individual Commissioners (May 2015), inconsistencies in the manner of reviewing cases by staff (February 2016) and concerns about data analysis I connection with research carried out into the CCRC by Oxford University, but where constructive dialogue had apparently followed (July. November 2015). In addition in his separately bound skeleton argument he refers to other matters, though I am unclear as to whether these are extracts from the Panorama

programme or sourced from elsewhere (see eg. asserted quotation from Air Anthony Hooper).

62. I am satisfied that none of these general matters provide grounds for granting permission in this case. They do not impeach the actual decision made in this case though one or more of them might provide some possible explanations as to any inadequacy in the way in which the CCRC dealt with this case were one to be identified.

63. The suggestion that the question of levying a charge on a person seeking a review by the CCRC has been aired (March 2016) does not seem to me to take matters any further forward.

Overall conclusion

64. Having considered the materials put before me I do not consider that permission to proceed with judicial review should be granted. In that respect I apply the test which is helpfully summarised in the White Book at paragraph 54.4.2 being notes to CPR 54.4 which summary is, for present purposes, that the applicant will need to satisfy the court that there is an arguable ground of review which has a realistic prospect of success. I apply that test in this particular context bearing in mind the passages from the cases that I have set out above and , in particular but without limitation, the words of Lord Bingham in the *ex p Pearson* case set out at paragraph 27 above. In short, I gratefully adopt the entirety of the short form reasons given by HH Judge Belcher when she refused permission on the papers. This is a case where Mr Canning disagrees with the conclusion of the CCRC on the merits. It is not this court's function to come to its own view on the merits and, if different, to substitute it for that of the CCRC or require the CCRC to reconsider. The Court can only interfere if the process which the CCRC has undertaken to reach its conclusion has gone wrong. Mr Canning has failed to raise an arguable case with a realistic prospect of success that the decision of the CCRC is irrational or "Wednesbury" unreasonable, that is, as being one that no person properly directed on the law could reasonably reach. He does not suggest that the CCRC applied the wrong legal test for referral. He submits that the CCRC has misunderstood or failed to read the documents that he has submitted. I am satisfied that the CCRC has, to the extent necessary, read the documents and that it has not erred. Accordingly, I refuse permission.

65. HH Judge Belcher ordered that the costs of preparing the acknowledgement of service were to be paid by the Claimant to the Defendant in the sum of £354.95 unless within 14 days the claimant notified the Court and the defendant in writing that he objected. No such notice was given. HH Judge Belcher said that on a reconsideration costs would be dealt with on that occasion. In the circumstances where I am handing down this judgment without the need for attendance I make an order as to costs in the same terms as made by the Order that HH Judge Belcher previously made but the first period of 14 days will run from the date of the handing down of this judgment and the timetable that she laid down shall be extended accordingly.