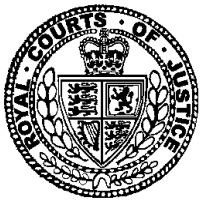

Neutral Citation Number: [2019] EWHC 677 (Admin)

CO/3984/2018

IN ADMINISTRATIVE COURT IN CARDIFF
SITTING AT THE BRISTOL CIVIL JUSTICE CENTRE

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Date: 08/04/2019

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

MICHAEL SHRIMPTON	**Appellant**
- and -	
BAR STANDARDS BOARD	**Respondent**

- -
- -

Michael Shrimpton (the Appellant, acting in person)
Stephen Mooney (instructed by the Bar Standards Board) for the respondent

Hearing dates: 14 January 2019

- -

Approved Judgment

Mrs Justice Jefford :

Introduction

1. This is an appeal by Mr Shrimpton, who was called to the Bar in 1983, against the decision of a Disciplinary Tribunal ("the Tribunal"). The appeal is made to this court under s. 24(6) of the Crime and Courts Act 2013. It is an appeal to a High Court judge: pursuant to CPR Part 52.21(1) it is, therefore, a review of the decision of the lower court and not a rehearing. Pursuant to Part 52.21(3), the appeal will only be allowed if the decision of the Tribunal is wrong or unjust because of a serious procedural or other irregularity.

2. In very short summary, Mr Shrimpton has two criminal convictions which led to the disciplinary proceedings against him and his disbarment in September 2018. He maintains, as he always has done, his innocence. As I will consider further below, the thrust of his appeal is that the tribunal was wrong not to allow him to adduce evidence on which, he submits, they ought to have concluded, on the balance of probabilities, that he was, in fact, innocent of all the offences of which he has been convicted. In particular, Mr Shrimpton's position is that the BSB had agreed that he would be permitted to adduce such evidence before the Tribunal and/or that that had been ordered by a previous Tribunal; that the BSB then resiled from that position; and that the Tribunal wrongly refused to permit him to adduce his evidence. He submits that that alone is sufficient ground to allow this appeal.

The events leading to Mr Shrimpton's disbarment
The criminal convictions and appeals

3. Mr Shrimpton, who appeared as a litigant in person, provided a detailed chronology of events and, orally, provided a helpful summary of the key matters. It is necessary for me to set out some the background, albeit briefly, to give context to the issues that arise. I should emphasise that I am reciting the facts as presented to the court by Mr Shrimpton and not making any findings of fact.

4. Mr Shrimpton was, as I have said, called to the Bar in 1983. His practice appears to have brought him into contact with the intelligence services and he has taken a particular interest in such matters. He professes a particular expertise in nuclear counter-intelligence. He is the author of a book entitled "Spyhunter: The Secret History of German Intelligence" which was provided as an exhibit to both the Tribunal and to this court. As I understand it from Mr Shrimpton's submissions, the principal thesis of the book is that towards the end of, or in the immediate aftermath of, the Second World War, a highly secretive German intelligence agency known as the Deutscher Verteidigungs Dienst ("DVD") came into existence and has been the instigator of, or determinative player in, numerous high profile and politically significant events ever since. The DVD, he says, has a London operation, known as GO2, which has penetrated the Thames Valley Constabulary Special Branch and the Cabinet Office. Mr Shrimpton is well aware that many of the beliefs he holds are often referred to as conspiracy theories and that, as he puts it, the intelligence illiterate simply think that he is making things up.

5. On 19 April 2012, Mr Shrimpton had a telephone conversation with a Mr Burton, Private Secretary to the Secretary of State for Defence. Mr Shrimpton says that that

followed the receipt by him of information of a nuclear bomb threat to the Olympic Games in London in 2012. That information was that one of four thermonuclear warheads retrieved from the Russian submarine, The Kursk, that sank in the Barents Sea in 2000, with tragic loss of life, had been placed in a location in East London. As I understood his submissions, Mr Shrimpton had made a call and left a message which had resulted in Mr Burton making a call to him. In his grounds of appeal against conviction in the Aylesbury Magistrates Court (which I come to below), he said that he had consulted a former Deputy Chairman of the Joint Intelligence Committee and on his recommendation had referred the matter to the National Security Council and in particular the Secretary of State for Defence. There was a second call on 20 April 2012 to a political agent of David Lidington MP, then a Foreign Office minister. What Mr Shrimpton was alleged to have said in that call was not before me but, on his own account, the purpose of the call was to set up informal drinks at the London residence of the Foreign Secretary at which the Russian government could verify the intelligence about the nuclear warhead, whilst preserving deniability.

6. What Mr Shrimpton had said was interpreted by the relevant authorities as what is commonly called a bomb hoax and, as a result, Mr Shrimpton was arrested on 20 April 2012. He notified the BSB of his arrest on 23 April 2012. He was subsequently charged with communication of false information with intent contrary to s. 51(2) of the Criminal Law Act 1977. The matter did not come on for trial until 2014.

7. At or about the time of his arrest for these offences, his property was searched and a laptop and a number of USB memory "sticks" were seized. The police later said that the computer and USB sticks had been examined on 23 or 24 April 2012.

8. Mr Shrimpton asserts that, on 1 November 2012, Alistair Burt MP briefed the media at a seminar for the Global Initiative to Combat Nuclear Terrorism in terms which confirmed that there was or had been a nuclear threat to the London Olympics. Mr Shrimpton places great reliance on this as establishing that he could not have committed the offence with which he was charged because the representations he made were true.

9. Then in about December 2012, Mr Shrimpton was invited to a voluntary police interview at which he was made aware of allegations that the police had found illegal images of children on one of the memory sticks seized. The images appeared to have been deleted but fragments could still be recovered from parts of the memory which required specialist expertise to recover them. Mr Shrimpton was charged with an offence contrary to s.1 of the Protection of Children Act 1978 for which he was to be tried summarily. He raised at least two preliminary points – (i) that the images could only have been downloaded in New Zealand and the offence was not, therefore, within the jurisdiction of the English courts and (ii) that a memory stick did not fall within s. 7(4)(b) of the Act. Both arguments were dismissed and the matter proceeded to trial before a District Judge in February 2014. He was convicted and sentenced to a 3 year supervision order.

10. Mr Shrimpton appealed to the Crown Court against that conviction: the appeal was dismissed on 20 October 2014. Mr Shrimpton notified the BSB of his conviction and a restriction was placed on his practice. Although none of the details was before me, he also asked the Crown Court to state a case, and when the court declined to do so, he sought permission to judicially review that decision. That application was also unsuccessful.

11. As I have said, Mr Shrimpton maintains his innocence. Somewhat inconsistently perhaps with the jurisdictional argument, he denies that he ever downloaded any illegal images. Rather he alleges that he was set up. The possibilities were that the images (or rather traces of them) were planted on a memory stick that belonged to him (which I do not understand to be his case); that a memory stick belonging to him was replaced with one that had these images on (which was in part his case); and that, in order to establish a link between his laptop and the stick, the hard drive/disk taken from this laptop has been replaced. Mr Shrimpton argues that there are numerous flaws in the police's handling and recording of the handling of the laptop and USB sticks seized from his property so that there is no proper chain of evidence which either permitted the items to be tampered with or disguises the record of that happening. Mr Shrimpton now has 4 reports from Mr Cufley who practises as a forensic examiner of digital systems and which he relies on in support of this case.

12. His trial in respect of the bomb hoax offence took place in November 2014 in the Crown Court before His Honour Judge McCreath. Mr Shrimpton represented himself. The material before me in relation to the Crown Court trial is limited but I make the following observations. Firstly, all the arguments of law which Mr Shrimpton still makes reference to were available to him in the Crown Court and, as he accepted, relied upon. These included his arguments as to the requisite elements of the offence. Secondly, all the material that Mr Shrimpton wished to rely on before the Tribunal was also available to him, including any relevant public statements of Mr Burt MP. The material is largely in the nature of published material that Mr Shrimpton considers either supports his hypothesis as to the existence and activities of the DVD or more specifically his case as to the actual existence of a nuclear threat to the London Olympics. Mr Shrimpton complains that the trial judge refused to admit much of this material as evidence. From what Mr Shrimpton told me in the course of argument, I understand that he argued that this material should be admitted under s. 118 of the Criminal Justice Act 2003 which preserves the admissibility of "published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps)" but that that submission was rejected. Thirdly, Mr Shrimpton complains that he was time limited, I assume in either or both of cross-examination or submission, and unable fully to present his case. The upshot of all these matters, in his view, is that his case was not, and indeed never has been, fully considered by that court or any court.

13. Further, Mr Shrimpton's position is that, so far as the child images offence is concerned, he was set up in order to discredit him in relation to the bomb hoax offence. The prosecution did not seek to adduce that evidence as bad character evidence (or on any other basis) at his trial for the bomb hoax offences, no doubt because it is difficult to conceive of a basis on which it would have been admissible under s. 101 of the Criminal Justice Act 2003. However, Mr Shrimpton claims that it was "held over him" (his expression) at the trial – in other words that he was somehow persuaded or induced not to "go in hard" (my expression not his) under threat that this conviction, which was of a nature that would inevitably prejudice a jury, would be disclosed to them. There is an obvious inconsistency between that position and the complaint that Mr Shrimpton was wrongly prevented from fully putting his case before the jury. Yet further, Mr Shrimpton believes that the jury improperly were made aware of his conviction in any event and that that lies behind his conviction.

14. In any event, Mr Shrimpton appealed his conviction. He was refused permission to appeal both on paper by the single judge and on a renewed oral application before a full court. Obviously, Mr Shrimpton raised on his appeal the issues of law, fact and conduct of the case that I have referred to above. There was no copy of any judgment of the court before me but I was told that Treacy LJ described the appeal as "hopeless".

15. Since then, Mr Shrimpton has applied to the Criminal Case Review Commission to have his conviction on the bomb hoax referred to the Court of Appeal and has, by his solicitors, asked for a Royal Pardon, without success.

Applications to the Criminal Cases Review Commissions ("CCRC")

16. So far as the applications to the CCRC are concerned, Mr Shrimpton raised again many of the arguments he had raised before but, in support of them, he also relied on the reports subsequently obtained from Mr Cufley (which are relevant to the images offences but not the bomb hoaxes). Before I turn to these reports and the decisions of the CCRC, I make two observations. Firstly, although it is apparent that the prosecution relied on expert evidence about the memory stick and the disk, Mr Shrimpton did not seek to adduce any expert evidence at his trial. Secondly, in his grounds of appeal against this conviction, his position was this:

> *"No indecent images were found on the Appellant's Dell min-laptop (sic) computer (Exhibit 1 below) but it is said that Exhibit 12 [the memory stick] was connected to Exhibit 1 on some four occasions between August 23rd and 27th October 2011. The Appellant's case is that Exhibits 1 and 12 are not his and were probably swapped by GO2 whilst being left unguarded in a deserted building (SECTU in Thatcham) over the weekend of 21st/22nd April, probably with two penetrations, the first being a scoping penetration to examine the files on Exhibit 1 and determine the numbers on the Exhibit bags. ..... the appellant's case is that there are probably duplicate bags, stored by GO2, ..."* (my emphasis).
>
> He explained that his case was not that GO2 had itself tampered with the evidence but that GO2 had penetrated Thames Valley Police who had done so.

17. Mr Cufley's first report dated 4 February 2015, summarised the position that fragments of images had been found in the "file slack". He summarised the evidence of Kelly Chant, an investigator for Thames Valley Police's High Tech Crime Unit, given at Mr Shrimpton's trial. That was that the data containing the offending images were downloaded while Mr Shrimpton was overseas (in New Zealand) by placing a locally acquired memory stick into a friend's computer, probably an Apple machine, and saving complete pages to the memory stick. Some were then copied to an encrypted container on the memory stick. The saved copy of the web page was then deleted. He said that there was no evidence from Ms Chant that the images had ever been viewed by Mr Shrimpton or that he had any knowledge that they were on the stick. That was no more than a recitation of one aspect of the evidence at trial and Mr Shrimpton's arguments about it. Mr Cufley then concluded that there it was not possible for Mr Shrimpton to have viewed the images with any program or method available on this laptop or to have known that they were there. The first point went no further than the evidence that it required specialist expertise to recover the images, whilst the second assumed that Mr Shrimpton had not downloaded the images and did not otherwise know them to be there. In other words, the evidence added little or nothing to the arguments

that Mr Shrimpton had run at trial, albeit without repeating the denial that the memory stick and the laptop were his.

18. In his second report, dated 21 December 2016, Mr Cufley took a further point which went to support Mr Shrimpton's case that the laptop (or at least the disk) was not his. What Mr Cufley said was that the serial number of the disk said to have been removed from the Dell laptop and examined began with WXN. He asserted that the disk fitted to the laptop had a serial number beginning MY.

19. Both these reports formed part of Mr Shrimpton's first submission to the CCRC. It appears that he also argued that the serial number of the disk indicated that it was an "after market" product (that is, not one that would be supplied with the laptop) and that it had a later warranty expiry date than would be the case if it had been supplied with the laptop.

20. The CCRC's decision not to refer any of the convictions to the Court of Appeal was made on 18 September 2017. In relation to the images, the CCRC made various observations about Mr Cufley's evidence and rejected that argument that it was relevant whether the images could be viewed on Mr Shrimpton's laptop. In relation to the serial numbers, they said that they had consulted publicly available information and that the WXN number demonstrated that the disk was not an "after market" product but rather a "original equipment manufacturer" and one that had a warranty period of 3 years.

21. On 13 October 2017 Mr Cufley produced a third report which was again sent to the CCRC. He still maintained that the WXN serial number indicated a replacement disk. He said this (paragraph 5.11):

"I will now turn my attention to the question of the potential substitution of the disk and of the memory stick. The first question I asked myself was, "Why should anyone bother to substitute the disk since it contained no inculpatory evidence". However it was essential to tie the memory stick to the Dell laptop. Next I considered why the modifications were not carried out on the original drive. The answer to this was probably logistical, it would carry a much lower risk of discovery to take a copy of Ms Chant's disk image and work remotely to set up a new disk with this image, make the necessary modification to the registry, take an image of the new disk and substitute both the disk and the image in the evidence locker. We know that Thames Valley Police make this very easy by abusing the evidence bags.
If substitution did, indeed, take place the error made relates to the memory stick…. "

22. Those passages only need to be set out to demonstrate that what they did was recite the case that there had been a substitution rather than provide any evidence that there had been. The CCRC considered the further report and concluded, unsurprisingly, that it did not change their view.

23. Thereafter Mr Cufley produced a fourth report dated 31 August 2018 (which, at the time of the hearing before the Tribunal, had not been considered by the CCRC). Because of what happened at the hearing before the Tribunal, I will set out paragraph 5.6 of that report:

"A disk has, potentially two serial numbers: one printed on a label stuck to the outside of the devise, the other electronically recorded within the device. This latter number is

shown in the report produced by the forensic software used by Ms Chant to make the forensic image of the disk. This report should have been included within her witness statement but was not. I know from Dell that the serial number attached to the outside of the disk supplied to the defendant when he purchased his laptop from Dell was [serial number beginning with my .....] and I know that the warranty expired on 3 November 2011. The source of my information is [e-mail address]."

The disciplinary charges against Mr Shrimpton

24. I note that, as originally framed the disciplinary charges against Mr Shrimpton were that he had breached the Code of Conduct by reason of his convictions. At the disciplinary hearing, the charges were amended to allege that he had done so by reason of the conduct giving rise to the convictions reflecting the decision of Mostyn J in *Garnham v Bar Standards Board* [2017] EWHC 1139 (Admin). Nothing, in my view, turns on this.

25. However the charges were particularised, the BSB relied on rule 146(1). In the more recent version of the Handbook, the equivalent rule is rule 169(1). Both rules were referred to at various times. They are in identical terms.

"In proceedings before a Disciplinary Tribunal which involve the decision of a court or tribunal in previous proceedings to which the respondent was a party, the following Regulations shall apply:
.1 a copy of the certificate or memorandum of conviction relating to the offence shall be conclusive proof that the respondent committed the offence;
.2 any court record of the findings of fact upon which the conviction was based (which may include any document prepared by the sentencing judge or a transcript of the relevant proceedings) shall be proof of those facts, unless proved to be inaccurate;
...."

26. Mr Shrimpton first took the point that this rule was ultra vires in making the fact of conviction conclusive evidence.

The ultra vires argument

27. Directions were given for the hearing of a preliminary issue by the Disciplinary Tribunal. Neither Mr Shrimpton nor the BSB was able to provide me with a copy of those directions or the formulation of the preliminary issue but it was agreed that the gist of it was whether the provision as to conclusivity was ultra vires.

28. I have been provided with Mr Shrimpton's written submissions on the preliminary issue and Mr Mooney's submissions for the BSB. Both sets of submissions were served in advance of the hearing.

29. In brief summary, Mr Shrimpton's argument was as follows:

    i) the rule in *Hollington v Hewthorn* [1943] 1 KB 587, that a conviction is merely the opinion of a criminal court and not admissible as evidence in civil proceedings, remains good law.

ii) The rule has been abrogated by section 11 of the Civil Evidence Act 1968 but that merely makes a conviction evidence not conclusive evidence.

iii) The leading (and binding) case, albeit one that precedes both *Hollington v Hewthorn* and the Act, is *General Medical Council v Spackman* [1943] AC 627, which Mr Shrimpton submitted was authority for the proposition that a disciplinary tribunal must make due inquiry and cannot rely on the decision of any other tribunal.

iv) The cases that appear to decide otherwise are all decided per incuriam (because *Spackman* was not cited) and are wrongly decided.

30. In the *Spackman* case, a doctor was cited as co-respondent in a divorce case and found to have committed adultery with someone with whom he had a professional relationship. In disciplinary proceedings, the doctor wished to adduce evidence that had not been relied on in the hearing of the petition. Section 29 of the Medical Act 1858 provided that a practitioner could be erased from the register if he had been found guilty of a felony or misdemeanour or "after due inquiry" the GMC found him to have been guilty of "infamous conduct". In his speech, Viscount Simon LC (who gave the leading speech with which their Lordships agreed) identified that the section drew a distinction between a case where the practitioner had been found guilty of a criminal offence and one in which the allegation of infamous conduct was not connected with a criminal conviction:

"In the former case, the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the practitioner, must be arrived at after due inquiry".

31. The Council could not therefore refuse to hear evidence that the practitioner wanted to rely on to show that he had not been guilty of infamous conduct. The finding of another court was prima facie evidence but no more. As to the duty to investigate the doctor's behaviour, Viscount Simon continued:

"The form in which this duty is discharged – eg whether by hearing evidence viva voce or otherwise – is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without first being given a fair chance of exculpation. This does not mean that the council has to rehear the whole of the case …. The council will primarily rely on the sworn evidence already given at trial. It is not required to conduct itself as a court. ….."

32. Although for the reasons I will explain the issue does not arise on this appeal, I do not see how this authority support Mr Shrimpton's proposition. The decision turns on the particular wording of the relevant section. In the particular case of "infamous conduct" not amounting to a criminal offence there was a statutory due to undertake due inquiry. The position was different where there was a criminal conviction which was conclusive, albeit that was a matter of statute not regulation. But one cannot spell out from that decision a generic duty on all regulators to make "due inquiry" (if that means a wholly fresh inquiry) in the light of a criminal conviction. In any case, what that due inquiry should be was recognised to be a matter for the regulator who would be entitled to rely primarily on the evidence already adduced.

33. Mr Mooney, who appeared on this appeal, also appeared for the BSB on what was to have been the hearing of the preliminary issue. He relied principally on the decision in *Michael Stannard v General Council of the Bar*, a decision of the Visitors of the Inns of Court in 2006 in which the judgment was given by Mr Justice Hart.

34. In that case, Mr Stannard had been convicted, following a jury trial, of defrauding the revenue. In disciplinary proceedings before the Visitors, he sought to argue that, whilst they could have regard to the jury's verdict, they could also take other evidence into account, and a central issue was identified as being the extent to which it was open to the Visitors to go behind the conviction. It was argued by the Bar Council that the Visitors should not seek to do so. The Bar Council relied on the decision of the Court of Appeal in *Shepherd v The Law Society* [1996] EWCA Civ 977. Mr Shepherd had been convicted of 15 offences of dishonesty. The Solicitors Disciplinary Proceedings Rules had incorporated s. 11 of the Civil Evidence Act 1968 which made the conviction prima facie evidence of guilt "unless the contrary was proved." It was held that the tribunal was entitled as a matter of law to refuse to go behind the conviction unless there were exceptional circumstances. The Court of Appeal quoted in full what Hutchison LJ described as a particularly important part of the judgment of the Divisional Court below:

"Public policy requires that, save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by a Disciplinary Tribunal ..... If this appellant's argument were right, he should have been allowed to challenge his conviction before the Tribunal even if he had appealed unsuccessfully to the Court of Appeal Criminal Division. That could, in theory, have led after a conviction by a jury on the criminal burden of proof, upheld by three Appeal Court Judges, to exoneration by a Disciplinary Tribunal on the civil burden of proof. Moreover, to achieve it, the witnesses from the criminal case would have had to undergo the trauma of a rehearing.. ..... In the absence of some significant fresh evidence or other exceptional circumstances such an outcome could not be in the public interest."

35. In *Stannard* the court held that exactly the same policy considerations applied to the Disciplinary Tribunal of the Bar which was similarly entitled to refuse to go behind the conviction save in exceptional circumstances. Mr Shrimpton accepted that the decision of the Court of Appeal in *Shepherd* was binding but not the decision of the Visitors in *Stannard*. Nonetheless, *Stannard* is a decision of a High Court judge which should be given due regard and it follows a policy as to the conduct of regulatory tribunals which is both fair and practical in its application.

36. On the hearing of the preliminary issue, and in the light of *Stannard* on which it relied, the BSB conceded that the conclusivity provision was subject to the rules of natural justice so there was to be implied into the rules a qualification that a conviction was not conclusive evidence if exceptional circumstances were established. Mr Shrimpton accepted and accepts that position. Thus the ultra vires argument did not, as such, arise before me but the arguments were still canvassed in the course of the hearing, as background if no more.

37. On the preliminary issue hearing, the BSB, however, argued that they could not identify any issue arising from either of the offences that could be described as exceptional and, accordingly, it was argued in the skeleton argument in advance of the hearing that Mr

Shrimpton should be "prevented from adducing evidence that would in effect re-litigating two previous criminal trials."

38. The matter came before a tribunal on 30 January 2017, with Her Honour Judge Mathews QC as chairman. The outcome of that hearing was not a decision on the preliminary issue but, in the light of the concessions referred to above, the tribunal made an order by consent which is central to the appeal before me. At paragraph 5, the Tribunal recited the following:

"….. While Mr Shrimpton in his skeleton argument had taken issue with the lawful status of the BSB to commence proceedings against him, and whether eR146(1) was lawful, during his oral submissions he made realistic concessions that these arguments were not sustainable. Mr Mooney for the BSB stated that the BSB case was that rE 146(1) was subject to rE144 and so the principles of natural justice would always apply and exceptional circumstances could be argued. There was common ground that the defendant had the right to call evidence as to "exceptional circumstances" at a Disciplinary Hearing."

39. The orders then made adjourned the hearing pending a final determination of the Criminal Cases Review Commission and provided that:

"Within 21 days of the determination of the CCRC (or other Court …) the Defendant shall serve on the Bar Standards Board and the Tribunal copies of all evidence upon which he wishes to rely in relation to his argument of exceptional circumstances."

The Disciplinary Tribunal

The decision

40. In due course, the matter came before the Disciplinary Tribunal on 19 and 20 September 2018, with His Honour Judge Critchlow as chairman.

41. The Tribunal concluded:

i) Paragraph 7:

"The Tribunal accepted that whilst the Respondent had been convicted of two criminal offences, on the facts of which the charges were based, the rules of natural justice applied to these proceedings which permitted the Tribunal to go behind those convictions where there were exceptional circumstances."

ii) Paragraph 8:

"Having heard submissions from the Bar Standards Board and the Respondent, and having had regard to the authorities which each party had cited, the Tribunal found that there was no significant evidence that Mr Shrimpton could produce and no exceptional circumstances which would justify the Tribunal hearing oral evidence on behalf of Mr Shrimpton as he sought to go behind the fact of his criminal conviction."

The effect of the consent order

42. The Tribunal's judgment on this issue was then set out at greater length. It is apparent from that judgment that Mr Shrimpton argued before the Tribunal (as he now submits on this appeal) that the effect of the consent order was that he was entitled to adduce before the Tribunal (and have the Tribunal make a determination on) all the material that he relied upon to assert his innocence of the offences of which he had been convicted. In other words, the Tribunal was bound to hear all the evidence and argument that he wished to present before it reached any decision as to whether there were exceptional circumstances that would justify departing from the provision that his convictions were conclusive evidence. His skeleton argument for this hearing states that his primary point is that the Tribunal was bound by the "Preliminary Ruling" by which he was permitted to introduce evidence with a view to challenging his convictions.

43. It was recorded by the Tribunal that Mr Mooney, whilst accepting responsibility for the recital set out above, submitted that Mr Shrimpton only had the right to argue for exceptional circumstances and not a right to call evidence and that it was for the Tribunal to decide whether he should be allowed to call evidence. In other words, as it was put before me, the evidence that the recital and the order referred to was evidence for the purpose of the Tribunal considering whether a threshold test was passed and whether there was sufficient evidence of exceptional circumstances for the Tribunal to consider that it should, as a matter of natural justice, go on to consider whether there were indeed exceptional circumstances which permitted the Tribunal to go behind the otherwise conclusive convictions. Mr Mooney drew an analogy with the test for the admission of fresh evidence on an appeal.

44. The Tribunal's judgment does not state in terms whether they accepted that argument or not, but it seems to me clear from the balance of the judgment that they did:

i) the Tribunal made the point that the convictions had been considered by appellate courts and by the CCRC and, in the case of the images offences, the ECHR.

ii) The only material not considered by an appellate court had been considered by the CCRC. This was a reference to the first three reports of Mr Cufley. The Tribunal noted that Mr Shrimpton had not sought judicial review of the CCRC's decisions not to refer of 18 September 2017 and 9 March 2018. This was a reference to the first three reports of Mr Cufley.

iii) The only material not considered by an appellate court or the CCRC was, therefore, the fourth report of Mr Cufley.

iv) The Tribunal concluded:

> *"We therefore conclude that the only material which should be considered by this tribunal as to whether it amounts to significant fresh evidence or would justify a finding of exceptional circumstances, is the fourth report of Mr Cufley …..*
> *There is no other material before us which could be said to satisfy the test of exceptional circumstances permitting the Tribunal to hear evidence on behalf of Mr Shrimpton in his wish to prove, on the balance of probabilities, that he is innocent of all charges as he maintains. We have listened with care to his oral*

> *submissions noting them down and we have fully examined them in our Tribunal discussions in retirement.*
> *Having done so we find that there is no basis which justifies oral evidence before us on behalf of Mr Shrimpton. ….."*

45. It is, in my judgment, clear from these paragraphs that the Tribunal, firstly, accepted Mr Mooney's submissions as to the proper meaning of the consent order and, secondly, decided that Mr Shrimpton had not passed the threshold test.

46. I have no doubt that the Tribunal's conclusion on the meaning of the consent order was right. If the recital and the order had meant anything else, the BSB would have been agreeing (and the Tribunal ordering) that, without more, Mr Shrimpton could re-run before the Tribunal every argument and defence that he had sought unsuccessfully to rely on in two sets of criminal proceedings (and appeals) and adduce every piece of evidence that he had previously sought to rely on. I have set out above some of the background and the position that the BSB had adopted prior to the hearing because they go to demonstrate why that would have been a remarkable concession for the BSB to have made and an equally remarkable order for the Tribunal to have made. It would also have involved departing from the policy in *Shepherd* and *Stannard* for no apparent reason which cannot have been what Her Honour Judge Mathews QC intended. The wording could have been more precise but the intent was obvious, namely that Mr Shrimpton was to be permitted to adduce evidence in order to seek to persuade the Tribunal that it should go on to hear his full case on exceptional circumstances in which his convictions would not be regarded as conclusive evidence.

47. There was, therefore, nothing wrong in the Tribunal's decision in this respect and no serious procedural error that rendered the decision unjust.

48. For completeness, I should add that in his skeleton argument for the hearing before me, Mr Shrimpton raised again the argument that rE 169(1) (or its predecessor) was ultra vires. As I have indicated, he accepted in oral submissions that it was not, provided that it was qualified in the case of exceptional circumstances. He then also submitted that the Tribunal had proceeded as if the "exceptional circumstances" words were not to be implied into the rule. That is obviously not right. That was what the Tribunal addressed but they considered that there was not sufficient evidence of exceptional circumstances and that they were entitled to refuse to go behind the convictions.

The Tribunal's decision on "exceptional circumstances"

49. That leaves the question of whether the Tribunal was wrong to conclude that there was not sufficient evidence for it to proceed to hear Mr Shrimpton's full case as to exceptional circumstances.

50. It is worth stating the obvious namely that the standard of proof for a criminal conviction is higher than that in civil proceedings. In the case of both offences, Mr Shrimpton had been convicted following a trial and, as the Tribunal took into account, his cases had been the subject of unsuccessful appeals (and an unsuccessful application for judicial review). It is not the case, as Mr Shrimpton sought to argue, that the Tribunal wrongly considered itself bound by previous decisions. Rather what the Tribunal did was properly take into account that, in those circumstances, something more than a re-run of the arguments and evidence at trial would be required to amount

to exceptional circumstances. Equally reliance on evidence that had not been admitted at trial would not be sufficient since that evidence, and the arguments that it ought to have been admitted, would have been, or ought to have been, the subject matter of any appeal. It would, in my view, also be open to the Tribunal to conclude that new evidence was not sufficient if that evidence could have been adduced at trial and there was no good reason why it had not been.

51. The only other evidence that the Tribunal had before it was then the evidence of Mr Cufley which related only to the child images offences which, as the Tribunal said, had been considered by the CCRC. One of Mr Shrimpton's submissions was that, since the CCRC was not a court of law, the Tribunal should not be influenced by it but, in my view, the Tribunal was entitled, in determining whether there was sufficient evidence of exceptional circumstances, to have regard to the views of a statutory body charged with considering the references of cases to the Court of Appeal.

52. The only evidence not considered by the CCRC was that in Mr Cufley's fourth report. The tribunal made particular reference to paragraph 5.6 (which I have set out above) and asked for clarification of what was said there. The decision records that Mr Cufley responded orally that the information came from a phone call which he had recorded although it transpired that he had not, in fact, recorded it. The Tribunal considered that explanation unsatisfactory and took the matter no further. Mr Shrimpton also complains about the manner in which the Tribunal dealt with that evidence and its inquiry, but, in my judgment, without justification. This was now the fourth report produced after trial and appeal and there was still not clear and persuasive evidence that the disk that had been examined was not Mr Shrimpton's disk or the memory stick (on which the images were found) not his memory stick. There is no reason why the Tribunal ought in fairness to have offered the opportunity for yet further evidence to be adduced.

53. Before me, Mr Shrimpton sought to adduce an addendum report of Mr Cufley. He provided a copy of an e-mail following the phone call to Dell (which says nothing about serial numbers) and his note of the serial numbers and some other data. That note includes both the WXN and MY numbers. He also seeks to give further evidence about the improbability of Mr Shrimpton having replaced the disk himself and about the memory stick.

54. Mr Shrimpton appears to believe that he can endlessly adduce further evidence and that the mere production of such evidence is sufficient to mean that the Tribunal ought to have gone behind his convictions and considered all matters afresh. That is unsustainable. The Tribunal was entitled to consider that there was insufficient evidence for it to proceed to a full hearing in which Mr Shrimpton could put before them whatever evidence he wished and re-run whatever legal arguments he wished in order to seek to persuade them that he was innocent of the offences of which he had been convicted.

55. Again for completeness, I should add that Mr Shrimpton further argued that, having denied him his right to call evidence, the Tribunal was obliged to take his evidence at its highest in deciding "whether or not it potentially showed exceptional circumstances". That seems to me to misrepresent the approach the Tribunal took: it did not deny him the right to call evidence (which he did not, in any event, have) but

considered properly what evidence it should have regard to in deciding whether there was any case as to exceptional circumstances.

56. In any case, so far as the bomb hoax was concerned, Mr Shrimpton relied on the evidence had been seeking to rely on throughout.

57. So far as the child images offence was concerned, he relied on the evidence that the memory stick was manufactured after he was alleged to have acquired it; that the courts were misled as to the country of origin; that he could not have handled it without transferring a fingerprint; and that the hard drive alleged to be his had not been fitted to his computer. The issues about the time and place of manufacture which Mr Shrimpton argued went to show that he could not have acquired the memory stick in New Zealand were issues at trial and on appeal. The point about the fingerprints was also raised at trial. Mr Shrimpton claimed that a report had been kept from his but that this evidence came out on cross-examination. I do not know whether that is an accurate reflection of what happened but, if it is, then it was evidence before the District Judge who convicted. That left again Mr Cufley's evidence. Even at its highest that was not, as I have said, clear or persuasive evidence that the disk that had been examined was not Mr Shrimpton's.

58. The decision of the Tribunal was not, therefore, wrong and nor was there any serious procedural error that rendered the decision unjust. The appeal is dismissed.