Neutral Citation Number: [2020] EWHC 1391 (Admin)

Case No: CO/4876/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2020

**Before** :

**MR JUSTICE JULIAN KNOWLES**

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**Between :**

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| **THE QUEEN ON THE APPLICATION OF JEREMY BAMBER** | **Claimant** |
| **- and -** | |
| **CROWN PROSECUTION SERVICE** | **Defendant** |

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**Joe Stone QC and Matthew Stanbury** (instructed by **Jordans**) for the **Claimant**
**Annabel Darlow QC** (instructed by **CPS**) for the **Defendant**

Hearing dates: **29 May 2020**

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# Approved Judgment

**The Honourable Mr Justice Julian Knowles:**

**Introduction**

1. On 28 October 1986 in the Crown Court at Chelmsford before Drake J and a jury Jeremy Bamber was convicted of murdering his adoptive father, Nevill Bamber, his adoptive mother, June Bamber, his adoptive sister, Sheila Caffell, and his nephews, her six year old twin sons, on 7 August 1985. They were shot to death some time during that night at the farm in Essex where his parents lived and Ms Caffell and her sons were staying.

2. An application for permission to appeal was dismissed in 1989. In December 2002, following a reference by the Criminal Cases Review Commission (CCRC), the convictions were upheld by the Court of Appeal: [2002] EWCA Crim 2912.

3. Drake J imposed a minimum term of 25 years. In May 2008 Tugendhat J reviewed the sentence in accordance with Sch 22 to the Criminal Justice Act 2003. He ordered that Mr Bamber should be subject to a 'whole life tariff', ie, that he never be released. That decision was upheld by the Court of Appeal in 2009: [2009] EWCA Crim 96.

4. Mr Bamber's case is one of the most notorious modern murder cases. Over the years since his conviction he has relentlessly explored every avenue of challenge up to and including the European Court of Human Rights. He has also made a number of applications to the CCRC. In 2012 he unsuccessfully judicially reviewed the refusal of the CCRC to refer his case to the Court of Appeal: [2012] EWHC 3768 (Admin).

5. The matter before me is a renewed application for permission to seek judicial review, following refusal by Saini J on 22 January 2020. Mr Bamber seeks disclosure of material by the CPS which he says is needed so that a forensic expert can produce a definitive report which can then be submitted to the CCRC in support of an application that Mr Bamber's case be referred back to the Court of Appeal pursuant to ss 9 and 13 of the Criminal Appeal Act 1995.

6. The CPS has refused disclosure. In this application Mr Bamber challenges that decision. The decision letter is dated 9 September 2019 and is signed by Rosemary Ainslie, then the CPS's Interim Head of Special Crime. It is common ground that the test to be applied is that set out in *R (Nunn) v Chief Constable of Suffolk* [2015] AC 225. Mr Bamber says that, on a proper application of that decision, the material he seeks is disclosable and that the CPS has misapplied *Nunn*. The CPS denies this. Also, it says that Mr Bamber has an adequate alternative remedy, namely, he can apply to the CCRC, which has extensive powers to investigate and to order disclosure of relevant material.

7. The hearing was originally listed for 1 May 2020. I adjourned that hearing to allow Mr Bamber's legal team time to consult with him following receipt of the Crown's Skeleton Argument shortly beforehand. I then held a remote hearing on 29 May 2020. Mr Bamber was represented by Mr Stone QC and Mr Stanbury. The Crown was represented by Ms Darlow QC. I reserved my decision.

**Factual background**

8. Before turning to the issues, it is necessary to explain a little about the circumstances of the murders. After 35 years, the following is barely an abbreviation of the facts, but it is what I judge necessary to decide this application.

9. The prosecution's case at trial was that Mr Bamber planned and carried out the killings. The defence case was that Ms Caffell, who had a history of mental health problems, killed her parents and children with a shotgun before killing herself with the same weapon.

10. The respective prosecution and defence cases were summarised as follows by the Court of Appeal in its 2002 judgment at [145]-[152]:

> *"The Prosecution Case at Trial*
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> 145. The prosecution case at trial was that the appellant, motivated by hatred and greed, had planned and carried out the killings. Having left White House Farm at about 10 p.m. on Tuesday 6 August 1985 he had returned by bicycle (taking a route which avoided the main roads) in the early hours of the following morning.
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> 146. He had the means and knowledge to gain entry to the address, one such route being through the bathroom window. He then took the rifle, with the sound moderator attached as normal, and made his way upstairs to where the members of his family were sleeping.
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> 147. The precise sequence of the killings was unclear. June Bamber was shot whilst still lying in bed but had managed to get up and walk a few steps before she collapsed and died by the main bedroom door. Neville Bamber was also shot in the bedroom but was able to get downstairs into the kitchen where there was a violent struggle before he was overwhelmed and then shot a number of times in the head. The children had been shot in their beds as they slept.
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> 148. Sheila Caffell, probably in a sedated state from her medication, was also shot in the bedroom. When she was dead the appellant set about arranging the scene to give the impression that it had been she who had murdered her family before taking her own life. The appellant then discovered, as he laid the gun upon her body, that it would not have been possible for her to have shot herself with the sound moderator attached since her arms were not long enough to reach down to the trigger. He therefore removed the silencer from the gun and then positioned the Bible by the body, knowing Sheila had been preoccupied with religion in the weeks before her death.
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> 149. The appellant returned the moderator to the gun cupboard and before leaving the address called his home at Goldhanger,

leaving the receiver off the hook, thus lending support to the alibi he would later rely upon. He then left the premises, one available route being to climb out of the kitchen window, banging it from the outside to drop the catch back into position and then cycled home.

150. Shortly after 3 a.m. he telephoned Julie Mugford, before calling the police at 3.26 a.m. He chose not to make a 999 call, drove slowly to the farmhouse, gave misleading information about his sister and her knowledge of guns to create as long a delay as possible before the bodies were discovered.

151. The prosecution relied upon the following areas of evidence:

i) The appellant's expressed dislike of his family;

ii) His speaking of his plans to kill his family and thereafter his confessions to his girlfriend, Julie Mugford;

iii) The finding of his mother's bicycle at Goldhanger;

iv) The appellant's admitted ability to effect covert entry into and exit from the farmhouse and the finding of the hacksaw blade outside the bathroom window. His claim to have entered the house in that way after the first arrest was an attempt to explain these findings;

v) Because on the facts of the case it could only have been the appellant or Sheila Caffell who carried out the killings, the factors below proved they were not the responsibility of the appellant's sister:

a) Although seriously mentally ill, there had been no indication of any deterioration in her mental health in the days before the killings. Neither had she expressed any recent suicidal thoughts and the expert evidence was that she would not have harmed her children or her father;

b) Save for the appellant nobody had seen her use a gun and she had no interest in them. Sheila Caffell also had very poor co-ordination and would not have been capable of loading and operating the rifle nor would she have had the required knowledge to do so;

c) She would not have been able physically to have overcome her father (who was fit, strong and 6' 4" tall) during the struggle which undoubtedly took place before his death in the kitchen;

d) Her hands and feet were clean. They were not blood stained and neither was there any sugar upon them;

e) Hand swabs from her body did not reveal the levels of lead to be expected in somebody who must have re-loaded the magazine of the gun on at least two occasions; and

f) Her clothing was relatively clean and she was not injured in the way that might be expected of somebody involved in a struggle. Her long fingernails were still intact and undamaged.

vi) The sound moderator had on any view been attached to the rifle during the fight with Nevill Bamber in the kitchen. But if Sheila Caffell had committed suicide it must have been removed before she shot herself. The following aspects of the evidence established it was still in place on the gun when the appellant's sister was murdered:

a) The blood grouping analysis proved (on the particular facts of the case) that Sheila Caffell's blood was inside the moderator; and

b) Had the appellant's sister murdered the other members of her family with the moderator attached to the gun and then discovered she could not reach the trigger to kill herself, the moderator would have been found next to her body. There would have been no reason for her to have removed it and returned it to the gun cupboard before going back upstairs to commit suicide in her parents' room.

vii) The appellant's account of the telephone call from his father could be proved to be false for the following reasons:

a) His father was too badly injured to have spoken to anybody;

b) The telephone in the kitchen was not obviously blood stained;

c) As a matter of common sense, Nevill Bamber would have called the police before the appellant;

d) Had the appellant really received such a call, he would have immediately made a 999 call, alerted the farm workers who lived close to the farmhouse and then driven at speed to his parents home; and

e) Instead he had spoken to Julie Mugford before calling the police. When he subsequently contacted the Police, it was not by way of the emergency system.

viii) He stood to inherit considerable sums of money.

*The defence case at trial*

152. The defence answered the prosecution case in the following way:

i) The witnesses who spoke of the appellant's hatred and dislike of his family were either lying or had misinterpreted what he had said;

ii) Julie Mugford, the jilted girlfriend, had also lied to prevent anybody else being with the man she had loved;

iii) Nobody had seen the appellant cycling to and from the farm in the early hours of 7 August;

iv) Because the appellant had on a number of occasions before and after the killings entered the house by various ground floor windows there was no probative value in the finding of the hacksaw blade etc;

v) Sheila Caffell had killed her parents and children and then taken her own life for the following reasons:

a) She had a very serious mental illness and it was known that even those with no previous history of violence had killed. She had expressed the morbid thought of an ability to kill her own children;

b) Those who carried out "altruistic" killings had been known to indulge in ritualistic behaviour before committing suicide. Sheila Caffell may have replaced the moderator, changed her clothes and washed herself before killing herself, thus explaining the absence of blood staining, the minimum traces of lead on her hands and absence of sugar on her feet;

c) Having lived on a farm and been present at shoots, the appellant's sister would have understood how to load and operate the rifle;

d) The gun, the magazine and the rounds of ammunition had been left close at hand by the appellant in the room where he had heard an argument about placing the children in foster care;

e) The defendant bore no obvious signs of injury;

f) No bloodstained clothing of his had been recovered by the police; and

g) Dr Craig, Dr Vanezis and the first senior investigating officer had all proceeded on the basis that Sheila Caffell was responsible for the killings.

vi) There was a possibility that the blood in the moderator was not from Sheila Caffell, but represented a mixture of Nevill and June Bamber's blood;

vii) In respect of the telephone call from his father, the appellant had not initially appreciated the seriousness of the situation and then had become frightened to go to the farm alone."

11. This application for judicial review relates to the issue of the sound moderator (silencer). As the Court of Appeal explained at [151(vi)], a central part of the prosecution's case was that Ms Caffell's blood was found inside the sound moderator which was recovered from the farm. The prosecution said the blood entered the moderator due to the 'blow back' of blood when Ms Caffell was shot. It said that it would have been impossible for Ms Caffell to have shot herself with the sound moderator attached to the gun because she would not have been able to reach the trigger because her arms were not long enough. Therefore, she must have been shot by someone else, and the prosecution said that person was Jeremy Bamber. The sound moderator was found in a cupboard.

12. The Claimant's Statement of Facts and Grounds asserts at [10] that Michael Turner QC (who represented Mr Bamber at the 2002 appeal) and junior counsel wrote to the DPP in October 2016 asking whether a second sound moderator had been recovered from the farm. He said he had been told during the appeal in 2002 that there were two sound moderators.

13. Mr Turner observed that among the documents disclosed during the 2002 appeal was a handwritten document from a Dr Wingad of the Huntingdon Forensic Science Laboratory in which it was stated that 'there was no record of blood being seen on the outside of the moderator'. He said that this contradicted the evidence given at trial about the presence of blood on the outside of the moderator as well as inside it. Mr Turner argued that this suggested the evidence at trial was compromised whether or not there was a second moderator. They sought disclosure of all material pertaining to the existence of a second silencer and sound moderator; material which might cast doubt on the findings made by the experts pertaining to the silencer or sound moderator at trial and on appeal in 2002; and material which might cast doubt on the integrity of the silencer or sound moderator as an exhibit.

14. On 13 January 2017 the CPS refused disclosure stating that the matters raised did not cast doubt on the safety of the conviction.

15. Over a year later, on 20 February 2018 a pre-action letter was sent on Mr Bamber's behalf. It said that the CPS had not complied with disclosure order made during the 2002 appeal including much of the material now sought. The letter again sought disclosure of documents because it was believed they would 'prov[e] beyond question that two silencers featured in this case not one as the Crown's case relied' (sic).

16. On 11 May 2018 the CPS's Head of Crime, Frank Ferguson, responded. The relevant paragraphs are as follows (emphasis added):

> "You have requested disclosure of a number of documents which you believe are capable of establishing that two silencers featured in the case and not one, as relied upon by the Prosecution at the trial.
>
> To clarify the context of your request, the issue at trial was whether the murderer was Jeremy Bamber (JB) as the prosecution contended, or Sheila Caffell (SC), his adoptive sister, as the defence contended. A critical part of the prosecution case in proving it was JB who fired the shots lay in the expert analysis of blood staining discovered on the silencer which was received in the gun cupboard some days after the murder by members of the family.
>
> *Accordingly, any evidence that suggests that there was or may have been another silencer for the rifle would raise the possibility that it was that other silencer which was used during the shooting or part of the shooting and not the one alleged by the prosecution. Such a possibility would significantly undermine the case against JB, and any material supporting such a possibility would plainly be 'material which casts doubt on the safety of the conviction' given that both the size and smearing on the silencer relied on by the prosecution was central to the claim that it must have been attached to the rifle when SC was shot and SC could not have shot herself with the silencer on.*"

17. However, for the reasons he went on to give, Mr Ferguson rejected the request for disclosure. In summary, he said:

    a. There was no evidence that prosecuting counsel made any concession about a second silencer during the 2002 appeal;

    b. Dr Wingad's minute does not support the existence of a second silencer and the evidence at trial was not inconsistent with what appears in the general examination record for DB/1 (the sound moderator found at the farm);

    c. The renaming of exhibits is a common feature of investigations and the suggestion that the evidence relating to the silencer had been contaminated was speculative.

18. He said that test for disclosure in the Attorney-General's Guidelines and in *Nunn*, supra, was not met. He concluded:

> "I also note from at least 2002 the defence have been aware of the suggestion from two sources referred to, suggesting that two silencers existed. The defence was also in possession of all forensic evidence which demonstrated the changed exhibit numbers of the silencers from the outset and chose not to argue this

> point on appeal, the Criminal Cases Review Commission having referred the case to the Court of Appeal."

19. The Claimant then instructed Mr Philip Boyce, a very experienced forensic scientist who specialises in ballistics and firearms, to prepare a report. As set out at [3.1] of his Report dated 8 August 2018, Mr Boyce was asked to comment on Parker Hale type MM1 sound moderators and to review copies of the original examination notes, diagrams and measurements made. In [5.13] and [6.1] of his Report Mr Boyce concluded, having reviewed the documents, that two sound moderators had been recovered. He said that an examination of the original case files, examination records and notes would assist him in reaching a more detailed conclusion.

20. This Report was sent to the CPS together with a renewed application for disclosure.

21. There was then an exchange of correspondence between the Claimant's solicitors and the CPS in September 2018. On 21 September 2018 Mr Ferguson wrote:

> "Secondly, we do not accept at this stage that two separate silencers were examined. Neither do we accept your assertion that in our letter of 11 May 2018 we gave an indication, open or otherwise that if there were two silencers, that of itself would significantly undermine the case against your client or that your client's conviction was unsafe. That is not what we said and, for the avoidance of doubt the prosecution make no such concession."

22. Mr Ferguson then provided a detailed eight page response to Mr Boyce's Report on 8 November 2018. He concluded at p8:

> "We have carefully considered your letter and attachments but are not persuaded that any of the submissions, material or documents, either taken separately or together, hold out any prospect that any further enquiries by the Crown Prosecution Service will uncover anything that may affect the safety of Mr Bamber's conviction. Accordingly, the CPS does not accede to your requests for disclosure."

23. Mr Boyce provided an initial response in May 2019 and on 26 June 2019 the Claimant's solicitors sent a further and detailed request for disclosure which concluded:

> "The jury were entitled to know that Essex Police seized two paint samples from White House Farm, one on 14 August 1985 and one on 14 September 1985. The CPS stated in their 'November' letter that a silencer was examined by Louise Floate on 12 September 1985. The CPS refuse to disclose this evidence from Louise Floate, or disclose the General Examination Record for the examination of red paint sample RM/1. Disclosure of this evidence would establish that someone had contaminated the knurling pattern of a silencer after 12 September 1985."

24. The reference to paint refers to paint found on the silencer which the prosecution said got there during a struggle with Nevill Bamber during the killings.

25. This produced the decision letter of 9 September 2019 from Ms Ainslie. This can be summarised as follows:

a. She began by referring to the decision of the Supreme Court in *Nunn*, supra (which she wrongly referred to as the Court of Appeal) and the test for disclosure which it establishes. At [30] Lord Hughes said:

> "30 All the stages thus far considered are ones at which the criminal justice process remains afoot, with either trial or sentence or appeal to be catered for. When it comes to the position after the process is complete, the Attorney General's guidelines deal specifically with disclosure of something affecting the safety of that conviction. The relevant paragraph in the most recent edition (2013), echoing the same principle in earlier editions, says this:
>
> '*Post-conviction*
>
> 72. Where, after the conclusion of proceedings, material comes to light, that might cast doubt on the safety of the conviction, the prosecutor must consider disclosure of such material.'
>
> The guideline must mean that not only should disclosure of such material be considered, but that it should be made unless there is good reason why not. Thus read, it is entirely consistent with the principle reflected in the position set out in the paragraphs above in relation to the pre-Crown Court stage, to the pending sentence stage and to the pending appeal stage. Mr Southey's submission entails the argument that the guidelines greatly understate the duty in the circumstances of the present claimant. He is entitled, if Mr Southey is right, to the full extent of the duty which the Crown had had during his trial. That would mean a duty to give active consideration, presumably continuously, to the state of the evidence. And, as the requests made of the police in the present case illustrate, it would mean a duty to respond from time to time to any requests for information, or for access to material, which the convicted defendant makes. The argument appears to be that his right to the performance of that duty endures indefinitely, or certainly whilst he, or perhaps anyone else, asserts that the conviction was wrong."

Ms Ainslie then referred to [35], where Lord Hughes said:

> "35 There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted, of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant. Simple examples might

include a new (and credible) confession by someone else, or the discovery, incidentally to a different investigation, of a pattern, or of evidence, which throws doubt on the original conviction. Sometimes such material may appear unexpectedly and adventitiously; in other cases it may be the result of a re-opening by the police of the inquiry. In either case, the new material is likely to be unknown to the convicted defendant unless disclosed to him. In all such cases, there is a clear obligation to disclose it. Para 72 of the Attorney General's guidelines, quoted above, correctly recognises this. This is, however, plainly different from an obligation not to reveal something new, but to afford renewed access to something disclosed at time of trial, or to undertake further inquiries at the request of the convicted defendant."

At [42] he said:

> "42 It is enough to determine the instant appeal that after conviction there is no indefinitely continuing duty on the police or prosecutor either in the same form as existed pretrials or to respond to whatever inquiries the defendant may make for access to the case materials to allow re-investigation. The duty is properly stated at para 72 of the Attorney General's guidelines, read as explained in para 30 above, with the addition that if there exists a real prospect that further inquiry may reveal something affecting the safety of the conviction, that inquiry ought to be made.

b. At p3 of the letter Ms Ainslie wrote:

> "We have reviewed your client's 28 page report and attachments in which he makes a number of disclosure requests. The requests are fundamentally misconceived because they proceed on an assumption about the scope of the ongoing duty of disclosure which the Court of Appeal in *Nunn* (set out above) expressly rejected. They are based on the premise of the existence of a second silencer or sound moderator and then attempt to establish that there must be some further material which would support that contention.
>
> We note that your client's case (at p21) is that Essex Police took part in deliberate concealment of evidence and misled the court at trial. The Court of Appeal judgment [2002] EWCA Crim 2912 (eg at para 509) carefully considered similar allegations of serious wrongdoing by the police and concluded that there was no evidence at all to support them."

c. She concluded that the Claimant's case on the second silencer was merely 'speculation and assertion' and that nothing had been shown that 'materially may cast doubt upon the safety of the conviction', and accordingly the *Nunn* duty of disclosure did not arise. She therefore declined to carry out a further disclosure exercise.

26. This produced a pre-action letter of 15 November 2019 from the Claimant's solicitors. This letter was accompanied by a number of appendices setting out material which was either required for inspection, or which the Claimant said should be disclosed.

27. The CPS replied on 3 December 2019, maintaining its stance. The author was a specialist prosecutor with the CPS's Appeals and Review Unit. I need not set out the detail, which largely repeated the CPS's earlier arguments, but it is perhaps of relevance to note what was said about Mr Ferguson's apparent acceptance that the existence of a second moderator would 'significantly undermine' the prosecution's case against Mr Bamber:

> "We note that, despite our letter of 21 September 2018, you continue to characterise the letter of 11 May 2018 as containing a concession that the existence of a second silencer would be a basis for concluding that the convictions might be unsafe. The paragraph you rely on in the letter of 11 May clearly states that the writer was setting out the context of your request, which included a summary of the significance which you would argue attaches to your second silencer theory. It was not a concession, as was made clear to you in the later letter of 21 September 2018."

28. This claim was issued on 6 December 2019.

29. Shortly before the hearing before me, the Claimant served a revised and narrowed disclosure request seeking only certain items from the appendices to the pre-action letter. They are largely documents which Mr Boyce requires in order to perfect his Report.

**The parties' cases**

*The Claimant's case*

30. In his clear and helpful Statement of Facts and Grounds, Skeleton Argument, and oral submissions, Mr Stone submitted as follows.

31. The prosecution's duty, *per Nunn*, supra, [35], is to disclose to the defendant any material post-conviction which comes to light which may cast doubt on the safety of his conviction unless there were good reason for not doing so, and, where there was a real prospect that further inquiry might reveal such material, make that enquiry.

32. Mr Stone accepted (Statement of Facts and Grounds, [36]) that in *Nunn*, supra, at [39] Lord Hughes said that judicial review of a refusal to disclose was likely to be inappropriate until the CCRC had considered the case. In his oral submissions he also accepted that the Claimant could go to the CCRC now on the material which currently existed, and invite the CCRC to order disclosure of the material he seeks, but that the Claimant wanted to be in a position to put his best case to the CCRC so as to give himself the best chance of a referral back to the Court of Appeal, given the resource and other limitations on the CCRC. However, he said that it was not an inflexible rule that an applicant *must* approach the CCRC first before seeking judicial review. He said that

the Claimant's case is exceptional, aside from its notoriety, in terms of the complexity of the factual matrix and the huge volume of evidential material. He pointed out that the Court of Appeal's 2002 decision ran to 522 paragraphs across 73 pages.

33. He argued that the CPS's decision not to disclose was unreasonable because it summarily rejected Mr Boyce's opinion without instructing an expert of its own. Whether or not Mr Ferguson made a concession, the issue of the sound moderator was on any view central to the trial and the existence of a second moderator was of crucial importance and would, if proved, significantly undermine the prosecution's case.

34. Mr Stone said that Mr Boyce's Report was reasoned and persuasive, but Mr Boyce had inevitably and properly commented that access to the original case files, examination records, and notes, would assist in forming his opinion, and that required the CPS to disclose the material sought. Mr Stone argued that Mr Boyce had credibly concluded on the evidence available to him that there was a second silencer examined during the police investigation. He said the credibility of his report is enhanced by the fact that he did not purport to be able to reach firm conclusions without access to the source material, i.e. the original case files, examination records and notes.

35. Mr Stone said that the existence of a second moderator would potentially undermine the safety of the convictions. Whilst the prosecution also relied on other evidence, the question of whether Ms Caffell could have shot herself with the moderator affixed to the rifle inevitably became a prominent one. He said there were questions surrounding the correctness of the attribution of the blood to Ms Caffell, and the attribution of the paint to a struggle with Nevill Bamber. He therefore argued the possibility that there was another silencer recovered would have required very careful consideration by the jury.

36. Mr Stone added that, to the extent that the CCRC in its previous reviews of the case had had regard to the 'second silencer' point, the arguments as the Claimant now wished to put them had not been considered previously.

37. Overall, Mr Stone submitted that the request for disclosure (as now formulated) was proportionate, careful and reasoned and the antithesis of a fishing expedition, as the CPS maintains.

38. Mr Stone also argued that the CPS had failed to have regard to the fact that a significant amount of the material that is now sought should have been disclosed in 2002.

*The CPS's case*

39. In response, Ms Darlow argued that:

a. There is an alternative remedy available to the Claimant, ie, an application to the CCRC;

b. The claim fails to comply with the time limit for filing the claim form, as the operative decision was taken on 13 January 2017;

c. The Claimant has failed to make out an arguable case on the facts.

40. I say at once that I am not concerned about the second, delay, point. There is an ongoing duty on the CPS regarding disclosure and if the material which the Claimant seeks is disclosable, it is disclosable. The case centres on Mr Boyce's report of August 2018 and the CPS's response to it thereafter. I accept that the operative decision was that of Ms Ainslie on 9 September 2019. Nothing would be gained by refusing this claim on grounds of supposed delay if it is otherwise sound.

41. In response to the Claimant's argument about alleged non-disclosure in 2001/2002, Ms Darlow said the CPS did not accept the unsubstantiated assertion that it breached one or more disclosure orders made by the Court of Appeal. She said that had there been material non-disclosure it would have been raised at the time. She pointed out that on 2 July 2002 the Court of Appeal ordered that both parties were to notify the Court of 'any failure in compliance with any order made, in writing, detailing all reasons for non- compliance and supply a copy of the letter sent to the other party.'

42. On the merits, Ms Darlow says, in essence, that Mr Boyce's report is complete and can be submitted in its present form to the CCRC. Although Mr Boyce has said he would like to see further documents, his report is not qualified and he expresses his conclusion with certainty. She says that the documents in Appendix 1 to the November 2019 letter before claim have been disclosed in copy form and Mr Boyce has not explained why he needs the originals.

43. As I will explain in a moment, Saini J concluded that there was no credible evidence that a second sound moderator was recovered at White House Farm. Ms Darlow says that the judge was right on this issue for the reasons he gave at [20] and [21] of his reasons for refusing permission. She says the issue was exhaustively analysed by the CCRC during the course of its second review and there was found to be no support for the assertion that two sound moderators were seized. She says the Claimant has failed to advance any credible explanation as to why reliance upon an expert witness, in purported support of the second sound moderator contention, was delayed until 2018. The existence of different exhibit numbers and the history of the recovery of the moderator was known to the Claimant since before his trial in 1986.

44. Perhaps most fundamentally, Ms Darlow argued that the Claimant has failed to mount a coherent or credible argument as to how the existence of a second sound moderator, even if established, could provide a tenable ground of appeal which undermines the safety of the Claimant's convictions. The relevance of the sound moderator was never that only one moderator was recovered, but the existence of depositions of blood and paint upon the item, which supported the contention that the sound moderator was used to kill Sheila Caffell, before being removed. The existence of two sound moderators could not support an argument as to accidental contamination as between the moderators.

45. Ms Darlow also made a number of forensic points on the detail of the evidence in response to points Mr Stone had made. It is not necessary to set these out.

**The decision of Saini J refusing permission**

46. Saini J gave detailed reasons for refusing permission. His decision runs to 23 paragraphs.

47. He said the role of the CCRC as explained in *Nunn*, supra, at [39] were of particular relevance to this claim ([1]). At [2] he said that the Claimant has an adequate alternative remedy in the form of an application to the CCRC and that in any event he had not identified an arguable error of law in the CPS's decision.

48. He said that he would refuse permission on that twin basis; he would not have refused permission on grounds of delay ([3]).

49. At [4] he said that, considering the principles in *Nunn*, supra, it was beyond argument that the CCRC was the appropriate forum to determine the Claimant's arguments (see also at [9]). He said the CCRC had already received extensive submissions about silencers/moderators and is best placed to determine whether the Claimant's claims have substance (see also at [6]).

50. At [12] onwards Saini J gave his reasons for concluding that the Claimant had failed to make out an arguable case that the CPS has made any error of law. He said that he agreed with the CPS's reasons as set out in its letter of 3 December 2019.

51. At [15] he said the value to the prosecution of the moderator was drawn from the evidence of John Hayward that, first, it had paint on it (from a fight with Nevill Bamber) and Sheila Caffell's blood in it (from when she was shot). Second, Sheila Caffell could not have shot herself with the silencer attached to the gun. Saini J said that this conclusions were not weakened by the presence of a second moderator (if there were one).

52. At [19], so far as the suggestion of contamination of the moderator is concerned, Saini J said there was no credible theory as to how it could have taken place. The suggestion that blood could have been dropped in with a pipette was unsupported by any evidence.

53. For the reasons given at [20] the judge said there was no evidence that there was ever a second sound moderator and the suggestion that Mr Turner had been told the opposite by a member of the prosecution team was refuted by the three QCs who have appeared for the Crown at various stages.

54. Overall, at [23] the judge said the Claimant's arguments were speculative and the disclosure request was 'fishing'.

**Discussion**

55. I have carefully considered the arguments of the parties and have read and considered all of the material that has been lodged. I have carefully considered the decision of Saini J and for the reasons that he gave, with which I agree, and for the following reasons, I have concluded that permission should be refused. This does not leave the Claimant without a remedy. Much work has already been done and he has the makings of a fresh submission to the CCRC including an unqualified report from Mr Boyce in support of his case that there was a second moderator recovered from the

farm. That provides him with the necessary basis for arguing that his convictions are unsafe.

56. I have set out the relevant passages from *Nunn,* supra. Whilst it recognised the duty of disclosure which lies on the CPS even post-conviction, it equally emphasised that the CCRC should be the first port of call for a litigant to whom disclosure is not made. Although whether or not to disclose material is always a fact specific determination, I would anticipate that most instances of *Nunn* disclosure will arise in fairly clear cut cases where it is plain that the disclosure will determine the case one way or another, for example, where a forensic sample is discovered that can be tested, or a new scientific technique is developed which did not exist at the time of conviction which can now provide a definitive answer. In such a case if the CPS were to decline disclosure then the case on judicial review would likely be an obvious one. The present case is a world away from that sort of case.

57. If ever there was a case where the CCRC should be approached to make a decision on what is said to be new evidence, it is this one. This is a massively complex case which has been investigated and re-investigated by more than one police force over some 35 years. The body of material is vast. After so many years, and so much litigation, the CCRC is the body undoubtedly best placed to consider the Claimant's arguments. This case is so complicated, and has so many overlapping layers, that judicial review is a hopelessly blunt tool with which to address and determine the Claimant's arguments. Even deciding what disclosure has, or has not, been made is fraught with difficulty Even if the Claimant were right on his primary case, the Court is hardly in a position to say whether the CPS's determination that it would not mean the convictions are unsafe, is one which was not reasonably open to it. It simply does not have the material or understanding of all the detail of the case to be able to make that determination.

58. So, like Saini J, I am unable to say that the CPS erred in law in refusing to make the disclosure sought. Like him, I am not on the material I have seen readily able to accept the premise that the existence of a second sound moderator is capable of affecting the safety of the Claimant's convictions in any meaningful way, notwithstanding what Mr Ferguson said in May 2018. The facts are that the moderator which *was* found had Ms Caffell's blood in it, and she could not have shot herself when the sound moderator was attached to the rifle. I acknowledge Mr Boyce's expertise and the detail in his report, but it needs to be evaluated against the whole *corpus* of evidence that has been gathered in this case. As I have said, the Court is handicapped in doing that.

59. For these reasons, despite Mr Stone's efforts, I refuse this renewed application for permission to seek judicial review.