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Case No: CO/1437/2023
AC-2023-LON-001239

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2023

Before :

THE HONOURABLE MR JUSTICE LINDEN

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Between :

THE KING **On the application of AB** **(By his litigation friend CD)**	**Claimant**
- and -	
UXBRIDGE YOUTH COURT	**Defendant**
-and-	
DIRECTOR OF PUBLIC PROSECUTIONS	**Interested Party**

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- -

Chris Buttler KC and Margo Munro Kerr (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
Benjamin Douglas-Jones KC and Andrew Johnson (instructed by **the Director of Public Prosecutions**) for the **Interested Party**

Hearing date: 14 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.45am on 21st November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

Judgment Approved by the court for handing down.

Mr Justice Linden:

Introduction

1. The parties to this claim for judicial review have agreed that the Director of Public Prosecutions ("the DPP") will withdraw the decision to prosecute the Claimant which is indirectly under challenge and will make a fresh decision on his case. For his part, the Claimant has therefore agreed to withdraw his claim subject to the permission of the Court.

2. There is, however, disagreement on the question of costs and this, therefore, was the Claimant's application for the costs of the claim. As the application was framed in writing, there were two issues for me to determine:

    a. First, should the question of costs be determined under the criminal or the civil costs regime? The Claimant argues that it should be the latter but the DPP disagrees. I was told by Mr Buttler KC that there is no disagreement that if it is the latter, costs should be awarded in the Claimant's favour.

    b. Second, if the Claimant's application should be determined under the criminal costs regime, should an order for costs be made against the DPP? The Claimant argued that one should be, on the grounds that there was *"an unnecessary or improper act or omission by"* the DPP for the purposes of section 19(1) Prosecution of Offences Act 1985. The DPP argued that this section does not confer a power on the High Court to make such an order and that, in any event, there was no impropriety in this case.

3. At the beginning of the hearing Mr Buttler said that he accepted that section 19(1) of the 1985 Act does not confer a power on the High Court to award costs: under this section, the power is only conferred on magistrates' courts, the Crown Court and the Court of Appeal. He said, however, that this made his case stronger on the first issue. He also indicated that he would be submitting that, in any event, the conduct of the DPP in deciding to prosecute the Claimant was unnecessary or improper and that therefore this was the type of case in which an award of costs in the Claimant's favour would be appropriate pursuant to the civil costs regime, and consistent with what is contemplated under the costs regime applicable to criminal causes.

4. I was also told at the beginning of the hearing that the DPP has now re-made his decision and has again concluded that it is in the public interest to prosecute the Claimant. The reasons for that decision were not available to the Claimant at the hearing and were not put before me or debated.

Context

5. The underlying criminal proceedings relate to an alleged robbery of a 17 year old boy on 18 March 2022. The Claimant and an accomplice are alleged to have jointly used force to steal the boy's mobile phone and to demand his password or PIN. When the boy's mother became involved shortly after the robbery, the Claimant is alleged to have twisted her arm and pushed her to the ground whilst his accomplice punched the boy repeatedly in the head, before both made good their escape.

6. The Claimant was born on 8 September 2007, and was therefore 14 at the time of the offending. The Single Competent Authority ("SCA") has made a conclusive grounds decision that he is a

victim of trafficking on three occasions, including on 25 November 2022 when it accepted that there was a nexus between the trafficking of the Claimant and the index offences. This, in summary, was that the Claimant was selling drugs as part of a drug dealing operation, that he owed the gang £1,700 and that he was told to steal the boy's phone. If the Claimant did this his debt would be cleared and, if he did not, he and his family would face torture. This account was accepted by the SCA on the balance of probabilities.

7. The CPS decided that the Claimant should be prosecuted for the robbery and also face 2 charges of battery. That decision was reviewed by the DPP in the light of the 25 November 2022 decision of the SCA but it was confirmed that the prosecution would proceed. At a hearing in the Youth Court on 3 March 2023, the Claimant therefore sought a stay of the criminal proceedings on the grounds that the reviewing lawyer for the prosecution had not considered the public interest in deciding to proceed. The Claimant's application was refused on the grounds that the relevant guidance had been followed and the public interest in the prosecution had been considered.

8. On 19 April 2023, the Claimant issued a claim for judicial review. Although in form the challenge was to the decision of the Youth Court to refuse a stay, in substance the pleaded grounds for review indirectly challenged the DPP's decision to prosecute. The DPP filed his Acknowledgment of Service and Summary Grounds for contesting the claim on 3 May 2023 and, on 17 May 2023, Lavender J ordered a rolled up hearing.

9. Subsequently, Mr Buttler was instructed on behalf of the Claimant and he advised that a request be made pursuant to CPR Part 18 for clarification of the decision making process which led to the prosecution. This was done on 9 June 2023 and the reply is dated 28 June 2023. In the light of this reply, on 3 August 2023 the Claimant applied to amend his Statement of Facts and Grounds to take a point which is now conceded by the DPP and which resulted in the agreement that a fresh decision would be made and the claim for judicial review would therefore be withdrawn.

10. That point is as follows. Whether or not a potential defendant in criminal proceedings would have a defence under s45 of the Modern Slavery Act 2015, and the Claimant would not have such a defence in relation to the charge of robbery, prosecutors are required to consider whether it is in the public interest to prosecute a suspect who is a victim of human trafficking. They do so in accordance with the CPS guidance on "Modern Slavery, Human Trafficking and Smuggling" which requires the application of a four stage test. Stage 4 requires consideration of whether it is in the public interest to prosecute. It requires the seriousness of the offence, the level of culpability of the victim of trafficking, the harm caused to the victim of the offence and the age and maturity of the suspect to be taken into account. In addition to this, where the suspect is an adult, the Guidance states that the prosecutors should consider:

    - "*Whether there is a nexus between the trafficking/slavery or past trafficking/slavery and the alleged offending; and, if so,*

    - *Whether the dominant force of compulsion from the trafficking/slavery or past trafficking/slavery acting on the suspect is sufficient to extinguish their culpability/criminality or reduce their culpability/criminality to a point where it is not it the public interest to prosecute them."*

11. This will be referred to as "the dominant force of compulsion test".

12. In the case of a suspect who is a child there is the same requirement to consider whether there is a nexus between the trafficking and the offending, but the second question is as follows:
    - *"…; and, if so,*
    - *Whether the circumstances extinguish the child's culpability/criminality or reduce it to the point where it is not in the public interest to prosecute them. If there was compulsion, then this will reduce the public interest, but it is not a necessary element. As for an adult, the more serious the offence, the stronger the countervailing factors will need to be before it is not in the public interest to prosecute."*

13. So, in the case of a child, a broader range of circumstances than the dominant force of compulsion may lead to the conclusion that they should not be prosecuted, provided that the circumstances extinguish the child's culpability or criminality, or reduce it to a sufficient extent for it not to be in the public interest to prosecute. If there was compulsion, this will support the argument that prosecution is not in the public interest, but compulsion is not a prerequisite or the only circumstance which may satisfy the test.

14. The DPP now accepts that the caseworker in the Claimant's case applied the second limb of the adult test rather than the second limb of the test applicable to a child and that this was an error of approach. As noted above, he therefore agreed to consider that public interest question again, applying the Guidance correctly.

Legal framework

15. Section 51(1) of the Senior Courts Act 1981 provides that the costs of and incidental to all proceedings in, amongst others, the High Court shall be in the discretion of the court. Section 51(5) provides that:

> *"Nothing in subsection (1) shall alter the practice in any criminal cause, or in bankruptcy."*.

16. As is well known, the CPR include various rules and practice directions which govern the exercise of the court's discretion but it is not necessary for present purposes to set these out.

17. In *Murphy v Media Protection Services Ltd* [2012] EWHC 529 (Admin), [2013] Costs LR 16 at [15] the Divisional Court held, as part of the ratio of the case, that:

> *"Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime".*

18. Again, it is not necessary to set out the details of "the criminal costs regime". This refers to Part II of the Prosecution of Offences Act 1985 and the regulations, rules and guidance made pursuant to these provisions. As is well known, Part II provides, in specified circumstances, for awards of costs out of central funds (sections 16-17), awards of costs against the accused (section 18) and other awards of costs against a party, a legal representative and against a third party (sections 19, 19A and 19B

respectively), and for regulations to be made by the Lord Chancellor to carry these provisions into effect (section 20).

19. *Murphy* was followed by a Divisional Court at first instance in *Darroch & Another v Football Association Premier League Ltd* [2014] EWHC 4184 (Admin) where it was held that there was nothing exceptional about that case. The Court of Appeal in the *Darroch* case dismissed an appeal from the decision of the Divisional Court on the grounds that it was an appeal in a criminal cause or matter and the Court of Appeal therefore did not have jurisdiction. In the course of doing so, it also referred to the *Murphy* principle without questioning its correctness (see [2016] EWCA Civ 1220 e.g. at [35]-[38]) although it said, obiter, that there was no jurisdiction under section 51 of the Senior Courts Act 1981 to award the costs of the proceedings in the Crown Court or the magistrates' court as opposed to the costs of the appeal to the High Court [26]. In *Darroch*, the Court of Appeal also held that there is no difference in approach as between appeals by case stated and judicial review where the proceedings are in a criminal cause or matter, and nor does the case lose its criminal character in relation to the issue of costs: [14] and [18].

20. The principle identified by the Divisional Court in *Murphy* was also applied by Divisional Courts in *Lord Howard of Lympne v Director of Public Prosecutions* [2018] EWHC 100 (Admin) and *R (Bahbahani) v Ealing Magistrates Court* [2019] EWHC (Admin) 1385. And I note that in *Bahbahani* the Divisional Court rejected a submission that the *Murphy* principle was inapplicable in proceedings for judicial review and/or had been undermined by the decision of the Court of Appeal in *Darroch*. At [100] the Divisional Court said:

> *"We are not persuaded…that the principle set out in Murphy is wrong or that we should not follow it. This is a claim for judicial review in a criminal cause or matter, and the criminal costs scheme should apply unless there are exceptional reasons to take a different course."*

The Claimant's argument

21. Mr Buttler does not dispute that his application for costs is made in the context of proceedings in a criminal cause or matter: see, in relation to decisions whether to prosecute, *R (Belhaj) v Director of Public Prosecutions* [2018] UKSC 33, [2019] AC 593. Nor did he directly challenge the correctness of the *Murphy* principle in his written submissions although he said, incorrectly as he conceded in his oral submissions, that what Stanley Burnton LJ said at [15] of his judgment in *Murphy* was *"a passing observation"*. Nor could Mr Buttler realistically challenge the correctness of this principle before me given the authorities to which I have referred: see *R v Greater Manchester Coroner ex parte Tal* [1985] QB 67 at 81C/D. As I understood his argument he did maintain, however, that if *Murphy* is read as the Divisional Court holding that it did not have jurisdiction under section 51 of the 1981 Act or declining to exercise, or surrendering, that jurisdiction, it was wrong. If, however, the Court was making a choice of which of its overlapping costs powers to exercise then he accepted that he could not challenge the correctness of the *Murphy* principle.

22. Mr Buttler's argument was that, in any event, the *Murphy* principle should be approached with caution given, he says, that it was an unreasoned statement and given that the Divisional Court did not explain what would amount to an exceptional case, or

what principles should be applied in identifying whether a criminal case was one to which the civil costs regime should be applied. The *Murphy* principle was also stated in the context of an application which included the costs of the proceedings in the criminal courts, so that the Divisional Court may have had in mind the fact that it was a civil court dealing with costs incurred in the criminal courts. Here, the application is solely for the costs of the claim for judicial review. Moreover, in *Murphy* there was a power under which costs might realistically have been awarded under the criminal costs regime. In the present case it is now common ground that costs could not be awarded in the Claimant's favour under section 19(1) of the 1985 Act.

23. Mr Buttler went on to submit that exceptionality is not a test and he referred me to *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801, [2008] 2 All ER 28 at [29]-[31] including the dictum of Sedley LJ that *"No doubt ...successful art 8 claims will be the exception rather than the rule; but to treat exceptionality as the yardstick of success is to confuse effect with cause"*. Mr Buttler submitted that it is therefore necessary to identify the principles to be applied in deciding, albeit as a matter of discretion, whether the civil law approach to costs should be applied in a criminal case or whether costs should be determined under the criminal costs regime.

24. Mr Buttler submitted that if a test of exceptionality applies it could be justified on the basis that once a prosecution has been commenced the prosecutor is acting as a minister of justice: see *R v Evans (No 2)* [2015] 1 WLR 3595 at [25], [29] and [121]. This function is inherently of a different character to decisions which are typically amenable to judicial review. The costs rules in criminal proceedings, once proceedings have been commenced, recognise that the prosecutor is acting in the public interest and they allow greater leeway to make decisions about the conduct of the proceedings without undue concern as to consequences in costs. Hence, for example, costs will only be awarded under section 19(1) of the 1985 Act if they are incurred as a result of an unnecessary or improper act or omission.

25. In contrast, submits Mr Buttler, the prosecutor's decision as to whether there is a public interest in a prosecution is similar in nature to the sort of decision which is typically considered in the context of a claim for judicial review. Moreover, where a prosecutor makes an unlawful decision that it is in the public interest to prosecute then, ex hypothesi, s/he is not acting in the public interest and the rationale for reducing the prosecutor's exposure to costs falls away. There is no greater justification for disapplying the principle that, for example, costs follow the event in relation to an evaluative judgment on whether to prosecute than in relation to a wide range of evaluative judgments that other public bodies make. A prosecutor should also be encouraged to make an early decision to concede a challenge to such a decision in the same way as any other public body which concludes that it has acted unlawfully. The rationale for the approach to awarding costs where judicial review proceedings are resolved by consent, explained in *R (M) v London Borough of Croydon* [2012] 1 WLR 2607, at [61] in particular, therefore applies with equal force. Mr Buttler also referred me to *In re appeals by Governing Body of JFS & others* [2009] UKSC 1, [2009] 1 WLR 2353 at [24]-[25] in support of the proposition that it is relevant to take into account the difficulties for firms of solicitors which do legal aid work if they are not able to recover their costs in this type of case.

26. These contentions did not lead Mr Buttler to submit, as they might suggest, that therefore the *Murphy* principle does not apply to judicial reviews of decisions about whether a prosecution is in the public interest. Rather, he said that they increase the likelihood that a court will accept that a successful challenge to a decision to prosecute is an exceptional case. They explain why the application of the civil costs regime is statistically or numerically exceptional – challenges to prosecutorial decisions rarely succeed – and why they are what he called "conceptually exceptional". They are conceptually exceptional because they relate to a decision which takes place outside the process for determining criminal liability. In this connection, he relies on the summary of the reasoning of the Divisional Court in *Belhaj* (supra) which was given by Lord Sumption at [12] of his judgment when the matter reached the Supreme Court.

27. Here, submits Mr Buttler, the caseworker was acting as an ordinary administrative decision maker rather than an officer of the court. There is therefore no principled reason why the civil law approach to costs should not apply.

28. As noted above, the provision relied on by Mr Buttler to support his argument that the DPP would have been ordered to pay the costs if the application for a stay had succeeded in the Youth Court and ought, therefore, to be made in the proceedings for judicial review is section 19(1) Prosecution of Offences Act 1985. This provides as follows:

> *"(1) The Lord Chancellor may by regulations make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings has incurred costs as a result of an unnecessary or improper act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs."* (emphasis added)

29. He submits that the application of the adult test for whether the culpability or criminality of the suspect has been extinguished, rather than the test applicable to children, was an unnecessary or improper act or omission. He makes a comparison with the facts of *Director of Public Prosecutions v Denning* [1991] 2 QB 532 where the test was held to have been satisfied in a case where the charge before the justices was using or permitting a goods vehicle to be used where the second axle weight of the vehicle exceeded the authorised limit contrary to section 40(5) of the Road Traffic Act 1972. The witness statement in support of the charge referred to the front axle and the gross weight of the vehicle, but not the second axle. In holding that the justices had been entitled to make an order for costs against the prosecution Nolan LJ said at 541C/D:

> *"In these circumstances, it seems to me impossible to maintain that there were no grounds upon which the justices could reasonably conclude that there had been an improper omission on the part of the prosecution. I would add in this connection that the word "improper" in this context does not necessarily connote some grave impropriety. Used, as it is, in conjunction with the word "unnecessary," it is in my judgment intended to cover an act or omission which would not have occurred if the party concerned had conducted his case properly."*

30. Mr Buttler also submitted that the error on the present case was the sort of *"clear and stark error"* which was contemplated in *Evans (No 2)* (supra) at [146] . In that case Hickinbottom J (as he then was) carried out a comprehensive analysis of the authorities

including *Denning*. At [144] and [145] he emphasised that the test is one of impropriety – failing to conform to prevailing standards of behaviour [119] - and not merely unreasonableness, and that the courts should be careful not to impose too high a burden or standard on the prosecuting authority. The section 19 jurisdiction is summary in nature so the conduct of the prosecution must be starkly improper, such that no great investigation into the facts or the decision making process is required. Bad faith will almost always suffice but otherwise each case will turn on its own facts and context. At [146] Hickinbottom J said:

> *"146. .. I consider that cases in which it will be appropriate to make (let alone grant) a section 19 application against a public prosecutor will be very rare, and restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. For example, where it is alleged that the decision to prosecute or a similar prosecutorial decision is the improper act on which a section 19 application is founded, it is difficult to conceive of circumstances in which it could succeed unless the decision was shown to be unlawful in a public law sense, ie leaving aside decisions unlawful because made in pursuance of an unlawful policy of the prosecutor (or made other than in accordance with the prosecutor's own lawful policy), if the decision was one which no reasonable prosecutor could have made. If it is a decision that a reasonable prosecutor could have made, then generally a section 19 costs order will not be appropriate."*

31. Mr Buttler appeared to submit that Hickinbottom J was therefore stating that any public law error would satisfy the test or, at least, any clear public law error. But Mr Buttler also said that he did not need to identify the precise boundaries in terms of the sorts of public law errors which would suffice because Hickinbottom J had specifically included decisions made otherwise than in accordance with the prosecutor's own lawful policy.

32. Hence, submitted Mr Buttler, this is the sort of case in which costs would be awarded in the criminal courts. I should therefore make such an award in the exercise of the court's powers under section 51(1) of the Senior Courts Act 1981.

Discussion and conclusion

33. Beguiling though Mr Buttler's submissions were, and skilfully made, I reject them. With respect to him, much of his argument was in truth an attempt to challenge the correctness and authority of the *Murphy* principle. This flew in the face of the decision of the Divisional Court in *Bahbahani* where arguments similar to some of Mr Buttler's were considered and rejected and where, in any event, the application of the *Murphy* principle was affirmed. In my view, the principle is well established.

34. As to the suggestion that in *Murphy* the Divisional Court may have been refusing to exercise jurisdiction etc, in my view the Court in *Murphy* was saying no more than this: Parliament has enacted a framework for the determination of costs in civil cases and it has enacted a framework for the determination of costs in criminal cases. Each identifies the orders which may be made and the statutory conditions which require to be satisfied if they are to be made. Parliament intended that costs would only be awarded in a criminal cause or matter where such an award is in accordance with the statutory provisions applicable to such causes or matters. The proceedings do not lose their criminal character when they are the subject of an appeal or a claim for judicial review

in the High Court, and nor do they for the purposes of the determination of costs of such proceedings. So it would only be in exceptional circumstances that a court would use its powers under section 51(1) of the Senior Courts Act 1981 to make an award of costs in a criminal case which would not be available under the provisions applicable to criminal cases.

35. The application of the *Murphy* principle flows from this. The acknowledgement by the Divisional Court that there may be exceptional cases, where the application of the civil costs regime is appropriate, is not a statement of how often, statistically, the civil costs regime will apply in this type of case. It is a reference to the sorts of reasons or features of the case which will justify the application of that regime, as [100] of *Bahbahani* confirms, and to the need for those reasons to justify a departure from the approach which Parliament intended in criminal cases. The reasons for applying the civil costs regime must take the case out of the run of criminal cases and they must be compelling.

36. *Murphy* was truly exceptional and it is a good illustration of the sort of case which may fall into this category. It concerned a private prosecution of a publican under section 297(1) of the Copyright, Designs and Patents Act 1988 – dishonestly receiving a programme with intent to avoid payment - for screening Premier League Football matches in her pub using her decoder card and equipment. The case was effectively brought as a test case which sought to protect a very substantial profit stream of the Football Association Premier League Limited. The question whether the publican had committed an offence required a reference to the Court of Justice of the European Court on complex, generally applicable, points of EC law. Ultimately, and at the risk of oversimplifying, it was held that because she had paid for her decoder card she was not guilty of an offence under section 297 as a matter of law, and her convictions were quashed. Because of the nature of the issues, and because it was a test case, the hearings were conducted in a manner which was indistinguishable from a hearing in the Chancery Division or in the Civil Division of the Court of Appeal. Stanley Burnton LJ described the appeal as being *"unusual"* and *"very far from being a typical appeal against conviction for a summary offence"* (emphasis added).

37. In these circumstances the Divisional Court in *Murphy* was prepared to apply the civil law approach to the determination of costs. But, even then, it is worth noting that in *Darroch* the Divisional Court did not accept that prosecutions under section 297 based on essentially the same fact pattern should be regarded as exceptional in the relevant sense. *Murphy,* it said, was truly a test case. Although points of law were raised in *Darroch* the matter was conducted like many prosecutions. The fact that points of EU law were raised did not of itself make the case exceptional and there was no reference to the European Court. *Darroch* illustrates the point that the category of case in which there may be a departure from the criminal costs regime in a criminal cause or matter is very narrow indeed.

38. If one then asks whether there is anything about the present case which took it out of the run of criminal causes or matters, or which meant that it was very far from being a typical claim for judicial review of a decision of the Youth Court, the answer is a resounding "No". The decision directly under challenge in this case was a decision to refuse an application to stay the proceedings in the Youth Court. That was a routine decision in a routine criminal case with which the criminal courts are well accustomed to dealing. Indeed,

the case is so far from being exceptional that it is not necessary to accept Mr Buttler's invitation to explore where the boundary may lie or what principles might apply on different facts.

39. Even if the claim is analysed as a challenge to the decision of the DPP to prosecute, the important point about *Belhaj* for present purposes is that the Supreme Court, overruling the Divisional Court, held that a claim for judicial review of a decision not to prosecute did amount to *"proceedings in a criminal cause or matter"*. Once it is accepted that the present claim was also in a criminal cause or matter the *Murphy* principle applies. To hold that, nevertheless, the fact that the decision under review is a decision that it was in the public interest to prosecute should be regarded as an exceptional circumstance would seem to me to be contrary to principle and indeed, contrary to any sensible application of the requirement that the case be exceptional. Nor, in my view, does the fact that the decision was legally flawed, of itself, render the case an exceptional in the relevant sense. The fact that the claim is conceded may provide a basis for an award of costs if the civil costs regime is applicable, but it does not answer the prior question whether that regime is applicable.

40. I do not agree that decisions about whether a prosecution is in the public interest are materially different in nature to other decisions made by the prosecutor in the course of criminal proceedings. The decision to which objection has been taken in the present case is the decision to prosecute and that decision was based on various considerations, including the prospects of a conviction. It is artificial to slice it up into component parts for this purpose.

41. Moreover, I do not accept that the rationale for giving the prosecutor greater leeway in relation to costs is inapplicable or less powerful when the prosecutor is considering the public interest in a prosecution. It remains the case that the prosecutor is operating in the field of criminal law enforcement and as a minister of justice. The limited scope for challenges to decisions to prosecute or not to prosecute is well recognised (see e.g. [29] of the judgment in *Evans*), and it is consistent with the rationale for this position that, when making this type of decision, prosecutors should not feel inhibited by the risk of liability in costs provided they are not acting improperly or unnecessarily. Moreover, subject to the same proviso, in carrying out this function they are acting in the public interest even if their decision is subsequently accepted to be legally flawed.

42. As to Mr Buttler's argument that section 19(1) of the 1985 Act would have been satisfied in the Youth Court and that this, in itself, provides a basis for concluding that the case is an exceptional one, again, this is flawed. The prior question is whether there are exceptional circumstances such that the civil costs regime should be applied to a criminal cause or matter. If the conclusion is that there are not, the criminal regime applies and costs should be awarded if it is in accordance with that regime to do so. If, as in the present case, the provisions of the criminal costs regime on which an applicant would have wished to rely does not provide for an award of costs against a party in the High Court it would be contrary to the intention of Parliament to treat this as an exceptional circumstance which justified awarding costs under section 51(1) Senior Courts Act 1981 given the terms of section 51(5) and given that section 19(1) reflects the intention of Parliament that costs should not be awarded against a party to a criminal cause in the High Court.

43. As to whether, aside from this point, costs would have been awarded had the DPP's error surfaced in the Youth Court, *Denning* was a case on its facts. The justices had ordered that the prosecution pay the costs and the question for the Divisional Court was whether they could reasonably have concluded that the statutory test was satisfied. The

Divisional Court went no further than to hold that they were entitled to come to this conclusion. The justices had not done so simply on the basis that the wrong axle was specified in the charge. A key defect in the prosecution was the unreliability of the weighbridge which had been used to ascertain the weight of the vehicle and there had been a series of failings by the prosecution to review the file and to take action in response to the defects in the case. In the meantime, the defence had incurred considerable expense in commissioning expert evidence to show that the weighbridge evidence was unreliable. *Denning* was also a case in which it was, in effect, admitted that the defendants should never have been prosecuted and there was an application to discontinue the proceedings.

44. As to the interpretation of [146] of the judgment in *Evans*, there is a danger in treating this paragraph as if it replaces the terms of section 19(1) rather than focussing on the question whether the conduct of the DPP in this case was *"improper"*. What Hickinbottom J said was intended to impress on the reader the fact that the threshold is a very high one. In my view he was not saying that any public law error, provided it is clear, will mean that the maker of the error has acted improperly. Nor was he saying that a failure to apply a policy correctly or at all is necessarily improper. The thrust of [146] is that generally, where there is no evidence of bad faith, the decision will need to be one which no reasonable prosecutor could have made if the court is to hold that it was improper. This tends to be confirmed by [148 (vi)] where he said this in his summary of the principles which he had derived from the case law:

> *"Each case will be face-dependent; but cases in which a section 19 application against a public prosecutor will be appropriate will be very rare, and generally restricted to those exceptional cases where the prosecution has acted in bad faith or made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him. The court will be slow to find that such an error has occurred. Generally, a decision to prosecute or similar prosecutorial decision will only be an improper act by the prosecution for these purposes if, in all the circumstances, no reasonable prosecutor could have come to that decision."*

45. This analysis is also consistent with the summary of the principles provided by Coulson J (as he then was) in *R v Cornish and Maidstone Tunbridge Wells NHS Trust* [2016] EWHC 779 (QB) at [16] which was approved by the Court of Appeal in *Asif v Ditta and another* [2021] EWCA Crim and followed in *Coll v Director of Public Prosecutions* [2022] EWHC 2653 (Admin) at [8] to which I was referred.

46. This being so, I do not accept that costs would have been awarded in the Youth Court in the present case had the error in the application of the Guidance emerged there. It seems to me that the relevant decision in this case was the decision to prosecute the Claimant. That is the step which led to costs being incurred by him and which he would have to show was improper or unnecessary. However, all that has been established at this stage is that in assessing the various factors which required to be assessed at stage 4 of the process of deciding whether to prosecute, the case worker mistakenly took an overly narrow approach to the circumstances which might lead to the conclusion that it was not in the public interest to do so. She considered a number of circumstances of the case but there may have been others which went to the issue of the public interest. There is no suggestion of bad faith and it has not been established that the decision that it was in the public interest to prosecute the Claimant was one which no reasonable prosecutor

could have taken. Indeed, all that has been conceded is that the matter should be reconsidered. This is not a case, like *Denning*, where it is accepted that the case should never have been brought.

47. As Mr Douglas-Jones KC pointed out, without contradiction from Mr Buttler, the information sought in the judicial review proceedings pursuant to CPR Part 18 could have been sought in the Youth Court pursuant to section 8 of the Criminal Procedure and Investigations Act 1996. Had this step been taken, there would have been no need for a claim for judicial review, either because the prosecution would have made its concession at that stage or because the application for a stay would have succeeded. It would be surprising, then, if the fact that the information was provided in the context of the claim for judicial review was a basis for awarding costs which would not have been awarded in the Youth Court.

Conclusion

48. So for all of these reasons I accept Mr Douglas-Jones' submission that there are no exceptional features of this case. The claim for judicial review concerned a routine prosecution brought by the relevant public authority. There was nothing to take it out of the ordinary run of cases which come before the criminal courts. The criminal costs regime therefore applies to the Claimant's application and it is common ground that under that regime I do not have a power to order that the DPP pay the costs of the claim.

49. I therefore permit the Claimant to withdraw his claim but dismiss his application for costs.