

Neutral Citation No: [2024] EWHC 2860 (Admin)

Case No: AC-2023-BHM-000208

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

Birmingham Civil and Family Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 29th October 2024

Page Count: 10
Word Count: 0
Number of Folios: 0.14

Before:

MR JUSTICE EYRE

Between:

DIRECTOR OF PUBLIC PROSECUTIONS

Claimant

- and -

NORTHAMPTON MAGISTRATES' COURT

Defendant

- and -

(1) MARK BEATY
(2) GARETH PHILLIPS

Interested Parties

MEGAN MILLAR (instructed by **the Crown Prosecution Service**) for the **Claimant**
CHRISTIAN JOWETT (instructed by **Harrison Clark Rickerbys**) for the **Interested Parties**

JUDGMENT
(Approved Transcript)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE EYRE:

1. I have to rule on the question of whether I have the power to award costs in this judicial review claim. The Claimant sought judicial review of the district judge’s decision as to the costs of criminal proceedings. The criminal proceedings were dismissed and the district judge made a costs order against the prosecution. I upheld the prosecution’s judicial review claim on the footing that the district judge’s approach to the making of an order of costs against a prosecutor was wrong in law and that he failed to apply the correct approach.
2. I now have to rule on the question of whether in this case I have power to make a costs order in favour of the Claimant, the Director of Public Prosecution.

The Relevant Legislation.

3. It is common ground that the matter is a criminal cause or matter.
4. The applicable and potentially applicable legislation is as follows. Section 51 of the Senior Courts Act 1981 provides as follows at (1)(b):

“Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—

...

(b) the High Court ...

shall be in the discretion of the court.”

5. Section 28A of the same Act, insofar as it is relevant, provides that:

“(1) This section applies where a case is stated for the opinion of the High Court—

(a) by a magistrates’ court under section 111 of the Magistrates’ Courts Act 1980.

...

(3) The High Court shall hear and determine the question arising on the case ... and shall—

- (a) reverse, affirm or amend the determination in respect of which the case has been stated; or
 - (b) remit the matter to the magistrates' court ... with the opinion of the High Court,
- and may make such other order in relation to the matter (including as to costs) as it thinks fit.”

6. I have been referred to sections 16, 17, 18 and 19 of the Prosecution of Offences Act 1985. Section 17 is headed “Prosecution costs”, and subsection (1) says:

“Subject to subsections (2) and (2A) below, the court may—

...

- (b) in any proceedings before a Divisional Court of the Queen’s Bench Division or the Supreme Court in respect of a summary offence;

order the payment out of central funds of such amount as the court considers reasonably sufficient to compensate the prosecutor for any expenses properly incurred by him in the proceedings.

(2) No order under this section may be made in favour of—

- (a) a public authority ...”.

The Arguments in Summary.

7. The competing submissions can be summarised as follows.
8. Miss Millar, for the Claimant, submits that the effect of the decision of the Divisional Court in *Hargreaves v Powys County Council* [2023] EWHC 13 (Admin), [2023] 1 WLR 1789 is that the civil costs regime prevails in these circumstances. She says that even though *Hargreaves* was concerned with an appeal by way of case stated the rationale underlying the approach taken there also applies here. In short, Miss Millar’s submission was that the effect of *Hargreaves* is that where there is only one regime for the recovery of a prosecutor’s costs that regime applies. She submits that the 1985 Act does not make provision for the recovery of costs by a public authority prosecutor, such as the Claimant. Therefore, Miss Millar says the 1985 Act regime is inapplicable and, as a consequence, the only regime that is applicable is that under section 51 of the Senior Courts Act.

9. Mr Jowett, for the Interested Parties, submits that the *Hargreaves* approach is limited to an appeal by way of case stated and that section 28A of the Senior Courts Act does not apply in the circumstances of this case. He submits that, here, there is a choice between two regimes: that under the 1985 Act and that under the Senior Courts Act. He says that where there are two potentially applicable regimes the criminal regime applies unless there are exceptional circumstances. There are no exceptional circumstances here and therefore the criminal regime applies.

Discussion.

10. Miss Millar’s elegant submissions have given me pause for thought but for the following reasons I am satisfied that the Interested Parties’ arguments are right.
11. The authorities have adopted a consistent approach in judicial review cases in criminal causes or matters which is to say that there is a choice between two regimes and that the criminal regime is to apply unless either the circumstances or the case is exceptional.
12. That approach is derived from the decision of the Divisional Court in the case of *Murphy v Media Protection Services* [2012] EWHC 529 (Admin), [2013] 1 Costs LR 16. At [15] Stanley Burnton LJ, having taken the view that there were two potentially applicable regimes, said this:
- “Clearly, save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime.”
- He went on to say that the particular case was exceptional and that the civil regime was applied because of that exceptionality.
13. The same approach as to the choice between the two regimes was applied by the Divisional Court in the judicial review case of *R (Bahbahani) v Ealing Magistrates’ Court* [2019] EWHC 1385 (Admin), [2020] QB 478. There in the judgment of the court,

Holroyde LJ and Dove J, explained at [91] the approach set out in *Murphy*, to which I have just referred. They considered the decision of the Divisional Court in *Darroch v Football Association* and also the subsequent appeal decision in that case, and then said this at [100]:

“The approach laid down in *Murphy* has been followed by the Divisional Court on at least two occasions. The decision of the Court of Appeal in *Darroch CA* is of course binding on us, and we would not follow the previous decisions of the Divisional Court if the decision in *Darroch CA* required a different approach. However, the judgments of the Court of Appeal in *Darroch CA* did not include any explicit disapproval of the principle that the criminal costs scheme should be applied (within its proper limits) unless there are exceptional circumstances making it appropriate for the High Court to make an award under the civil costs scheme. Nor, in our view, is any disapproval of that principle to be inferred from the reasons given by the Court of Appeal for its decision on the issue of jurisdiction. Moreover, the decision in *Darroch CA* makes it clear that in this context, there is no necessary distinction to be drawn between an appeal by way of cases stated and a claim for judicial review which seeks the quashing of a criminal conviction. We are not persuaded by Mr Mably's submissions 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.”

14. A similar approach was taken by Linden J in the case of *R (AB) v Uxbridge Youth Court* [2023] EWHC 2951 (Admin), [2023] Costs LR 1733. At [34] and [35] he said:

“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.”

15. Fordham J applied a similar approach in *R (DPP) v Manchester City Magistrates' Court* [2024] EWHC 111 (Admin) although concluding on the facts that the circumstances of that case there were exceptional so as to bring the civil costs regime into play.

16. Then in the case of *R (Morjaria) v Westminster Magistrates' Court* [2024] EWHC 178 (Admin), the Divisional Court, consisting of William Davis LJ and Stacey J, addressed a claim for costs in a judicial review claim. They concluded that the criminal costs regime did not permit any order of costs to be made in favour of the interested parties in that case and concluded that there were no exceptional circumstances. The court's conclusion as to exceptional circumstances was explained at [12] and then, at [13], the court said:

“It follows we do not make any order for costs in favour of the interested parties. It may be said there is a lacuna in the criminal costs regime in relation to costs in the criminal case heard in the High Court. It is not for us to fill that lacuna by an unjustified extension of a very narrow jurisdiction.”

17. Against that background I turn to *Hargreaves*. In *Hargreaves* the Divisional Court, President of the King's Bench Division and Hilliard J, were dealing with an appeal by way of case stated. The court concluded that the prosecutor's costs were recoverable pursuant to section 28A of the Senior Courts Act. At paragraph [16] they addressed *Murphy*, explaining that it was concerned with the costs of a person who had been a defendant in criminal proceedings, including the costs of proceedings in the Divisional Court. They said that, in such a case, there were indeed two different possible regimes for payment of those the scheme pursuant to s.28A(3) of the 1981 Act was potentially more generous than the scheme under the 1985 Act because it allowed for the possibility that legal costs can be recovered. The crux of the court's reasoning was set out in the first part of [23] and it that passage on which Miss Millar relies. The court said this: consisting of the

“We are not concerned with an application for costs on behalf of a person who has been convicted in the magistrates' court and in respect of whom there are two possible regimes for costs. We are not concerned with

the *Murphy* test of exceptionality because there was only one scheme available here to the prosecutor and that is pursuant to s.28A(3) [of the 1981 Act]. In our judgment, that is the power which is available in this case to make an order for costs against the appellant. The fact that there is no power at all under the [1985] Act does not mean that the power under s.28A(3) cannot be exercised in this case if we think it appropriate to do so. It is the very absence of a power under the [1985] Act which brings s.28A(3) into play where prosecution costs are concerned.”

18. It is that last sentence on which Miss Millar hangs her argument. She points to section 17 of the 1985 Act and to the exclusion in subsection (2) there of orders in favour of public authorities. Miss Millar says that the consequence of that provision is that there is no power under that section to award costs in a prosecutor’s favour. She says that as a consequence the reasoning in *Hargreaves* applies to bring section 51 of the Senior Courts Act into play.
19. I pause to say that Miss Millar proceeded on the footing that the reference in section 17 to a Divisional Court is to be taken as including a reference to a single judge of the High Court sitting in the Administrative Court. In my judgement that is far from a given. The question has not been the subject of argument before me because Mr Jowett has not felt any need to advance any argument on the point but I am not persuaded that a reference to a divisional court is necessarily to be taken as a reference to the High Court and, indeed, one would expect the contrary. However, that is, to some extent, by the bye and Miss Millar would say that her argument is reinforced if the reference does not include a single High Court judge because it would support the contention that the 1985 Act contains no provision for a prosecutor’s costs in the current circumstances.
20. It seems to me that the key here is the question of whether there are two potentially applicable schemes. The facts that under one scheme costs are only payable to a prosecutor in particular circumstances and that those circumstances do not arise where there is a public prosecutor do not necessarily mean that the scheme is inapplicable. They

simply mean that the scheme is one which does not make provision for costs in the circumstances that have arisen.

21. The overwhelming tenor of the authorities is that there are two key propositions. First, that in judicial review claims involving criminal causes or matters there is a choice between two regimes: the regime under the 1985 Act and the regime under the Senior Courts Act. Second, that the 1985 Act regime is to be applied save in exceptional circumstances. The fact that in *Hargreaves* the court concluded that section 28A was applicable and was the approach to be followed, does not detract from those propositions nor from their application to judicial review cases. It is of note that section 28A only applies to appeals by way of case stated and can be seen as imposing a regime particularly applicable to such cases.
22. If Miss Millar's approach were correct there would be no need for section 28A. That is because her argument would mean that even without section 28A the regime under section 51 of the Senior Courts Act would necessarily apply as being the only regime applicable. That would be so whether the court was considering an appeal by way of case stated or a judicial review. That is because section 51 provides for the costs incidental to all proceedings in the High Court and an appeal by way of case stated dealt with by a single judge in the High Court is necessarily a proceeding in the High Court. Accordingly, if Miss Millar's argument were right section 28A would be unnecessary.
23. Miss Millar says that if Mr Jowett's argument is right then a prosecutor can never recover their costs in judicial review proceedings no matter how meritorious those proceedings are. I think the answer to that contention is that which was given by the Divisional Court in *Morjaria*. It may very well be said that there is a lacuna in the criminal costs regime and that the limitations are such that the criminal costs regime does not enable public

authority prosecutor to recover the costs of judicial review proceedings in the High Court. It is not, however, for this court to seek to fill that lacuna but rather for the court to apply the rules as they are.

24. It follows that I reject Miss Millar's argument based on *Hargreaves*. I am satisfied that here the choice is between the criminal costs regime and the regime under section 51 of the Senior Courts Act. The authorities make it clear that in a criminal cause or matter, save in an exceptional case, the 1985 Act regime is apply. It cannot be suggested that this is an exceptional cause or matter. It is an argument between the parties as to the costs below and as to the exercise of the district judge's discretion as to costs. Important though those issues are to the parties they are not exceptional for the purposes of the *Murphy* approach. The criminal costs regime applies and that regime does not provide for any costs to be awarded in these circumstances.
25. It follows that I have no power to award the costs sought by the claimant and that application must fail.