Neutral Citation Number: [2025] EWHC 238 (Admin)

Case No: AC-2024-CDF-000121

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
CARDIFF DISTRICT REGISTRY SITTING IN BRISTOL

Bristol Civil Justice Centre
2 Redcliff Street, Redcliffe
Bristol, BS1 6GR

Date: 06/02/2025

Before :

MR JUSTICE KERR

- -

Between :

OLIVER LEWIS	**Appellant**
- and -	
(1) SARAH LOUISE FRANCIS	**Respondents**
(2) STEPHANE BORIE	

- -
- -

Robert McCracken KC (instructed by direct access) for the **Appellant)**
Sarah Salmon (instructed by **Hanratty & Co**) for the **Respondents**

Hearing date: 29 November 2024

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Approved Judgment (2) on Costs of the Appeal

This judgment was handed down remotely at 10.30am on 6 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1. This is my second judgment in this appeal. My main judgment, allowing the appeal by case stated, is on the National Archives under the citation [2025] EWHC 17 (Admin). This supplemental judgment relates to the costs of the appeal and should be read together with the main judgment. The appellant applies for assessed costs of the appeal, calculated at £8,449.90. The respondent resists the application and argues that the court should make no order as to the costs of the appeal.

2. In the appeal by case stated, the appellant secured the overturning of an order made in the North East Wales Magistrates' Court on 16 January 2024 under section 19(1) of the Prosecution of Offences Act 1985 that the appellant must pay the respondents' costs of unsuccessful statutory nuisance proceedings brought by the appellant against the respondents and heard in November 2023. Those costs were assessed at £10,123.20.

3. For the reasons given in my main judgment, by my order made on 9 January 2025, I set aside the judge's costs order. I held that it was "wrong in law" within the meaning of section 111(1) of the Magistrates' Court Act 1980 and "wrong" within the meaning of CPR rule 52.21(3). Under CPR rule 52.20(1) and (2), I directed instead that, with one exception, the respondents' costs of the proceedings below be paid out of central funds.

4. The exception was that I disallowed the costs of evidence from a veterinary expert about the behaviour of the two dogs that were the subject of the unsuccessful statutory nuisance claim. In my main judgment, I explained why such expert evidence is of very limited value in a statutory nuisance claim such as in this case. I did not think it right for the state to have to pay for obtaining that evidence.

5. It was agreed that after deduction of the disallowed costs of the expert veterinary evidence, £8,863.20 was the amount payable to the respondents out of central funds (under section 16 of the Prosecution of Offences Act 1985). The outcome of the appeal is therefore (in rounded figures) that:

   - the appellant is spared having to pay the respondents £10,123;

   - the respondent will instead receive £8,863 from central funds; and

   - the respondent cannot recover the difference, which is £1,260.

6. To bring about this result, the appellant incurred what he claims are reasonably incurred costs of £8,449.90. He seeks to recover that sum. The respondents have incurred legal costs in the appeal but do not seek to recover them, having failed to secure the upholding of the costs order below. It is common ground that the court has no power to order costs of the appeal from central funds. Any recovery must be *inter partes*.

Relevant law

7. The parties' helpful written submissions drew my attention to the relevant statute and case law. By section 51(1) of the Senior Courts Act 1981 (**the 1981 Act**), costs in the High Court are, subject to "the provisions of this or any other enactment … in the

discretion of the court". By section 51(5), "[n]othing in subsection (1) shall alter the practice in any criminal cause …".

8. Section 28A of the 1981 Act applies to appeals on a case stated by a magistrates' court or Crown Court. By section 28A(3) the High Court must determine the question arising on the case, may reverse, affirm or amend the determination below and "may make such other order … (including as to costs) as it thinks fit". The High Court's decision is final, subject only to an appeal to the Supreme Court (section 28A(4)).

9. In *Murphy v. Media Protection Services Ltd* [2013] 1 Costs LR 16, Stanley Burnton LJ held at [15] that "save in exceptional cases, prosecutions and appeals in criminal cases should be and will be subject to the criminal costs regime". In *Hull and Holderness Magistrates' Court v. Darroch* [2014] EWHC 4184 (Admin), the Divisional Court (Carr J, as she then was, and Foskett J) accepted the exceptionality test derived from *Murphy* but decided that it was not met on the facts.

10. Carr J's judgment of the court gave *obiter* reasons for accepting that the court had jurisdiction to apply the civil costs regime to costs incurred in a criminal case in the magistrates' court, following a successful appeal to quash convictions for summary offences. At [53], she explained that if the court had had to decide whether it had jurisdiction to make the costs order sought (against a third party), the court would have been willing to follow *Murphy* and "we would not have regarded the acceptance of the applicability of the civil costs regime in this context as wrong".

11. On appeal from that decision, in *Darroch v. Football Association Premier League Ltd* [2017] 4 WLR 6, the unanimous Court of Appeal decided it lacked jurisdiction to hear the appeal because the decision was a criminal cause or matter in which the only route of appeal is to the Supreme Court. Burnett LJ (as he then was), *obiter*, disapproved of the proposition in *Murphy* (and the concession on which it was based) that there was an "exceptionality test" enabling the court to apply the civil costs regime. He said at [26]:

> "section 51 of the 1981 Act does not empower the High Court, on an appeal by way of case stated, or a claim for judicial review that seeks to quash convictions, to make a civil costs order in respect of costs incurred in the underlying criminal proceedings in the Crown Court or magistrates' court."

12. In *Lord Howard of Lympne v. Director of Public Prosecutions* [2018] EWHC 100 (Admin), the successful appellant had his conviction in the magistrates' court for a motoring related offence quashed on appeal by case stated. He sought his costs incurred in the appeal (not having incurred costs below). The Divisional Court (Whipple J, as she then was, giving the lead judgment and Simon LJ agreeing) at [28] accepted the exceptionality test derived from *Murphy* and approved by the Divisional Court in *Hull and Holderness*, but found that the test was not met on the facts.

13. In *R (Bahbahani) v. Ealing Magistrates' Court* [2020] QB 478, DC, the Divisional Court (Holroyde LJ and Dove J) in a judicial review claim seeking an order quashing a conviction, considered (at [87]ff in the judgment of the court) the issue of costs of the judicial review claim. Costs in the magistrates' court proceedings were not sought. Holroyde LJ and Dove J reviewed the cases and noted at [96] that the Court of Appeal's decision in *Darroch* did not appear to have been cited in *Lord Howard*'s case.

14. The court in *Bahbahani* concluded at [100]:

> "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 court decided that there were no such exceptional reasons and refused costs, applying the criminal regime; adding, for good measure, that it would also have refused costs if the civil regime had applied.

15. The last case I need to mention is *R (AB) v. Uxbridge Youth Court* [2023] Costs LR 1731. A judicial review claim challenging a decision to prosecute the claimant was withdrawn, on the Director of Public Prosecutions agreeing to reconsider the question of whether to prosecute. It was agreed that the judicial review was a criminal cause or matter. The claimant sought his costs of the judicial review.

16. Linden J dismissed the application for costs, holding that the criminal regime applied. The claim for judicial review had involved a routine prosecution. There was no unnecessary or improper conduct. At [34] and [35], Linden J commented:

> " … it would only be in exceptional circumstances that a court would use its powers under s 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.
>
> …. The reasons for applying the civil costs regime must take the case out of the run of criminal cases and they must be compelling."

Summary of parties' submissions

17. The appellant pointed out that, while he was unrepresented below, the respondent was represented below by a solicitor and chose to make the costs application based on unnecessary or improper conduct, which generated the error by the District Judge. The appellant could not, said Mr McCracken KC, have secured the variation to the costs order, wrongly made below, without incurring the costs he has incurred in the appeal, which are reasonable. The arguments in the appeal were complex and difficult.

18. Mr McCracken's other main points were as follows. The respondent did not, even in the alternative, apply to the District Judge for the respondents' costs from central funds under section 16 of the POA 1985. They chose to rely exclusively on section 19. During the appeal process, they were warned in open email correspondence about their risk of costs in the appeal, having told the appellant his appeal was "misconceived".

19. The appellant, said Mr McCracken, had offered to withdraw the appeal with each side bearing its own costs of the appeal, if the respondents would agree not to enforce the costs order made by the District Judge. The respondents had a draft of the appellant's skeleton argument at that stage and did not respond to the offer.

20. The civil costs regime should apply, Mr McCracken submitted. Under that regime, costs of the appeal should follow the event in the normal way. The circumstances here are truly exceptional. The appeal is against an order made below in respect of costs, not as to the substance of the proceedings below. Unless the civil regime applies, the

appellant cannot recover any costs of the appeal. He cannot recover any costs under the criminal regime because the proceedings below did not lead to a conviction. Had there been a conviction and had he been represented below, the appellant would have recovered costs as of right under section 82(12) of the EPA 1990.

21. None of the cases is factually similar to this one, said Mr McCracken. The decision in *Lord Howard*'s case flowed from a deliberate decision of parliament in legislation to deprive a successful defendant of his legal costs on appeal. The present case is different; it involves an unsuccessful prosecution below, visited with a wrong adverse costs order below; which, if not challengeable on appeal without incurring irrecoverable costs on appeal, is not effectively challengeable on appeal at all.

22. Not surprisingly, Mr McCracken warned about article 6 implications. Not to apply the civil regime would be a serious obstacle to access to justice. He referred to Strasbourg decisions cited in *Coventry v UK* (6016/16) at [59]; which, he submitted, "demonstrate that financial burdens on successful parties at the conclusion of proceedings may deprive people of their rights under ECHR A6 to a fair trial with equality of arms." If necessary, a question should be formulated for the Supreme Court, questioning the correctness of the *Lord Howard* line of authorities.

23. For the respondents, Ms Sarah Salmon submitted that there was nothing exceptional about this case. The criminal costs regime should apply in the normal way and the POA 1985 afforded no basis for any order as to costs. The appellant cannot and does not dispute that the appeal is a criminal cause or matter. The Court of Appeal so held on appeal in *Darroch*, at [21]-[22]. The reasons for applying the civil regime instead would have to be "compelling" (Linden J at [35] in the *Uxbridge Youth Court* case).

24. What amounts to an exceptional case is likely to be fact specific, Ms Salmon submitted. The present appeal bears no resemblance to the facts in *Murphy*, where a process akin to substantial civil litigation had been followed. That was, Ms Salmon submitted, "more akin to civil proceedings". This appeal is not. The appeal arises from a process intended to be simple and speedy and accessible to litigants without any requirement for legal representation.

25. Section 82(12) of the EPA 1990 did not assist because there was no conviction here, said Ms Salmon. It is not for the court to fill any lacuna in the legislation. The court's task is to apply the rules as they are. It is true that the situation in the current appeal is not covered expressly in the legislative scheme. That means the default rules of the criminal regime apply, as they did in *Lord Howard*, where the appellant had to live with his sense of injustice because parliament had made a deliberate decision on the issue.

26. Alternatively, if the court were persuaded to apply the civil regime, Ms Salmon submitted that the respondents could not be criticised for the error of the District Judge below. The respondents did not make the impugned decision; the District Judge did. The offer to settle, if it could be properly accepted at all, was on terms less favourable than the outcome of the appeal for the respondents: they had preserved most of their costs award, albeit from a different source, i.e. central funds rather than the appellant.

27. If the civil regime applied, Ms Salmon submitted that the court should refuse under section 28A(3) to make any order in the appellant's favour, considering all the circumstances of the case. The respondents reasonably participated in the appeal to

protect their interests, with a large measure of success. They were entitled to rely on the District Judge's decision and to defend it.

28. Ms Salmon submitted that there was no arguable issue as to article 6 of the European Convention. The human rights claim in *Coventry v. UK* was about prohibitively expensive civil proceedings; the court had to consider conditional fee agreements and after the event insurance premiums. The excessive financial burden fell on an unsuccessful uninsured defendant who was found liable to pay costs in the High Court and Court of Appeal running to over £800,000.

29. Ms Salmon submitted, in the alternative, that the quantum of the costs claimed should be reduced. The higher costs incurred by the respondents are irrelevant. The issue arose because the appellant chose to bring a case so weak that the respondents did not have to answer it. The case stated was not of the respondents' making. The respondents had partially succeeded in the appeal. They queried whether the appeal needed a silk; they should not have to pay for pre-trial work, in particular, preparing the initial case stated and any threat of judicial review of the magistrates' court's decision.

Reasoning and Conclusions

30. The *Murphy* exception remains good law and has survived the disagreement with it expressed by the Court of Appeal, *obiter*, in *Darroch*. The issue of exceptionality is, as Ms Salmon rightly accepts, fact sensitive. The situation here is unlike that in any of the other cases cited to me. What is exceptional here is a combination of features which, taken together, mean the appellant's right of appeal in this very case would be devoid of any value and useless if the criminal costs regime were applied.

31. Those features are, as the parties have pointed out (i) the appeal is against an order relating to costs only (ii) there was no conviction below (iii) the appeal is brought by the prosecutor not the defendants (iv) the appeal raised complex issues and (v) the appeal could not be effectively argued without expert legal representation. Those features together produce the result that the appellant must, if he is to appeal, fund the appeal, with a sum roughly equivalent to the amount of costs in issue in the appeal.

32. It is obvious, therefore, that an appellant embarking on this appeal without any possibility of costs recovery in the event of success, would in practice be throwing good money after bad. At most, he could achieve a Pyrrhic victory or a victory of principle. That is not enough to ease the conscience of the court. It is a set of circumstances *par excellence* suitable for application of the *Murphy* exception. I do not agree with Ms Salmon that the exception cannot be used to fill a lacuna.

33. This reasoning is not at odds with the statutory scheme. Section 51 of the 1981 Act is a generic provision dealing with costs in the civil courts generally. Section 51(5) makes clear that section 51(1) shall not alter the "practice" in any "criminal cause". The "practice" refers to the criminal costs regime in the POA 1985 and elsewhere and in case law. But section 51(1) conferring general discretion on matters of costs is subject to section 28A, which specifically addresses costs in appeals by case stated.

34. Section 28A applies to appeals by case stated from a magistrates' court or from the Crown Court. It applies to this appeal. Apart from determining the substantive issues in the appeal, the court is empowered by section 28A(3) to "make such other order …

(including as to costs) as it thinks fit". I can exercise that power by applying the *Murphy* exception if the circumstances justify me doing so. I am not violating section 51(5) by doing so. The "practice" as to costs in a criminal cause does not include cases where the court, exceptionally, applies the civil regime instead.

35. If an appellant succeeds on appeal in getting an adverse costs order overturned, but can only do so by incurring irrecoverable costs of the same order as the adverse costs order he wishes to overturn, reasonable people might think the law is an ass. Fortunately, it is not because the *Murphy* exception comes to the rescue and this case demonstrates its value and utility. For the reasons I have given, I apply the civil costs regime.

36. There is, therefore, no need to consider certifying a question for the Supreme Court, nor whether article 6 of the European Convention is arguably engaged. The discretion is the familiar one exercised in accordance with rule 44 of the CPR. There is no doubt who is, in substance, the successful party. The respondents did preserve most of their costs but the appellant is the successful party because he was absolved from having to pay any of them.

37. However, I attach minimal weight to the offer of settlement of the appeal, not accepted by the respondents. I accept Ms Salmon's submission that the respondents achieved a better outcome in the appeal than was offered. If they had accepted the offer, they would have received no money from central funds. Having contested the appeal, they lost entitlement to only a small proportion of their costs below and preserved their entitlement to the rest, albeit coming from a different source.

38. I consider the discretion as to costs, in the usual way, through the lens of CPR rule 44.2. The costs of the appeal were incurred mainly in consequence of two actions. The first was the appellant bringing the prosecution for statutory nuisance. That led to the acquittal of the respondents when their submission of no case was upheld. There was no legal error or impropriety in that process, as I have decided in the main judgment. An acquittal or acceptance of a submission of no case does not entail legal error.

39. The second action was the respondents applying for costs on the ground of an unnecessary act, bringing the proceedings. They were legally represented. They chose to apply under section 19 of the POA 1985 and did not, as an alternative, apply for costs from central funds under section 16. I can find no evidence that the District Judge was invited to consider or did consider making an award from central funds; although, as I said in the main judgment, I do not doubt that he was aware of the power to do so.

40. It was the bringing of that application and its success that was the more direct cause of this appeal being brought. The respondents could have sought below, but did not seek below, what they have achieved (veterinary fees apart) in this appeal. Moreover, as legally represented parties, their solicitors were under the usual duties to their unrepresented opponent: to alert the court to authority adverse to their case and not to take unfair advantage of the opponent's lack of representation.

41. The respondents had some responsibility to educate the court as to the correct approach to exercise of the "unnecessary or improper act or omission" jurisdiction under section 19 of the POA 1985. The District Judge was referred to no case law. It would have been sufficient for the respondents to have taken him to the six propositions of Coulson

J (as he then was) in *Cornish*, cited in my main judgment at [52]. Had that been done, the obligation would have been discharged and the error might not have been made.

42. Balancing those factors, I think responsibility for the District Judge's error lies more directly with and to a greater extent with the respondents than with the appellant. In my judgment, the respondents should pay a substantial proportion, but not all, of the appellant's reasonable costs. In my judgment, the amount payable should be 65 per cent of the appellant's reasonably incurred costs.

43. I do not order the respondents to pay the other 35 per cent because I recognise that they had the misfortune to be accused of criminal conduct of which they have been found not guilty. That would not have happened but for the appellant's decision to prosecute, albeit that was a decision not tainted by any wrongdoing or misconduct.

44. As for quantum, I think the amount claimed is reasonable, modest even. Nothing turns on the point that Mr McCracken is a silk. It would probably have been more expensive to retain solicitors and junior counsel than a silk by direct access. I reject the submission that the amount claimed should be reduced (except by the percentage) and I will order that the respondents pay summarily assessed costs in the sum of £5,492.44, which is 65 per cent of £8,449.90, the amount claimed.